*The Queen v Ryder* [2010] NTSC 21

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| PARTIES: | THE QUEEN |
| | v |
| | AARON PETER RYDER |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | 20915582 |
| DELIVERED: | 11 May 2010 |
| HEARING DATES: | 28 April 2010 |
| JUDGMENT OF: | BLOKLAND J |

RULINGS ON SENTENCING FACTS

**CATCHWORDS:**

CRIMINAL LAW - JURISDICTION PRACTICE AND PROCEDURE – Verdict - whether verdict unsafe and unsatisfactory - whether appropriate question for reservation to the Court of Criminal Appeal - facts adopted by the sentencing Judge must be consistent with the verdict of the jury - the facts for the purpose of sentencing are able to be reconciled with the verdicts.

Criminal Code (Cth) s 400(3)
Criminal Code s 31, s 43AK, s 174D, s 174G, s 181, s 188(1)(2)(a)(m), s 318, s 408, s 408(2)

*Ansari v The Queen* [2007] NSWCCA 204
*Craig Isaacs* (1997) 90 A Crim R 587
*Mackenzie v The Queen* [1996] 190 CLR 348
R *v Olbrich* (1999) 166 ALR 330
*Savvas v R* (1995) 183 CLR 1
*Helen Patricia Secretary* (1996) 86 A Crim R 119
*Yunupingu v The Queen* [2002] NTCCA 5

**REPRESENTATION:**

*Counsel:*

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| Plaintiff: | M Chalmers |
| Defendant: | S O'Connell and J Brock |

*Solicitors:*

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| Plaintiff: | Office of the Director of Public Prosecutions |
| Defendant: | Northern Australian Aboriginal Justice Agency |

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| Judgment category classification: | C |
| Judgment ID Number: | BLO1001 |
| Number of pages: | 13 |

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*The Queen v Ryder* [2010] NTSC 21
No. 20915582

BETWEEN:

**THE QUEEN**
Plaintiff

AND:

**RYDER, AARON PETER**
Defendant

CORAM: BLOKLAND J

REASONS FOR RULINGS

(Delivered 11 May 2010)

**Introduction**

[1] After the return of the jury's verdicts and during the course of submissions on finding the proper facts for sentencing purposes, counsel for the accused submitted I should reserve a question of law to the Court of Criminal Appeal pursuant to s 408 *Criminal Code* (NT). The issue raised on behalf of the accused forming the basis of the potential question was whether the verdicts returned by the jury were inconsistent, and as a consequence, whether the Court of Criminal Appeal should review the verdicts of guilty as they may be "unsafe and unsatisfactory".[1]

[1] Written submissions on behalf of the accused, 28 April 2010.

[2] As this application for reservation of a point of law was not made prior to the verdicts, there is no requirement as a matter of law to make the referral. The question of referral in this instance is a matter of discretion.[2] As a preliminary point, the proposed question, in so far as it relies on *"unsafe and unsatisfactory"* is not a discrete question of law as required by s 408. By its nature, it would require the Court of Criminal Appeal to draw certain inferences or make certain findings of fact. Consequentially, it is not an appropriate question for reservation to the Court of Criminal Appeal.[3] The accused is at liberty to advance this argument by way of appeal should he choose.

[3] A further suggested refinement of the question was whether in all of the circumstances it was open to the jury to find the accused did not foresee the possibility of serious harm being caused as a result of his conduct but that he was aware of a substantial risk that his conduct would give rise to a danger of serious harm. It was submitted there was no possible basis for the jury's decision and judgement should be postponed pursuant to s 408(2) *Criminal Code*.[4]

[4] Put in its more refined way, the proposed question does not require consideration whether as a matter of law the verdicts can stand together. In *Mackenzie v The Queen*,[5] a majority of the High Court drew the distinction

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[2] *Criminal Code* (NT) s 408(1).
[3] *Helen Patricia Secretary* (1996) 86 A Crim R 119, Mildren J at120; *Yunupingu v The Queen* [2002] NTCCA 5, Angel J at par 4; Riley J at pars 24-29.
[4] Written submissions on behalf of the accused, 5 May 2010.
[5] [1996] 190 CLR 348 at 366.

between legal or technical inconsistency on the one hand and cases of suggested factual inconsistency on the other.[6] The proposed question is one of mixed fact and law; it must also be noted the *Criminal Code* provides there may be an alternative verdict in these circumstances. Section 318 *Criminal Code* provides a person who is acquitted by virtue of *s* 31 *Criminal Code* may be found guilty alternatively of an offence in Part VI, Division 3A, Subdivision 2, which includes endangerment offences.

[5] The proposed question is whether "in all of the circumstances" the jury's apparent decision or reasoning on foresight in relation to counts 1 and 2 can be reconciled with the return of guilty verdicts on counts of reckless endangerment that require proof of awareness of a substantial risk. I queried this issue with counsel early in the trial,[7] however, aside from filing an amended indictment laying counts 3 and 4 as alternatives, instead of one count of reckless endangerment originally charged as count 2, no further issue arose or application made about any potential inconsistency.

[6] This proposed question would still require some consideration of the facts or inferences to be drawn. Counsel for the accused drew my attention to *Ansari v The Queen*[8] that dealt with the question on appeal on whether under the provisions of the *Criminal Code (Cth)* it was possible to charge conspiracy to commit an offence that has recklessness as one of its fault elements. The point argued was that conspiracy requires intent, or intent to

[6] Examples of legally inconsistent verdicts given in *McKenzie v The Queen* are convictions for attempt and the completed offence; being convicted as both the receiver and the thief.
[7] Trial transcript at 71.
[8] [2007] NSWCCA 204, (14 August 2007).

commit the overt acts whereas the completed offence alleged, (Dealing in Proceeds of Crime, contrary to s 400(3) *Criminal Code (Cth)*) required only recklessness as a fault element. No inconsistency was found within the conspiracy count.[9] *Ansari*[10] deals primarily with an argument that a charge may be bad for internal inconsistency. It is readily distinguished from the case at hand.

**The Verdicts**

[7] Some history is required. On 28 April 2010 the jury found the accused *not guilty* of unlawfully cause serious harm to Stephen Wilkinson (Count1, contrary to s 181 *Criminal Code* (NT)) and *not guilty* of an alternative count of unlawful assault with circumstances of aggravation, namely that Stephen Wilkinson suffered harm and that Stephen Wilkinson was threatened with an offensive weapon, namely a motor vehicle. (Count 2, contrary to s 188(1)(2)(a)(m) of the *Criminal Code* (NT)).

[8] The jury found the accused *guilty* on two further alternative counts; the first, (Count 3), that he engaged in conduct that gave rise to a danger of serious harm to Stephen Wilkinson. The relevant particulars are that he drove his motor vehicle at Stephen Wilkinson being reckless as to the danger of serious harm to Stephen Wilkinson. This verdict was accompanied by a verdict of guilt on a circumstance of aggravation, namely that the offence

[9] Special leave on this point has been argued but not determined in the High Court *Ansari v The Queen* [2009] HCAT (2, 3 December 2009).
[10] [2007] NSWCCA 204, (14 August 2007).

was committed by use of an offensive weapon, a motor vehicle: (contrary to sections 174D and 174G (a) *Criminal Code* (NT*)*). Secondly, the jury returned a verdict of guilty to Count 4. Count 4 is in the same terms as count 3, the facts arising out of the same conduct but charged in relation to a different victim, namely Mark Dwyer.

**Outline of the Case Put to the Jury**

[9] The Crown case in essence was that on 7 May 2009 the accused drove his vehicle towards Mr Wilkinson in the drive through bottle shop at Palmerston in a manner to hit or frighten Mr Wilkinson, intending or foreseeing to cause him serious harm (Count 1). Count 2 was put in similar terms as an alternative that the accused hit Mr Wilkinson with his vehicle and the hitting was intended or foreseen by him. For the purposes of fact finding the Crown submitted the jury was told only to consider Count 2 if they were not satisfied on the serious harm element in Count 1. In my view, having put Count 2 to the jury, it must be concluded the jury considered all of elements of count 2 and chose to acquit because one or more of the elements was not made out to their satisfaction.

[10] In rejecting Counts 1 and 2 it is clear the jury was not satisfied beyond reasonable doubt the accused intended or foresaw hitting Mr Wilkinson. Further, in relation to Count 1, (cause serious harm), the jury could not have been satisfied serious harm was intended or foreseen, (in the sense of s 31 *Criminal Code* (NT)).

[11] The Crown case was that if the intent was not actually to hit Mr Wilkinson, the impugned driving was done in a manner to frighten Mr Wilkinson. Further, Mr Wilkinson was seriously injured either when he was hit by the vehicle or as a result of falling after being hit. Although causing fear is not an element of a charge of cause serious harm, it was put forward by the Crown as a fact integral to the manner of driving and the cause of the serious harm.

[12] In relation to the counts of engage in conduct giving rise to a danger of serious harm and being reckless to the danger, the jury was instructed that to find those counts proven they would need to find beyond reasonable doubt the accused *meant* to drive at the two victims; the particular driving gave rise to a danger of serious harm to the victims and the accused was reckless as to the danger of serious harm that arose. The jury was given the definition of "reckless". The jury was told the Crown must prove the accused was aware of a substantial risk that the serious harm would happen to the victims and having regard to the circumstances known to the accused, it was unjustifiable for the accused to take the risk of driving the vehicle at them.

[13] The case put forward by the accused in brief, was that if he did drive forward and hit Mr Wilkinson it was accidental. He had come forward after reversing out when he saw the victims running towards his car. He had needed to move forward due to the approach of headlights signifying a car

was about to approach his vehicle and he was aware he may be hit from behind. He was unaware he had hit anyone.

[14] In my view it was open to the jury in the way the case was put to them to reject the Crown case that the accused intended or foresaw the particular serious harm (Count 1) that occurred. It was also open to them to reject the accused intended or foresaw hitting Mr Wilkinson (Count 2). At the same time, it was open to them to consider that the conduct, (the accused driving towards the two men when they were running towards his vehicle in the confined space of the Bottle Shop, in a vehicle that had deficient brakes), objectively gave rise to a danger of serious harm. Further, it was open to them to conclude the accused was reckless as to the danger, namely, he was aware of a substantial risk that serious harm of some type could occur and in that knowledge took the risk and proceeded without justification.

[15] The mental element required for recklessness under s 43AK *Criminal Code* read with 174D *Criminal Code*, does not require the degree of foresight of the particular "result" as compared with what is contemplated by foresight of the "act omission or event" under *s* 31 *Criminal Code*. Section 174D *Criminal Code* appears to involve a less culpable mental state of awareness of a substantial risk of serious harm rather than foresight of the particular act omission or event as a possible consequence. The fact that serious harm was occasioned in this instance, (being Mr Wilkinson's broken right wrist) does not affect the evaluation of the accused's mental state at the time of

engaging in the conduct. The jury was specifically told not to use the injury in their reasoning to a verdict.

[16] Both counsel rely, to a limited degree, on the preparatory material relevant to the enactment of the reckless endangerment offences. There is, no doubt, force in counsel for the accused's submission that reckless endangerment provisions were enacted to capture conduct where intent and foresight could not be made out due to intoxication.[11] Clearly, however, the legislature chose an approach that broadens criminality in certain circumstances not confined to cases concerning intoxication. To that extent, the observations of the Model Criminal Code Officers Committee are illuminating:[12]

> "The key focus of offences against the person is to protect members of the community from harm. Endangerment offences are akin to preparatory offences like attempts – they extend liability because the harm was not done, but was risked. Further, unlike attempt, endangerment offences extend the core of criminal liability by punishing reckless endangerment in addition to intentional endangerment. The fact that endangerment offences extend the criminal sanction in these ways suggests that the scope of the offences should be limited to risks consciously taken in relation to serious harms."

[17] In all the circumstances, I decline to reserve a question on this point. As there are findings of fact that can be made respecting all verdicts given by the jury and given there is not a clear question of law that emerges and given the accused preserves his rights, I decline to reserve a point of law and will proceed to sentence.

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[11] Written submissions on behalf of the accused, 5 May 2010.
[12] 'Model Criminal Code, Chapter 5, Non fatal Offences against the Person' at 69.

**Findings of Fact**

[18] In order to maintain the integrity of the jury's verdicts on Counts 1 and 2, a suggestion of a purpose on the part of the accused to frighten Mr Wilkinson by his driving must be rejected. The jury was instructed in terms of s 31 *Criminal Code* of the need to find the accused intended or foresaw hitting Mr Wilkinson as a possible consequence of his driving if they were to return a verdict of guilty. The jury's acquittal on both counts leads me to the conclusion that I should not sentence on the remaining counts on the basis that the purpose or intention in the manner of the driving was to frighten Mr Wilkinson.

[19] In coming to a view on the facts for sentencing purposes, I bear in mind the principle that the facts must not conflict with the jury's verdicts.[13] The constraints on the fact finding process are examined by the Court of Criminal Appeal (NSW) in *Craig Isaacs*[14] emphasizing that the view of the facts adopted by the judge for the purposes of sentencing must be consistent with the verdict of the jury, even though the judge may have taken a different view if unconstrained by the verdict. The further constraint noted is that findings made against an offender by a sentencing judge must be arrived at beyond reasonable doubt. Further, the Court notes[15] there is no general requirement that a sentencing judge must sentence an offender on the basis of the view of the facts, consistent with the verdict, which is most

[13] *Savvas v R* (1995) 183 CLR 1.
[14] (1997) 90 A Crim R 587 at 591.
[15] Ibid at 592.

favourable to the offender. It is the consequence, however, of resolving any reasonable doubt in favour of the accused that the judge will be obliged to sentence on a view of the facts which is most favourable to the offender.[16]

[20] On the issue of standard of proof, it is settled that facts adverse to the interests of an accused cannot be taken into account unless proved beyond reasonable doubt, however, if there are circumstances which the judge proposes to take into account in favour of the accused, it is enough if those circumstances are proved on the balance of probabilities.[17]

[21] As a result of the guilty verdicts returned on Counts 3 and 4 and without infecting the integrity of the acquittals on Counts 1 and 2, in my view, the jury must have found the accused drove towards Mr Wilkinson and Mr Dwyer and that he meant to drive towards them while they were running towards his vehicle; that the accused's driving objectively gave rise to a danger of serious harm to both Mr Wilkinson and Mr Dwyer and that the accused was reckless as to the danger of serious harm that arose.

[22] Bearing in mind the above discussion, and the necessary restrictions, I find the accused was the driver of the motor vehicle at the Palmerston Tavern, Palmerston on 7 May 2009; that he attended at the Palmerston Tavern with his brother Jordan to purchase some alcohol; that Jordan attempted to purchase alcohol while Mr Dwyer and Mr Wilkinson were closing the bottle shop.

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[16] Ibid.
[17] R *v Olbrich* (1999) 166 ALR 330.

[23] I find Jordan spat on Mr Dwyer and there was a brief altercation. I am unable to find the accused witnessed this altercation; however, I do find the accused felt the need to leave in haste when Jordan got back into the accused's vehicle saying "go, go, go."

[24] I find the accused reversed out of the bottle shop driveway to around the end of the driveway. The accused saw Mr Wilkinson and Mr Dwyer running towards his vehicle. I find Mr Wilkinson and Mr Dwyer wanted to obtain the number plate, although that purpose was not known to the accused. I find it would have appeared to the accused he was being pursued and that would have made him unsure of what was happening. In a moment of haste the accused drove back into the Bottle shop towards Mr Wilkinson and Mr Dwyer, meaning to do so but without any particular intent towards them. Rather, this was a spontaneous act without logic and reason due to the accused's brother's apparent need to leave quickly and the awareness the accused had of headlights that were possibly approaching his vehicle in the street behind. Although this driving occurred spontaneously, it was done with the awareness that there was a substantial risk that serious harm could happen.

[25] I reject the accused's description that he may have come forward "a little bit, say a couple of metres". I find it was more than that. Although he may have initially come forward in part for the reason of the head lights, he continued to drive towards the two men while they were running towards him, as I say, in a moment of haste and some uncertainty of what the men

were doing. There was no factor that justified the accused's driving up to the point of Mr Wilkinson being hit. I find the accused drove to the point Mr Wilkinson says he was hit. I find the speed was sufficient to engender a belief in Mr Dwyer he may be hit and hence he jumped sideways and was sufficient to engender a belief in Mr Wilkinson he would be hit and hence he braced himself fearing impact.

[26] Given the accused knew he was driving into a narrow area and, given he knew his brakes were not in good working order, the jury must have found, and I will sentence on that basis, he did not intend or foresee serious injury to Mr Wilkinson but knew there was a substantial risk that serious harm would occur. It was unjustifiable for him to drive towards them. I confirm the accused is not to be sentenced on the basis of intending or foreseeing that he would hit or cause serious harm to Mr Wilkinson.

[27] Mr Wilkinson was hit by the vehicle causing him to fall back and break his arm. I cannot find beyond reasonable doubt the accused was aware that he had hit Mr Wilkinson until after his arrest and the commencement of the investigation. I will sentence on the basis Mr Wilkinson was hit by the side of the bull bar. The car hit Mr Wilkinson, and I find it was a hit that was harder than a light push. Beyond that the force cannot be determined however it was not force that would have indicated to the accused that he had hit Mr Wilkinson. The accused left in haste but was not aware he had hit someone. I find Mr Wilkinson's arm was broken by the ensuing fall. I

find Mr Dwyer was subject to the same danger although he was able to get out of the way and was not hit.

[28] I will forward these findings to counsel and request final sentencing submissions on the basis of these findings. At that time I will also rely on the content of the Victim Impact Statements tendered by the Crown and references already tendered on behalf of the accused.

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