Local Court

New South Wales

Case Name:	NSW Police v Carrall
Medium Neutral Citation:	[2016] NSWLC 4
Hearing Date(s):	21, 28 January 2016
Decision Date:	1 February 2016
Jurisdiction:	Criminal
Before:	Heilpern LCM
Decision:	I find the defendant not guilty in respect to the June offence, and will proceed to sentence on the May offence on a date to be fixed.
Catchwords:	CRIMINAL PROCEEDINGS – drive with illicit drug present in blood – positive test to cannabis – defence of honest and reasonable mistake of fact – availability
Legislation Cited:	Road Transport Act 2013, s 111
Cases Cited:	Appeal of Francesco Mendilicchiu [2008] NSWDC 182 Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002) [2004] NSWCCA 303 Bergin v Stack [1953] HCA 53 CTM v The Queen [2008] HCA 25 DPP v Bone [2005] NSWSC 1239 Giachin v Sandon [2013] ACTSC 77 Ostrowski v Palmer (2004) 218 CLR 493 Proudman v Dayman [1941] HCA 28 R v Duong [2015] QCA 170 RTA v O'Reilly & Ors [2009] NSWSC 134

Category:	Principal judgment
Parties:	Joseph Ross Carrall (defendant) NSW Police
Representation:	Solicitors: Mr Costin-Neilson on 21/1/2016, Mr Huxtable on 28/1/2016 (for the prosecution) Mr Bolt (for the defendant)
File Number(s):	2015/237138

JUDGMENT

Reasons for decision

1 The defendant has been apprehended for the offence of driving with an illicit drug present in his blood (s 111 *Road Transport Act 2013*) on two relevant occasions - 26 May 2015 and 23 June 2015. He pleads guilty to the May offence. He pleads not guilty to the June offence on the basis of an honest and reasonable mistake of fact.

2 This judgment is prepared without the benefit of a transcript.

3 There was no expert evidence for either the prosecution or defence.

4 The legislative provision is simple:

> **111(1) Presence of prescribed illicit drug in person's oral fluid, blood or urine**A person must not, while there is present in the person's oral fluid, blood or urine any prescribed illicit drug:
>
> (a) drive a motor vehicle….

5 The elements of the offence are not in issue – the defendant was driving a motor vehicle on a public street whilst there was present a detectable level of THC in his oral fluid.

6 It is important to note that there need not be any affect proven – the mere presence of a minute or residual presence of THC is sufficient. There is a separate offence of driving under the influence of a drug for which affect must be proven.

Prosecution case

7 The apprehending officer for the May and June offences was Senior Constable Chayne Foster. His evidence-in-chief relating to the June offence was by way

of statement which relied on the audio recording from the highway patrol vehicle. There was some other conversation not recorded.

8 First the defendant was breath tested for alcohol, and that was negative. In accordance with standing orders, the defendant was asked prior to the test:

> Have you had any alcohol today?

9 The defendant was then subjected to a second test, this time for illicit drugs. The officer said:

> I am now going to subject you to a drug test. Have you taken any illicit substances in the past 48 hours?

10 The defendant said:

> I had a smoke over a week ago, Sunday week ago.

11 The first indicative roadside test came back positive to cannabis, and the defendant was arrested and taken to the police station for the purpose of conducting the second test. The defendant said:

> I thought I would be right, it was over a week ago.

12 The second test also proved positive to cannabis, and so a sample was sent to the Forensic and Analytical Science Service. That sample was tested and a certificate was issued that the defendant's oral sample had cannabis present.

13 In cross-examination it was put to Senior Constable Foster that when he apprehended the defendant on the May occasion, the defendant and he had discussed how long after a smoke before he could drive and not be detected, and the officer had said that he would be required to wait a week.

14 The officer did not unequivocally deny that, but said that he would have been unlikely to say those words, as he would not want to encourage an offence. He did acknowledge a lack of specific memory of that conversation, understandable given the hundreds of tests he must have conducted before and after that occasion.

15 When pressed, he stated that he believed the equipment detected cannabis three to four days after use, but that it depended on a range of factors including the amount consumed, how it was consumed, and the regularity of use leading up to the last occasion.

16 He also stated, from my notes, that “a line had been drawn and that now you could be a smoker and not drive, or a driver and not smoke and that that was the effect of the new laws”.

The evidence of the defendant

17 The defendant stated that when he was apprehended by the Senior Constable in May, the officer had said to him "If you had waited a week you would have been fine to drive". He had relied on this information and had last had a smoke of cannabis on the Sunday, almost a week and a half prior to being apprehended the second time. He had been in the same house as another person who had smoked on one occasion in the interim, but that person had been in a closed separate room. The prosecution took this no further once it was apparent that the possibility that this led to further ingestion was remote.

18 Given the length of time, and the police officer’s advice, the defendant stated he was convinced that he was right to drive and would not have THC in his system. He made it clear that in his view he did not consume any cannabis from the potential passive smoking episode.

Burden and onus of proof

19 There is an evidential burden to raise the defence. This has been achieved by the evidence above. The prosecution then bear the burden of disproving 'honest and reasonable mistake of fact'. The test is stated clearly in the concluding remarks of Goldring J in *Appeal of Francesco Mendolicchiu* [2008] NSWDC 182 at [20]:

> I find that, once the appellant raised the defence of an honest and reasonable belief by asserting facts, that, if true, would have exonerated him from guilt of the offence, the evidentiary burden of disproving that defence shifted to the prosecution. The prosecution has not discharged its evidentiary burden.

Factual resolution

20 Given the clear and unambiguous evidence of the defendant I am satisfied that the conversation as he recollects it is accurate. He was not shaken in cross-examination. The officer’s evidence was equivocal, and he was not in a position with any certainty to deny what was said.

21 I am also satisfied that the defendant is telling the truth when he says that the last cannabis he smoked was at least nine days prior, and he believed that all

the cannabis would have been gone from his system by the date of the alleged offence.

22 The community may be curious as to why the issue of passive smoking was the subject of some focus in cross-examination and examination-in-chief. This court deals with about fifty of these offences each week, and the issue of passive smoking has been canvassed in numerous cases, where people plead guilty even though they are not cannabis users themselves.

23 I am satisfied that the defendant honestly and reasonably believed he did not consume any smoke from the potential passive episode given the location and timing of that occurrence.

Does the defence apply to s 111 of the Road Transport Act?

24 It is clear that the defence applies to High Range PCA due to the key and binding case of *DPP v Bone* [2005] NSWSC 1239. The context of that legislation was described as follows at [16]:

> It can easily be accepted that the reason for the legislation in the first place and its increased severity is a reaction to the perceived need in the public interest to deal with the havoc caused when persons who have been drinking also drive.

25 The court accepted that in the case of High Range PCA the offence is one of strict, not absolute liability, and thus the defence of honest and reasonable mistake of fact does apply.

26 This case has been applied in the District Court in *Appeal of Francesco Mendolicchiu* [2008] NSWDC 182 where the appellant took cough mixture which 'topped him up' to a low range reading. The defendant was acquitted.

27 *Bone* was determined more than a year prior to the legislation creating the current offence under s 111. If parliament had wanted to make drug driving an absolute offence it could have by clear unequivocal language in the decade since.

28 In *Proudman v Dayman* [1941] HCA 28 the court found that when dealing with 'a new crime' it is necessary to look at the purpose of the legislation to determine whether the defence would apply.

29 Having carefully read the legislation, the second reading speech when it was introduced, and the above cases there is no reason to differentiate this offence from the drink driving offences.

30 The second reading speeches are interesting for a related purpose - they illustrate the reasoning behind the legislation some ten years ago. The bill which introduced the amendment was the *Road Transport Legislation Amendment (Drug Testing) Bill 2006*. It was first introduced by Mr Matt Brown, Parliamentary Secretary for Transport in the Legislative Assembly. The aim in general was road safety, and he said on 19 September 2006 (my emphasis):

> People who have *active* drugs present in their system should not be driving on our roads.

31 In the Legislative Council the Bill was introduced by The Hon. Eric Roozendaal, the Minister for Roads, who said on 18 October 2006 (my emphasis):

> The bill allows police to randomly test drivers for the presence of three illicit drugs in oral fluid. These are speed, ecstasy and THC, the active ingredient in cannabis. These drugs are illegal, they are the most commonly used drugs in the community and they all *affect the skills and sound judgment* required for safe driving.

32 Whilst not relevant to the issue at hand, but of interest given one of the submissions from Mr Bolt, I note that the Greens also supported the legislation (Ms Lee Rhiannon, Legislative Council, 18 October 2006 at 2815) on the basis that:

> ... the screening devices have been shown to only detect THC which is the intoxicating element at very high levels and the window of detection is about one hour. The tests cannot pick up the non-active component, which stays in a person's body for a longer period. Therefore, those who smoke cannabis the day before will not test positive according to the advice I have received.

33 It is clear that the second reading speech Ministers had in mind that it would be drugs that were 'active' and 'affect the skills' that were the mischief. References to 'no tolerance for any drugs' in the speeches need to be viewed in this context. Whist the police do not have to prove affect, and no bottom limit was set, the target was those who were 'drug driving' just like 'drunk driving'.

34 Clearly, in 2006, the technology was not nearly as advanced as it is now. Certainly it was not the aim of the Ministers that if you consume cannabis (at

all) you cannot drive (ever), or that those who had been around other smokers could be caught in the net.

35 There is no indication that these offences were to be absolute liability in the wording of the legislation or in the second reading speeches.

36 The prosecution point to some features of the *Road Transport Act* to suggest that the offence is absolute. The prosecution contend that the wording of the legislation, particularly s 111(2), precludes the defence of honest and reasonable mistake of fact. In my view this is not correct; s 111(2) relates solely to the issue of multiple drugs in the saliva.

37 The prosecution contends that the very nature of the offence dictates that it ought to be viewed as absolute liability in that it does not use words such as "knowingly" or "wilfully" and the maximum penalty is a fine and disqualification with no prison term.

38 The *Appeal of Francesco Mendilicchiu* is authority for the proposition that the defence applies to Low Range PCA, which also does not carry a prison term, and has identical disqualification periods. Low Range PCA provisions also do not mention intent. A mandatory disqualification is a serious and significant punishment. This was recognised by Howie J in the guideline judgment[1] at [116]:

> Licence disqualification is such a significant matter and can have such a devastating effect upon a person's ability to derive income and to function appropriately within the community that it is a matter which, in my view, must be taken into account by a court when determining what the consequences should be, both penal and otherwise, for a particular offence committed by a particular offender.

39 The prosecution contend that the existence of a statutory defence for medicinal purposes for morphine based drugs points to the absolute nature of the s 111 offence. As pointed out in *Appeal of Francesco Mendilicchiu* at [12] to [14], the existence of a medical defence and the absence of a specific defence do not mean that the defence is unavailable.

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[1] Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002) [2004] NSWCCA 303 (8 September 2004)

40 The prosecution contend that the importation of the *Criminal Code* strict liability provisions to the regulations does not apply to the Act. I agree with this proposition. The provisions only apply to the regulations, and thus do not affect the Act.

41 The prosecution did graciously and properly alert me to a very recent unreported spiking case determined in Byron Bay Local Court by Magistrate Dakin, where he dismissed a s 111 offence relating to methamphetamine on the basis of an honest and reasonable mistake of fact. That is not binding, but is highly persuasive, and accords with my view.

42 For the reasons above in my view the defence of honest and reasonable mistake of fact is available for the offence charged in the present case. It is a strict liability offence.

Application to the present case

43 I have accepted in this case that the last ingestion of cannabis was at least nine days prior. No-one is seriously contending that the defendant was still in any way affected by the drug. I have found that the informant Senior Constable from the highway patrol asks questions about a 48 hour period, believes the presence generally can be detected for three to four days, and told the defendant that after a week he should be clear to drive.

44 Of course it can never be the law that a person can rely on mistake where they made a miscalculation as to their driving ability based upon a misconceived analysis of their own level of intoxication. Every day in every court in the land defendants say: “I thought I was sober enough to drive”. And that is because alcohol and other drugs intoxicate and dull the judgement. The defence of honest and reasonable mistake is not a drunk (or drug) driver’s charter.

45 The comments of Adams J in *DPP v Bone* reinforce this at [36]:

> One of the important purposes of the legislation is to warn drivers that, whatever their subjective judgment might be as to their fitness to drive, they are objectively a danger to themselves and to other members of the public if they drive with a prescribed concentration of alcohol in their blood. Accordingly, persons who drink drive at their peril as well as the peril of other road users.

Was the defendant's belief honestly held?

46 As a question of fact, I find that it was the defendant's truly held belief that he had no detectable level of cannabis. More precisely, the prosecution have not disproved the defendant's evidence in this regard.

Was it a mistake of fact, or a mistake of law?

47 The leading case on this issue is *RTA v O'Reilly & Ors* [2009] NSWSC 134 handed up by the prosecutor. In that case the appellant honestly and reasonably believed speed limit was 70kph not 60kph. That was found to be a mistake of law, not of fact. Whilst there are grey areas relating to the distinction between fact and law (see *Ostrowski v Palmer* (2004) 218 CLR 493), in this case, in my view, the belief was clearly one of fact. The defendant knew the law; he believed that he no longer had the presence of THC in his saliva.

Was the defendant's belief reasonably held?

48 This is a difficult question to answer, and I have wavered in my opinion. In particular, I am aware that parliament's intention is only relevant to the issue of whether the defence applies. Further, I was originally attracted to the contention that a mistaken honest belief about an action (driving) may never be reasonable if it originated in a crime (smoking cannabis).

49 Mr Huxtable stated that to have a detectable level of THC the defendant, absent spiking or accidental consumption, must have knowingly committed the offences of possession of a prohibited drug, and self-administration of a prohibited drug. He stated that those who flout the law cannot then rely on a reasonable mistake.

50 Mr Huxtable further stated that alcohol is regulated, legal and it is easy to assess the quantity consumed in almost all cases due to the standardisation of drinks and percentage labelling. It is impossible to assess the quantity or quality of cannabis in an illegal market.

51 These are each valid points. However, consideration of the hypotheticals canvassed during submissions, in the authorities, and discussed below, as well as application of the onus of proof, has led me to the conclusion that prosecution have not negatived reasonable mistake.

Lack of Precedent

52 I have been unable to locate a single authority on this issue – whether a belief can be reasonable where the initiating action was a separate preliminary criminal act committed many days before. The only relevant cases deal with the legality of the same act at the same time. In the joint judgment of Gleeson CJ, Gummow, Crennan and Kiefel JJ in *CTM v The Queen* [2008] HCA 25 at [8] (footnotes omitted):

> Where it is a ground of exculpation, the law in Australia requires that the honest and reasonable, but mistaken, belief be in a state of affairs such that, if the belief were correct, the conduct of the accused would be innocent. In that context, the word "innocent" means not guilty of a criminal offence. In the case of an offence, or a series of offences, defined by statute, it means that, if the belief were true, the conduct of the accused would be "outside the operation of the enactment".

53 In my view, 'the enactment' refers to the substantive offence in issue, and does not require the court to peer back looking to another enactment. Similarly, the cases of *Giachin v Sandon* [2013] ACTSC 77 and *R v Duong* [2015] QCA 170 apply *Bone* interstate, but do not assist where a person is otherwise innocent but the initiating act is unlawful. See also Fullagar J at [14] in *Bergin v Stack* [1953] HCA 53.

54 In my view the focus ought not be on the original action – the smoking of the cannabis. The reasonableness of the belief ought to be focussed more sharply – at the time of or immediately before the action constituting *this* crime – driving with the presence of cannabis in the person's saliva. After all, the defendant is not relying on the defence for the offence of consuming the cannabis, only for the driving offence.

55 Apart from timing, the issue is also partly dependent upon the nature of the originating offence. In this case it is the possession and personal use of cannabis. This crime is so minor, that the police have a unique statutory discretion to deal with it by the cannabis cautioning scheme and such an offence would rarely attract more than a minor fine. For a first offence it may well not lead to a conviction.

56 The criminal law does not as a rule require 'clean hands' from those who seek to rely on defences. For example, even a person who throws the first punch

can in some circumstances rely on self-defence. Self-defence is also not closed off from a trespasser or a thief. A person who engages in an armed robbery to recover goods they believe to have been wrongfully detained may have a 'claim of right' that leads to acquittal.

Hypotheticals

57 Firstly, what if the cannabis was ingested lawfully, in Colorado or Portugal or elsewhere? It cannot be that the defence is not available in the present case, but available in those circumstances. This illustrates that the focus needs to be on the mistake with respect to the act which is said to constitute this offence (driving with presence) not any other offence prior (cannabis self-administration or possession).

58 Secondly, what if a 17 year old used fake identification to enter licenced premises and then drank a spiked soft-drink. The defence of honest and reasonable mistake would still be open to her despite the unlawful entry into the club sometime prior which has a direct causative link. Again, this illustrates that the focus needs to be on the legality of the act which is said to constitute the offence (driving) not any other offence (obtaining benefit by deception).

59 Thirdly, what if a person was driving a stolen car (plea of guilty) and was also driving unlicensed (plea of not guilty – honest and reasonable mistake of fact). The defence would still be available on the unlicensed offence, even though the vehicle was stolen. Again, the focus is on the licence issue, not on the theft.

60 Fourth, what if the technology improves even more, so that the THC can be detected after one month, or three, or even twelve? Mr Bolt chose the example of two years which I scoffed at. However, on reflection the question is valid. Surely at some point the defendant's belief may be reasonable that there would no longer be the presence of THC in the saliva?

61 Fifth, a relevant hypothetical was raised in the case of *Giachin v Sandon* [2013] ACTSC 77 which applied *Bone* in that jurisdiction. Penfold J at [70] commented:

> A person who correctly believes that he or she has not consumed alcohol for a week but whose blood contains alcohol at the end of that week because of some previously undiagnosed metabolic disorder might well be able to make out a Proudman v Dayman "defence".

62 The court is clearly envisaging that the defence is available where a drink-driver believes that the alcohol would have exited his system, but is mistaken, so long as the period of time is beyond anything that the person would ordinarily and reasonably expect. That broadly corresponds to the current situation.

63 In my view, each of the above hypotheticals suggest that despite the illegality of the use in this case, provided the defendant honestly believed that the cannabis was no longer present, and the passing of time was sufficient, then the prosecution may not have disproved the 'reasonable' defence. The time can only be sufficient where it is completely outside the period of any affect. Nine days is well outside that period.

Lack of Information regarding testing levels

64 I did not allow the defence to tender a document from a member of parliament seeking to support the contention that the government/police force was not releasing information on the level of the tests. The reason for that rejection is that this was effectively conceded by the prosecution. Mr Huxtable and Mr Costin-Neilson both made the submission that should this defence succeed those who choose to use cannabis will not have to 'run the gauntlet' whereby they do not know if they are detectable. That gauntlet is apparently part of the mystery and uncertainty-by-design of the current testing regime. As expressed, the argument is that the floodgates may be opened and lessen the deterrent effect of this legislation on consumption of cannabis should the defence be applied.

65 As for floodgates, my duty is to apply the law as I see it in a given case and not determine that application based upon what could happen in other cases.

Police advice

66 The only further prosecution submission not dealt with above is the reasonableness of reliance on the police advice. The prosecution contend that it is not reasonable. The defence contend that it is reasonable, given the dearth of information as to how long the wait has to be before the presence cannot be detected.

67 Given the evidence in this case and the context in which the advice was proffered, I am not satisfied that the reliance upon it was unreasonable. In *Ostrowski v Palmer (*2004) 218 CLR 493, the reliance on the advice given by the government agency was not found unreasonable and the situation here is similar. After all, how else is a person to determine when they are 'right to drive'? Mr Bolt suggested that government information is unhelpful - the NSW government website that I think he is referring to is the Centre for Road Safety (part of Transport For New South Wales)[2] where there is the surprisingly definitive, oft-quoted statement made (my emphasis):

> Cannabis can be detected in saliva for *up to* 12 hours after use. Stimulants (speed, ice and pills) can be detected for one to two days.

68 Mr Bolt's reference to 'unhelpful' is aptly restrained.

Conclusion

69 In my view there is no bar to raising the defence in the current circumstances. Given the length of time given following the ingestion of the cannabis, the elimination of passive ingestion as a source, and in addition the advice proffered by the police officer on the previous occasion, I am satisfied that the belief was honest and reasonable. More precisely, the prosecution have not negatived the defence.

70 Accordingly, I find the defendant not guilty in respect to the June offence, and will proceed to sentence on the May offence on a date to be fixed.

Magistrate David Heilpern

Lismore Local Court

1 February 2016

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[2] roadsafety.transport.nsw.gov.au/stayingsafe/alcoholdrugs/drugdriving/

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