MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Queensland Police Service v Murray* [2021] QMC 5
PARTIES:	**QUEENSLAND POLICE SERVICE** (prosecution) **v** **MITCHELL RUSSELL MURRAY** (defendant)
FILE NO/S:	MACK-MAG-00100453/20(7)
DIVISION:	Magistrates Courts
PROCEEDING:	Criminal Trial
ORIGINATING COURT:	Magistrates Court at Mackay
DELIVERED ON:	10 August 2021
DELIVERED AT:	Mackay
HEARING DATE:	22 February 2021
MAGISTRATE:	Acting Magistrate J M Aberdeen
ORDER:	**Defendant is found Not Guilty**
CATCHWORDS:	TRAFFIC – OFFENCES – In charge of motor car while UIL – defence of occupying compartment other than driving compartment – intention to refrain from driving – elements of defence *Transport Operations (Road Use Management) Act 1995* section 79(1) and (6) *Traffic Act 1949* section 16 *Newburn v McCann ex parte McCann* [1970] QWN 17 (Full Court Qld) *Ex parte Campbell, In re Cathcart* (1870) LR 5 Ch App 703 [2009] QDC 407 *James Neil v The Queen* (1909) 3 QJPR 93; 8 CLR 671
SOLICITORS:	Ms S Gravino (for Police Prosecution Corps) Ms A Morton (Fisher Dore Lawyers) for the Defendant

REGISTRY: Mackay

MACK-MAG-00100453/20(7)

QUEENSLAND POLICE SERVICE

v

MITCHELL RUSSELL MURRAY

DECISION

[01] Mr Mitchell MURRAY is before the Court charged with one offence against the *Transport Operations (Road Use Management) Act 1995*, which can be shortly described as "being in charge of a motor vehicle while under the influence of liquor or a drug".

[02] This matter proceeded to trial before me on 22 February 2021, following which I reserved my decision to consider the evidence, and the application of the relevant law.

The charge:

[03] The charge against Mr Murray is in the following terms –

> "That on the 5th day of June 2020 at Hay Point in the Magistrates Courts District of Mackay in the State of Queensland one Mitchell Russell MURRAY whilst he was under the influence of liquor or a drug was in charge of a motor vehicle namely motor car on a road namely Rasmussen Avenue Hay Point
>
> AND it is further alleged the offence was a Type 2 vehicle related offence as it was committed in circumstances in which the said Mitchell Russell MURRAY was over the high alcohol limit within the meaning of the ~~Road Use Management Act~~ *Transport Operations (Road Use Management) Act 1995*, section 79A
>
> AND it is averred that the said motor car was a motor vehicle as defined in Schedule 4 of the *Transport Operations (Road Use Management) Act 1995*

AND it is averred that the said Rasmussen Avenue was a road as defined in Schedule 4 of the *Transport Operations (Road Use Management) Act 1995.*

[04] I note the reference in the first averment, pertaining to a Type 2 vehicle-related offence, to the "Road Use Management Act". There is no such statute. I intend to amend the charge, in the first averment, by striking out the words "Road Use Management Act,", and inserting in lieu thereof the words "*Transport Operations (Road Use Management) Act 1995*"

[05] To this charge, Mr Murray has entered a plea of Not Guilty.

[06] This is a criminal charge. The prosecution carries the onus of proving each and every element of the charge beyond a reasonable doubt; and, if I am left in doubt as to any of the elements of the offence, the Defendant is entitled to an acquittal.

Evidence at trial:

[07] The evidence at trial was of relatively short compass. The prosecution called Constable Ari KUSTER[1] as its only witness. The defence called Mr Bradley ISON[2], and the Defendant Mr Murray[3].

[08] The following exhibits were tendered, and received into evidence:

Exhibit 1 = Breath Analysis Certificate, 01:51am, 05/06/20, 0.168

Exhibit 2 = Notice of Licence Suspension (s. 79B)

Exhibit 3 = Body-worn camera footage (Kuster)

Exhibit 4 = Body-worn camera footage (Hall)

Exhibit 5 = copy Section 79 *TORUM* Act

Exhibit 6 = copy *Newburn v McCann* [1970] QWN 17 (FC)

Exhibit 7 = copy *Foster v Dahl* [2009] QDC 45 (Clare SC DCJ)

Exhibit 8 = copy *Police v Bouwer* [2007] QMC 9 (Costanzo M)

Exhibit 9 = copy *Brooks v Spasovski* [2004] QDC 471; 25 *Qld Lawyer Reps* 256 (McGIll SC DCJ)

[09] Constable Kuster gave evidence that on 4 June 2020, he was attached to the Sarina Police Station, and was rostered on to perform a 6pm to 2am shift, which would take him through to the early hours of the morning of the 5 June. At about 12:55am, he

[1] Transcript pp 1-6 to 1-19.
[2] Transcript pp 1-20 to 1-26.
[3] Transcript 1-27 to 1-35.

was performing patrols in company with Senior Constable Jamal Hall along Rasmussen Avenue, Hay Point.

[10] As he did so, he observed, on the right hand side of the road (*ie* the opposite side of the road to his direction of travel), a four-door utility, stationary on the side of the road, with the headlights illuminated. Senior Constable Hall, who was driving the police car, drove past the utility, performed a U-turn, and then drew in behind the utility.

[11] The vehicle was in a parked position, partially up on the kerb, in such a manner that the wheels were marginally turned towards the road. As the police car pulled in behind the utility, Constable Kuster also noted that the tail-lights, and the right-hand indicator were operating.

[12] Both police officers alighted from their vehicle. Constable Kuster activated his body-worn camera. He walked to the passenger side of the utility. As he reached the passenger-side window, he could hear the engine of the vehicle running. From his position, he saw a person – whom he identified as Mr Murray – occupying the driver's seat in the utility. Senior Constable Hall walked to the driver's side of the utility, and reached inside, turned off the ignition, and removed the keys.

[13] Constable Kuster carried out checks through the police communication system, and was able to locate data pertaining to the vehicle; and from a link contained within that data, was able to bring up a photograph of the registered owner, which was taken from his driver's licence photo.

[14] Constable Kuster walked around to the driver's side of the vehicle, where Senior Constable Hall was located. The driver's window was down, and Mr Murray could be seen lying in the vehicle. The back of the driver's seat had been reclined, and Mr Murray was lying on this seat. The headrest of the seat was just above the back seat, and Mr Murray's head was on the headrest[4]. Thus, Mr Murray's body was contained within two compartments – the driver's compartment contained the lower part of his body; while the left-rear compartment contained his head and chest down to the waist area.

[15] Both officers then attempted to rouse Mr Murray. On a couple of occasions Mr Murray sat up – but then lay down again. In due course, when he sat up, Mr Murray operated the lever[5] which raised the driver's seat so as to raise the back of the seat, and hold him in an upright position.

[4] This can be seen on a number of occasions, when Constable Kuster opened the rear driver's-side door in order to access and rouse the Defendant: see Exhibit 3, file 1.
[5] Transcript p 1-16 line 26; Exhibit 3, file 1 at 3:24.

[16] Constable Kuster then made a requirement to Mr Murray to provide a sample of breath for a roadside breath test. When asked if he understood the request, Mr Murray nodded affirmatively, and appeared to mouth "yeah"[6].

[17] Constable Kuster then handed the breath testing device to Mr Murray, who took it, and placed the tube in his mouth. He appeared to commence to blow, but was then asked to stop, as he had "sucked back in", rather than blowing continuously. At that point, Constable Kuster warned Mr Murray that if he did not provide the specimen in accordance with his direction, he may also be charged with another offence. Mr Murray then tried again. Constable Kuster thought he may have bitten the "straw"; but after checking the device, he was able to advise Mr Murray that he had a sufficient sample, and that the sample showed a positive result.

[18] Mr Murray was then detained for further testing, and required to alight from his car. This took some time, with Constable Kuster cautioning Mr Murray that if he continued obstructing him (*ie* by failing to step out of the car), Mr Murray may be arrested[7]. At one point, Mr Murray moved his right hand forward, apparently towards the ignition tumbler area; he was told by Constable Kuster that the officers already had his keys.

[19] Mr Murray was eventually able to step out of the utility, and was assisted by the officers to go to the police vehicle parked behind his own car. The officers and Mr Murray appeared to move at a reasonable pace. There he was stood beside the car, while a "pat-down" search was carried out. He was told to place his hands out in front, on the side of the pod, and did so, but then dropped his hands, so that the officers had to put them back up on the side of the pod; this happened a couple of times. After the search, Mr Murray was then placed in the pod, and the doors secured (time stated by Constable Kuster = 12:59am. Constable Kuster also stated, for the recording, the BAC level as indicated by the roadside breath test = 0.187).

[20] The officers then transported Mr Murray to the Mackay Police Station, arriving at about 1:34am (time stated for the recording). Mr Murray, upon arrival, was taken to an internal office, where a breath analysing instrument ("breathalyser") was present on a desk.

[21] On walking across the car park at the rear of the police station, and into the building, and down the hallway, Mr Murray was noted to be able to walk of his own volition, at a reasonable pace. He was seated in the breathalyzer office, and was then asked a number of questions prior to the administration of the test.

[6] Exhibit 3, file 0052, at 4:03.
[7] *Ibid* at about 6:00.

[22] At 1:51am, upon a requirement by Constable Kuster[8], Mr Murray provided a specimen of his breath for analysis, which revealed a BAC reading of 0.168.[9]

[23] Mr Murray was then taken to a cell, and allowed some time for his BAC to reduce. During that time, he was served with a notice advising him that his driver's licence was immediately suspended.[10]

Evidence for the defence:

[24] Mr Murray was 27 at the time of this interception on 4 June 2020. He was employed as a painter/blaster at the Dalrymple Bay Coal Terminal, and had been working there for about 2 ½ years.

[25] On the 4 June, his crew had just finished a 5-week shutdown, and had just completed the fifth shift of a 5 days on/2 days off roster. Each shift was of 12 hours duration. This translates to a 5-day week of 60 hours physical work as a painter/blaster.

[26] He finished work on this day at 6:00pm, and left the workplace at about 6:10pm.He and a number of co-workers drove to the premises of Mr Brad Ison, also a work colleague. Their purpose was to have a few drinks, to mark the end of the week's work. It was apparently the case that Mr Ison had made some sort of "home brew", which was called "vodka". Mr Murray, when speaking to Senior Constable Hall just prior to his breach analysis test, also referred to the brew as "methylated spirits" - apparently because "that was what it tasted like".

[27] It should be noted that Mr Ison's home was at 94 Rasmussen Avenue, Hay Point. This was the address outside which Mr Murray was found, asleep in his car, just before 1:00am the following morning, the 5 June.

[28] In his evidence before the Court, Mr Murray was asked[11]:

> **Q:** What do you recall of that night?
>
> **A:** Just drinking, really. Just wrap – wrapping up our working time that we'd just done. It wasn't really going to get out of hand, and I had asked approximately – well, about 8 o'clock I knew that I was ready to be done. I'd sent a couple of messages to people to be picked up, knowing that, like, I didn't have a place to stay at that point, and yeah, that was…
>
> …Well, Brad [Ison] had offered me to stay, but I did not feel in place to stay there, due to the kids being in the house. Like, we have a pretty – obviously, having kids of my own, we don't really let anyone stay that's not within the

[8] Exhibit 3, file 0134, at about 16:10.
[9] See Exhibit 1.
[10] See Exhibit 2.
[11] Transcript from 1-28 from line 13.

family, so I have a strong belief that I didn't have a place to stay because of that.

I opted to sleep in my car, thinking nothing more than that.

… So I had sent a couple of messages. Everyone had – wasn't -was not able to come get me. So we had another couple of drinks and then at that point I remember going to the car with Brad – with both Brads and, yeah, just going to the car with full intent to sleep and to wake up in the morning and go home to my family.

[29] Mr Murray was asked if his car was locked?

A: No. The car was not locked, due to its Hay Point. I just don't feel like -yeah. Just personal preference I guess, of…"

…I recall just walking to the car, saying goodbye to the boys and, like, 'Thanks for the night', get into the seat and reclining in a position of sleep.

[30] He was asked:

Q: What do you recall from that?

A: I don't recall anything , really, from that until – I remember waking up in a hot fluster of, like – I was suffocating kind of feeling and, yeah, that's – reaching to put the window down, whereas the electric windows would not go down for me, so, therefore, I've – yeah. Recollection of that time was not….

Q: So you recall, I just want to…?

A: I recall feeling – yeah, I recall a hot feeling, being in a jumper and jeans after being at – at work and, obviously, alcohol. It was – I just felt hot and, like, I was in – yeah.

A: …I've reached for the ignition to turn the car on, obviously, to put the electric windows down, and fallen back asleep, unaware of what was about to happen.

Q: Do you know what time that occurred?

A: I would say from the last message that I sent to get picked up, it wouldn't have been any more than an hour before I've got to the car there-abouts, say, and the waking up hot, I can't recall that.

Q: And what's your next recollection?

A: Waking up to a bright light in my eyes and just, sort of, not knowing where I was, as I was pretty asleep by that point. I was – well, between being asleep and being unconscious, but I'd – yeah, had a bright light in my eyes. I remember getting put in the cop car and then I slept to the station where I've then come back awake.

[31] Mr Murray was then asked about the police BWC footage:

Q: You've seen the footage today?

A: Yep.

Q: Do you have a recollection of those events in relation to your interactions with police?

A: I vaguely remember the two police officers. I remember that police officer's face that was in the [witness] box. I definitely know that he was there, like, I remember that, but that was a lot – like, it was a big blur for me.

Q: …what is your normal driving position?

A: Upright seated. I'm pretty short, so close to the steering wheel.

…

Q: Can you comment on your ability to drive in the reclined position?

A: I don't believe that I was able to drive in that position.

Q: … you've seen that the vehicle was 'on'?

A: Yes.

Q: Do you recall how that occurred?

A: I'm assuming that – well, when I woke up to put the window down, being electric, I've turned the ignition to – to source that power to put the window down, due to being hot.

Q: You've just, "I assume"?

A: Yeah.

Q: Do you have a recollection?

A: No, not – not overly, no.

Q: How did the indicator come to be on?

A: I don't know that.

Q: When you were driving from Hay Point at 6pm, can you describe to me what the conditions were at 6pm?

A: It was raining, overcast. At that point in the month it was pretty dark, like, in June. So I had my hazard – my – sorry, my headlights come on automatically at a certain setting.

…

Q: Are you saying that your headlights automatically came on?

A: Yes, as soon as – yeah.

Q: Okay. Explain to me how the Navarra works in that way of the headlights automatically?

A: So I have a …

Q: The headlights' operation?

A: Yeah. So I have an 'on' – I have an 'auto' and I have – then I've got high beam, obviously. So 'auto' is the second furthest turn.

Q: Okay. And how does the 'auto' operate?

A: So as soon as my car starts they come on. You can turn them off, but that will stay on until the door opens. As – if on 'auto' they will – yeah. The door to open is what turns the lights off.

[32] Mr Murray was cross-examined by Ms Gravino, for the prosecution. Mr Murray agreed with Ms Gravino that he had had quite a lot to drink on the evening in question, and that he shouldn't have been driving in that state. He described "waking up in a panic of heat…from a deep sleep", at which time he opened the driver's window.

[33] He described, after opening the window, going "back into an unconscious state" due, he thought, to a combination of the alcohol he had consumed and fatigue after his work the previous week..

[34] He described the position of the indicator switch as right above the ignition, with the window switch being to his right on the driver's inside door panel.

[35] When he had got into the vehicle, he sat in the driver's seat, and operated the seat-recline lever to put the back of the seat down. When lying back on the reclined seat, his feet were in the vicinity of the pedals of the vehicle, possibly resting on the pedals. He believed that one foot was resting on the brake pedal when the car was turned on; although he did state that he could not actually recall that, but he had deduced such from his viewing of the BWC footage.

[36] Ms Gravino put the following proposition to Mr Murray[12]:

> **Q:** …So at the time of the video you accept that your feet were there, and do you accept that during the period that you would have been laying in that seat there that your feet would have been somewhere in that footwell?
>
> **A:** Yes.
>
> **…**
>
> **Q:** …Thinking about your experience in driving that vehicle?
>
> **A:** Yes.
>
> **Q:** Your Navarra. If the vehicle is turned on, if you were to press the accelerator, would you accept that your vehicle could slowly move forward?
>
> **A:** No, because the handbrake and park brake – it was in park and the handbrake was on.
>
> **Q:** Okay. Do you accept that to drive a vehicle, you don't need to be able to see out of the windscreen? To operate a vehicle. Not safely, but to operate a vehicle, you don't need to be able to see out of a windscreen?
>
> **A:** Well, that would go against all driving rules, I guess, but…
>
> **Q:** It would, but let's – I'm asking you…?
>
> **A:** Yeah. Yeah. Sorry.
>
> **Q.** …because of your knowledge of your vehicle?
>
> **A:** Yes.
>
> **Q:** So even if you could not see out of the windscreen, it's fair to say that you would still be able to move the vehicle forward?

[12] Transcript p 1-32 and ff.

A: After taking – yeah. Well, you'd have to do a lot of …

Q: It's not ideal and it's not safe?

A: Yeah. Yes.

Q: But it's fair to say that you don't need to see out of the front windscreen…

A: Yeah.

Q: …to be able to move the vehicle, and it's fair to say that even if you were laying reclined in the seat, if you were in a vehicle and you had knocked it into, say, drive, you would still be able to accelerate and move the vehicle, even though you were in a reclined position. Do you think that's fair to say?

A: Again, it's…

Q: Again, not that it's safe?

A: Yeah. No. Again you've got to…

Q: Not that you should do it?

A: You've got to engage the brake to pull the drive – pull the lever back, otherwise you will never move. To disengage a handbrake, like, I don't think it's …

[37] Mr Murray was asked if he recalled engaging the handbrake. He stated that he did not have a specific recollection of doing so; but that he was sober when he parked there, and that engaging the handbrake, and shifting gears to 'park' were things that he always did when parking his car[13].

[38] Mr Murray's cross-examination concluded with his confirmation that after arriving at Mr Ison's premises after work, he had stayed there for 2 to 3 hours drinking. He was drinking Mr Ison's home brew – an apparently strong drink of vodka and whiskey, which he referred to as 'methylated spirits' because that was what it tasted like.

[39] Mr Ison gave evidence that he lived at 94 Rasmussen Avenue, Hay Point. He worked with Mr Murray at Hay Point, at the "Dally" [Dalrymple] Bay Coal Terminal.

[13] See Transcript p 1-33 lines 21-46.

[40] He and his work colleagues, including Mr Murray, had finished their 12 hour shift at 6:00pm on the relevant evening, and all had then adjourned to Mr Ison's home for some drinks after work[14].

[41] Mr Ison was asked what he recalled of the night:

> "…we were just having drinks at home, virtually, having a good time. Virtually, at the time of the – end of the night to – you know, everyone to, leave and go to bed or whatever. I offered Mitch [Mr Murray] a room – like, a bed there or to crash there. My house is only small, so – I had the three kids and the wife there. He's got a family of his own, so he didn't really want to burden me by staying there. He was happy to stay in his car, so me and Brad Boyle took him to the – his car and put him in the front seat of his car, so, yeah. We looked for the keys, couldn't – didn't see the keys in the ignition, so we thought he'd be fine and just thought that he was going to crash the night there, so, yeah."

[42] Mr Ison agreed it was probably about 9:00pm when Mr Murray was taken out to his car. He was able to tell the Court that Mr Murray's car was not running while he was outside[15].

[43] Mr Ison, when asked by the prosecutor, confirmed that he had, later in the night, and after everyone had left his house, gone outside to check on Mr Murray. At that time, he did not believe that the car was running – he thought he would have noticed if it was; and that he was not aware of any lights being on. He was unable to state whether the driver's window was open or closed. He believed he had looked at the car from the area of his front fence. He had not actually gone out to the car itself.

[44] Ms Gravino drew Mr Ison's attention to a letter he had provided to Mr Murray's solicitor. Mr Ison was shown the letter, and was able to confirm it was his letter, but was not able to provide a date on which it had been written.

[45] Mr Ison agreed that in that letter, he had told Mr Murray's solicitor that he had checked on Mr Murray, and that he was fast asleep. However, his recollection, at trial, was that he had checked on Mr Murray from a viewpoint from his front fence, and that he had not gone out to the car[16].

[46] That concluded the evidence in the case.

Submissions by the parties:

[14] I note also that their shift that day was the final shift for the 5-day roster, and that it may have been the end of the shutdown: see T/s p 1-27 line 47.
[15] Transcript 1-22 line 21.
[16] Constable Kuster had given evidence that the area in which the vehicle was located was dark – "it's a poorly-lit area of Hay Point": T/s p 1-12 line 38.

[47] Ms Morton, on behalf of Mr Murray, raised the "defence" under subsection (6) of section 79 of the *Transport Operations (Road Use Management) Act 1995*. She also places reliance upon the decision of the Full Court of Queensland in *Newburn v McCann*, *ex parte McCann*, in 1970[17].

[48] Ms Morton addressed each of the necessary components of subsection (6), which the legislation requires are present before the subsection can come into operation. Subsection (6) is, perhaps, somewhat unusual, in that, while it can be termed a matter of defence, the facts which must exist before it can have any application have to be proved, by evidence received on oath, to a level described as "beyond a reasonable doubt"[18]. This is an especially high level of proof in the context of criminal defences, in that the usual standard of proof required is the civil standard *ie* "on the balance of probabilities".

[49] It was conceded by Mr Murray's solicitor that *Newburn v McCann* was decided under section 16 of the *Traffic Act 1949*; this Act is now repealed. However, Ms Morton submitted that the relevant wording of the *Traffic Act*, in this respect, was consistent with the defence under section 79 of the 1995 Act.

[50] The submissions by Ms Gravino can be summarised – I hope without detrimental effect – by the following point-by-point examination:

(i) Charges which raise the subsection (6) defence must be considered on a case-by-case basis;[19]
(ii) It is a "very big distinction" [when considering *Newburn's* case] that in this case the car's engine was turned on, and was running;[20]
(iii) The Defendant here obviously had possession of, or access to, the vehicle's keys, whereas in *Newburn* the appellant had passed these to another person;
(iv) From where, and how, this Defendant was lying in the vehicle, with the seat reclined, he could still "drive" the vehicle, or at least put it into motion;
(v) The Defendant's feet were in the driver's footwell at all times, and may well, at some points, have been on some of the pedals;
(vi) It is relevant for the Court, in this case, to consider whether or not the vehicle could be operated by the Defendant;[21]
(vii) The Court in this case could not accept that Mr Murray could reach the ignition switch while lying back reclined[22]. From this (as I understand the submission) it must be the case that Mr Murray, at some point, sat up and operated the ignition key, with the intention of enabling him to lower the driver's window. If this occurred, Mr Murray may have been solely, for at

[17] [1970] QWN 17.
[18] The criminal standard of proof.
[19] Transcript p 1-54 line 32.
[20] Transcript p 1-55 line 37.
[21] Transcript p 1-54 line 28.
[22] Transcript p 1-55 line 21.

least that short time, wholly in the driver's compartment; and for that (probably) quite brief period of time, he was not *occupying* a different compartment, and thus the operation of subsection (6) was displaced.[23]

(viii) The Defendant's concessions that he was quite intoxicated, and very fatigued, resulted in a situation which presented considerable danger to the community, and that is a consideration in determining whether the subsection (6) defence is made out;

(ix) The Defendant was "too intoxicated to form an intention to drive or abstain from driving"; one of the "elements" of the subsection (6) defence was therefore negatived;

(x) There is an analogy between this case, and the decision of her Honour Judge Clare SC in *Foster v Dahl*[24].

[51] ***The relevant law:***

Section 79 of the *Transport Operations (Road Use Management) Act 1995* provides, as far as relevant:

> (1) **Offence of driving etc. while under the influence**
>
> Any person who, while under the influence of liquor or a drug—
>
> …
>
> (c) is in charge of a motor vehicle, tram, train or vessel;
>
> is guilty of an offence and liable to a penalty not exceeding 28 penalty units or to imprisonment for a term not exceeding 9 months.

[52] It is further provided, by subsection (6) of section 79:

> (6) **Court not to convict if satisfied of particular matters**
>
> If on the hearing of a complaint of an offence against subsection (1)(c), (1F)(c), (2)(c), (2AA)(c), (2A)(c), (2B)(c), (2J)(c), (2K)(c) or (2L)(c) in respect of a motor vehicle the court is satisfied beyond reasonable doubt by evidence on oath that at the material time—
>
> (a) the defendant—
>
> (i) by occupying a compartment of the motor vehicle in respect of which the offence is charged other than the compartment containing the driving seat of that motor vehicle; or
>
> (ii) not being in that motor vehicle, by some action;
>
> had manifested an intention of refraining from driving that motor vehicle while any of the following circumstances relevant to a conviction on the complaint applied—

[23] See also Transcript p 1-57 line 29 *et seq*.
[24] [2009] QDC 45.

(iii) the defendant was under the influence of liquor or a drug; and

(b) the defendant—

(i) was not under the influence of liquor or a drug to such an extent;

as to be incapable of understanding what the defendant was doing or as to be incapable of forming the intention referred to in paragraph (a); and

(c) the motor vehicle in respect of which the offence is charged was parked in such a way as not to constitute a source of danger to other persons or other traffic; and

(d) the defendant had not previously been convicted of an offence under subsection (1), (1F), (2), (2AA), (2A), (2B), (2D), (2J), (2K) or (2L) within a period of 1 year before the date in respect of which the defendant is charged;

the court must not convict the defendant of the offence charged.

[53] At the time *Newburn v McCann* was decided, the relevant legislation was section 16(1b) of the *Traffic Act 1949*[25].

[54] I have compared the provisions of the 1949 Act, and those of the present 1995 Act. I am satisfied that section 16(1b), as it stood at the time of the decision in *Newburn v McCann*, was largely re-enacted as section 79(6) of the 1995 Act.

[55] The approach to be adopted to the interpretation of section 79(6), in respect of a decision upon its predecessor, was laid out in *Ex parte Campbell, In re Cathcart*, in 1870[26]:

> "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

[56] The same rule was succinctly stated by Griffith CJ in the course of argument, in the High Court, in *James Neil v The King*[27]:

> "It is a recognised rule that, when a statute has received an authoritative interpretation, and has afterwards been re-enacted, the Legislature intended that the same interpretation should be given to the provision as re-enacted."

[57] In comparing the 1949 and 1995 provisions, it is apparent that the section is a quite complex one, involving a number of different elements, each of which is necessary to support the defence. There is, in my opinion, a striking similarity between the essential components of the relevant sections. It would have been very simple, had it been intended, to reframe, or change, one or more of these elements. The failure to

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[25] *The Queensland Statutes 1828-1962* (1975), Vol 19, p 239 – section 16 (1b) as at 27/04/1971.
[26] (1870) LR 5 Ch App 703, at 706.
[27] (1909) 3 QJPR 91 at 93, SLR from [1909] St R Qd 225. The report at 8 CLR 671 does not include the arguments. Note also DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (5th Ed,2001) at [3.40]. Chubb J, in *R v Neil*, *supra*, would have applied the same principle where "our Legislature [*Criminal Code* (Q)] adopted the words of the English statute": [1909] St R Qd at 228-229.

take such a course leaves me in no real doubt that the law as expounded in *Newburn v McCann* was intended, by the Legislature, to be applicable under the 1995 Act. No change in the scope of the defence was intended.

[58] Each of the three witnesses who gave evidence in this trial did so under solemn affirmation. Section 79(6) (first paragraph) requires that evidence in support of the defence be given under oath. I note the terms of sections 5 and 17 of the *Oaths Act 1867*, and also of section 36, and Schedule 1 (definition of *oath*) of the *Acts Interpretation Act 1954*. It is my opinion that evidence given under affirmation, as authorised and permitted by the *Oaths Act*, has the same effect as "evidence on oath"; and that evidence given under affirmation is sufficient to satisfy the terms of s. 79(6) in this respect.

[59] It is necessary to look carefully at the facts of *Newburn v McCann*.

[60] The appellant had been found, under the influence of liquor, in the driver's seat (a "bucket" seat) in an Austin motor car. The seat was of a type which, by the use of a lever, could have its rear squab lowered backwards, to convert the interior into what was then generally called a "camping" body. The passenger's seat was similarly adjustable.

[61] At the time the defendant was so found by the police officers, the rear of the driver's seat had been lowered backwards to its full extent so that the defendant was lying with his legs and buttocks on the front seat of the vehicle and the remainder of his body extending into what is normally the rear compartment of the vehicle. From the evidence it would appear that the upper part of his body, from the waist up, was in the rear compartment of the vehicle and behind the position which would be occupied by the rear of the front seat when that seat was in its normal upright position. The defendant's lower legs extended beyond the front of the front seat and occupied a position similar to that in which they would be if a person were sitting on the front seat with the rear in its upright position. His feet were in the vicinity of the control pedals, on the floor of the driver's compartment.

[62] The convicting Magistrate found that the appellant's car keys had been taken by a man named Frank, who had been driving the car for the appellant. As far as the appellant knew, there were no keys in the vehicle.

Discussion:

[63] Based upon the police BWC footage, it is reasonably clear that Mr Murray's position, in relation to the layout of the interior of his car, bears extremely close similarity to that of the appellant in *Newburn's* case.

[64] It appears to me that there are, however, some differences, in the overall situation, between *Newburn's* case and the present case. They are:

- in this case, the keys, I find as a fact, were in Mr Murray's possession (*ie* control) at all relevant times;
- the keys were in the ignition of the vehicle at the time of police interception;
- the engine of Mr Murray's car was running, and some lights were on;
- at some time, between about 9:00pm and the arrival of the police, Mr Murray changed his position from that in which he was found, to enable him to activate the ignition with the keys, in order to open his window. He has then resumed his reclined position.

[65] These distinctions must be assessed against the principles laid down by the Full Court in *Newburn*'s case. The central issue in *Newburn* was whether it could be said that the appellant, whose body was "occupying", or contained within, two compartments of his vehicle, namely the driver's compartment, and the rear seat compartment (on the right hand side, *ie* behind the driver's seat), was *"occupying a compartment of the motor vehicle…other than the compartment containing the driving seat…"*.

[66] The Full Court answered this question in the affirmative, and held that the subsection (6) defence had been made out[28].

[67] The Court's approach to the interpretation of s.16(1b) of the repealed Act was outlined by Justice Hart[29]:

> "The subsection places the burden of proof on a defendant, but this burden relates only to proof of the facts on which he relies. The question whether the facts which he proves bring him within the protection of the subsection is one of law, and the subsection is part of a section which is penal in character. This being so any doubts that exist as to the meaning of the words "occupy" and "compartment", should be resolved in favour of the subject. "Occupy" is defined, *inter alia*, in the Concise Oxford Dictionary which was reprinted with corrections in 1969, as meaning "take up or fill (space, time) reside or be in (place, portion)", in this subsection it is used I think in the sense of "be in"."

[68] The ambiguity of the word "occupy", as thrown up by the facts as proved in *Newburn*'s case, led the Court to find the defence was proved where the appellant's lower body was in the driving compartment, at the same time that his upper body was in the rear compartment. Thus, "occupy" was not to be interpreted as to *exclusively* occupy a compartment other than the driving compartment. His Honour was careful, however, to point out that if a person was sitting in the driving seat with his left arm hanging over into the back compartment, he would not, by that action alone, be evincing an intention not to drive. Similarly, one might think, if the driver had a portion of his arm hanging out the window.

[69] His Honour then went on to set out the effect of the section thus interpreted:

> "The subsection requires two things, the **existence of an intention of refraining from driving** whilst under the influence of liquor or a drug and a **manifestation of that intention by occupying a compartment other than that containing** the driving seat. It is possible to be partly in one compartment and partly in another and thus to occupy two compartments at the same time. But the occupation has to be such as to manifest an intention not to drive whilst under the influence of liquor or a drug. It has to be an **outward and visible sign of the inward intention** not to drive until sobriety." [*emphasis added*]

[70] I intend at this point to address the submissions made by Ms Gravino, on behalf of the prosecution, by reference to the informal numbering above.

[71] (i) - All cases are fact-specific. In this case, the position occupied by Mr Murray is, to my mind, almost identical with that of the appellant in *Newburn*. To that extent, the

[28] Judgment delivered by Justice Hart, with Justices Hoare and Kneipp agreeing.
[29] At QWN p 44.

observations by the Court in *Newburn*, so far as they pertained to the position of the appellant, are directly applicable to this case. What differs are the possible distinctions I have listed above.

(ii) & (iii) -There is a distinction in fact insofar as this case is concerned, in that Mr Murray had control of the keys at all relevant times, and the keys were not only in his possession, but had in fact been used to activate the ignition in order to allow him to lower the driver's window. I also find, as a fact, that the indicator, which had been observed to be operating by the police[30], was accidentally – and unknowingly – activated by Mr Murray when he was operating the ignition. The indicator control was just above the ignition, and I think it highly likely, to the degree to which I am able to make the finding, that he inadvertently activated that function.

No evidence was placed before the Court as to the layout of the controls of the vehicle. I can only speculate as to the location of various controls which were mentioned in evidence; and having regard to the differences between modern vehicles as concerns exactly where their dash and associated controls are located, and the manner in which they are operated, I can make no firm findings in this respect.

In particular, it would have been informative, and potentially useful, to have evidence of the various functions activated *via* the ignition tumbler, *eg* the presence of what is sometimes called an "ACC", lights, and perhaps other positions, to which the tumbler may be turned, to engage different functions. Mr Murray tried to give some explanation in his evidence, as reproduced above; but again I am wary of drawing firm conclusions, as to exactly what he must have done, based upon what he said. It seems that the lights of the vehicle – or at least some of them – were activated automatically when the ignition was turned. That may explain the lights on the rear of the vehicle which are visible in the BWC footage as the officers walked towards the car.[31]

An important finding, in this case, relates to the fact that the engine of the vehicle was running when police arrived. How did this occur? To some extent it is linked with the question of Mr Murray's intention at relevant times, which I will deal with in more detail below. But I can indicate that I am of the view that the car's engine was started when Mr Murray was in the course of activating the ignition in order to lower the driver's window. In the absence of clear evidence as to the location of the various functions engaged by rotation of the ignition, I can form no conclusions as to whether Mr Murray turned the ignition to, *eg* position 1, position 2, or perhaps some other position, as the case may be.

[72] The prosecution contentions included (i) that the keys were with the Defendant[32]; (ii) that the vehicle's engine was running; (iii) that the front wheels of the vehicle were turned slightly to the right, towards the carriageway; (iv) the right-hand indicator was operating; and (v) some (at least) of the car's lights were on. Ms Gravino did not submit that I should find, or even could find, that Mr Murray, at some time after 9:00pm and before police attendance, had tried to drive the vehicle (s.79(1)(a)), or at least put it into motion (s.79(1)(b)). The charge before the Court particularised s.79(1)(c). I think, on the whole of the evidence, this is correct; the evidence which has been adduced would fall short, in my opinion, of proving an offence under

[30] And which is visible on the BWC footage.
[31] In the same footage, one can clearly see the vehicle parked up over the kerb.
[32] Justice Hart, in Newburn, noted that the location of the car keys was a "background" consideration: QWN at p 45.

ss.(1)(a) or (1)(b) to the required level of proof. The combination of facts I have set out immediately above would be potent evidence in a charge alleging a "being in charge" of the vehicle, as has been done here. But of course, subsection (6) as a defence, can only come into play *if* the elements of that offence are made out; if they have not been proved, then subsection (6) has nothing upon which to operate.

I am certainly satisfied, beyond reasonable doubt, that Mr Murray was "in charge" of his vehicle at the relevant time. The contrary proposition was never advanced, and is really unarguable.

[73} With respect to (iv), (v) and (vi) - A number of propositions were put to Mr Murray suggesting the feasibility of him "driving" the vehicle while in a reclined position. I don't find those propositions to be provide any real assistance in this case. Once again, the proposition might be relevant to a finding of being "in charge" – but when, as here, there is no real issue as to a Defendant being in charge, the possibilities put up by the prosecution really don't advance the case.

[74] With respect to point (vii) – I have given very careful thought to the proposition that, if Mr Murray sat up at some time, in order to access the ignition, such action may defeat reliance upon the defence contained in subsection (6).

The relevant clause provides:

> "...by occupying a compartment of the motor vehicle in respect of which the offence is charged other than the compartment containing the driving seat of that motor vehicle;"

Upon what I believe is an ordinary interpretation, I can detect nothing in this clause to support the contention that a brief period within which a defendant occupies only the driver's compartment somehow operates to disqualify reliance upon the subsection (6) defence. I can readily accept that there may be a strong argument that the intention to refrain from driving must exist at all relevant times. But in a case such as this, where the defendant evinced the required intention[33], then changed position, for perhaps 10 to 20 seconds for the purposes of comfort, after which the previous position was resumed[34], I perceive no valid reason for denying the application of subsection (6). The clause is directed to the *manifestation of the relevant intention*, and it is this intention which underpins the defence, not the precise periods during which the relevant compartments are occupied.

The only other basis for such a finding of disqualification which occurs is an argument based upon the content accorded to be ascribed to "occupy" in this context. The approach to the construction of ss. (6) is contained within the judgment of the Court in *Newburn*. That decision, I believe, is binding upon this Court, to the extent that it is applicable to these circumstances; which poses the question - is this a valid distinction to *Newburn*'s case?

[75] The structure of subsection (6) has, to my mind, been very carefully considered prior to its enactment. Apart from the (unusual) change to the standard of proof required for a defence to be accepted, there are a number of quite stringent conditions which have to be satisfied. They have been carefully drafted, and very deliberately included. The effect of the existence of all the conditions precedent to the operation of ss. (6), is to enjoin the Court - even if satisfied that Defendant was in charge of a vehicle while

[33] By reclining he seat and lying down and going to sleep.
[34] *Ibid.*

under the influence of alcohol – from proceeding to conviction. It has represented the law of Queensland for more than fifty years.

The provisions of ss. (6) should be construed according to the language used, in so far as it indicates the intention behind its enactment. I have given thought to other situations which might arise, and which may also implicate ss. (6). In this case, the ignition was activated, in order to lower a window, because the Defendant was too hot. In another case, a defendant might activate the fan, or air-conditioning within the vehicle for the same purpose. In another region, like the southern downs of the State, a defendant might wish to activate the vehicle's heater for a period. And of course, noting that a defendant in this position has probably consumed a very substantial quantity of liquor, that person might simply need to step outside the vehicle for the purpose of natural comfort. In all of these cases, the defendant may always intend to refrain from driving until sufficiently sober. Are they to be excluded from the operation of ss. (6)?

[76] I am not prepared to adopt that interpretation. The reasoning of Justice Hart, as set out above, dictates the approach I should take with this provision. I have distinct reservations about adopting an interpretation which would exclude these types of circumstances. I think that to accord such a strict content to "occupy" in the subsection would run counter to the approach adopted by the Court in *Newburn,* and would not be in accordance with the probable intention of the Legislature in drafting the clause in these terms.

[77] In my opinion, the content of "occupy" in subsection (6)(a)(i) does not exclude the circumstances of the present case; the brief period necessary for Mr Murray to activate the power source for the driver's window does not affect the situation whereby he "occupied" a compartment other than the compartment containing the driving seat so as to fall within subsection (6).

[78] (viii) – the possibility of danger to the community has been contemplated by the Legislature, and the relevant restriction involves a requirement that the vehicle be parked in such a way as not to constitute a source of danger. Ms Gravino, on the evidence, and very fairly, accepted that the prosecution position in respect of this element was not strong, and I agree with her concession in this respect[35].

I have no hesitation whatsoever in accepting that it was Mr Murray's usual practice, when parking his car, to do two things (i) shift the gear indicator to park, and (ii) apply the handbrake. The fact that he could not specifically remember doing so does not detract from the high probability that he did. His usual procedure, or "habit", in this respect, is one shared, I suspect, by the great majority of regular vehicle drivers. Such actions, to my mind, become matters of habit in regular drivers; and one might suspect that a very great number of them, if specifically asked, would admit that they could not honestly remember putting their car in park, and putting on the handbrake, when they parked it the previous day. I have evidence of Mr Murray's habit in this regard, which I am able to accept in order to make this finding[36].

I would make one further observation in this respect. Mr Murray used the lever to raise his seat to a driving position at 3 mins 24 secs into the BWC footage tendered by Constable Kuster[37]. It would appear, from that moment on, he was wholly within the

[35] Transcript p 1-59 line 25.
[36] *Eichsteadt v Lahrs* [1960] Qd R 487, affd [1961] Qd R 457 (HCA).
[37] Exhibit 3, file 1, at 03:24 (total length 07:56).

driving compartment. There is no evidence as to what he did when he activated the ignition, *ie* did he bring his seat up from its reclining position, to an upright position? Or did he simply change body position to the point where he could reach the ignition? I have no evidence on this point, and I am not prepared to speculate. He might have brought his seat up, but equally he might have reached forward just far enough to turn the key. I am not prepared to make a finding either way.

[79] (ix) – I don't accept that Mr Murray was so intoxicated that he was unable to form an intention not to drive, or to be incapable of understanding what he was doing. There is in evidence a certificate[38] indicating a blood/alcohol concentration of 0.168. This certificate enables me to find that Mr Murray was under the influence of liquor for a period of two hours preceding his analysis. Use of the certificate for further findings is limited. No evidence was led as to "relation back" so as to estimate an alcohol concentration at the time Mr Murray entered the car around 9:00pm.

When first intercepted by police, Mr Murray was certainly difficult to rouse. He had clearly been what I would term sound asleep, when he was woken. He had just finished a run of five 12-hour shifts, involving manual work. He had had quite a bit to drink. We do not know just how strong the alcohol was, but it seems it was supposed to be similar to vodka and/or whiskey. The only other fact I can find is that it didn't taste good.[39]

0.168 is a high reading; but one frequently sees in this Court cases with higher readings. Obviously, all these people are able to drive. I would certainly accept that Mr Murray's dexterity, when activating the ignition, was well below his usual ability; perhaps even clumsy.

He was some time getting out of the car. When he did so, he walked, with an officer on each side steadying him, to the police vehicle. He raised his hand against the vehicle when requested – though he let it fall soon after. This occurred a couple of times. When he arrived back at the Mackay Police Station, he exited the vehicle, and walked unaided across the car park down the hallway, and into the breath analysis office. He answered questions asked of him, though his responses are not particularly clear.

The officers speaking with Mr Murray at the scene advised him, on two different occasions, that he was required to do as they asked, namely (i) provide the breath sample requested; and (ii) alight from the vehicle. In both cases, Mr Murray was advised to comply, or he could be charged with further offences. This provides, to my mind, an indication that, to the perception of attending officers, he was capable of understanding what he was being told, and of moving in the way required[40].

When Mr Murray first went to his vehicle, I find that he had the presence of mind, and the physical ability, to enter his vehicle; he then activated the lever which lowered the back section of the driver's seat, and he lay down on that seat, as lowered. By doing so, he demonstrated, quite clearly, that he did not intend to drive his vehicle at that time. That intention, to refrain from driving, was manifested by (i) the lowering of the seat; (ii) taking up a position of recline on the lowered seat; and (iii) remaining

[38] Exhibit 1.
[39] "methylated spirits".
[40] Had Mr Murray presented as "incapable" to the officers, I doubt that they would have made the relevant requirements, and threatened him with further charges in the event of non-compliance..

in that position until he fell asleep[41]. At some point he has woken, and has accessed the vehicle's keys. He has activated the ignition, he has lowered the window, and he has then reclined on the seat again. In doing so, he has deliberately, and manifestly, chosen not to drive.

[80] (x) – In *Foster v Dahl*[42], a number of issues were raised on appeal. One of them was the subsection (6) defence. Her Honour Judge Clare SC observed[43]:

> "Mr Swindells [for the appellant] relied upon a witness who said that the seat had been reclined. This was after the keys had been removed. Officer Gilpin's evidence was that the seat was reclined a little bit. He said 'She was sort of sitting back in the chair a little bit. It was sort of reclined a little bit but her head was sort of partially out of the window against a pillar and it was also raining on her at the time'.
>
> The weight of evidence, especially at the point where the appellant had been roused and before she had the keys removed from her, was that she was positioned in the driver's compartment. She was not protruding into another compartment of the car and that her seat was in the driver's position that would allow her to drive."

Her Honour's remarks, of course, have to be read in context, and in the light of what is being considered. The decision is distinguishable from the present case[44].

[81] The prosecution also adverted to the fact that, when he had been woken by police, and had raised the back of his seat, Mr Murray reached forward towards the ignition area. The BWC footage tendered by Constable Kuster[45] shows at about 5 mins 11 secs, that Mr Murray reaches forward, towards the centre of the dash, with his left hand. Shortly after he was told to turn the car's lights off, and he seems to be reaching forward. At about 6 mins 13 secs, he appears to reach forward with his right hand, towards the ignition side of the dash. He is told, at that point, that police already had his keys; and the proper inference might be that intending to remove the keys. The BWC footage taken by Senior Constable Hall[46] is a little more detailed in this respect: at 6 mins 03 secs, Mr Murray extends his right arm, and appears to place his thumb near the ignition tumbler. These actions, while certainly relevant to the "in charge" element, do not advance the prosecution case in any other way.

Conclusions:

[82] Based on the evidence received, under affirmation, I find the following facts beyond any reasonable doubt:

- Mr Murray was found by police in his car, asleep, at about 12:55am on the 5th June 2020;
- Mr Murray's car was, at that time, parked outside 94 Rasmussen Avenue, Hay Point;
- Mr Murray was under the influence of liquor at the time he was located, and was in charge of his vehicle;

[41] At which point, his omission to drive becomes unwilled, and is neutral for evidentiary purposes.
[42] [2009] QDC 45, Exhibit 7.
[43] Commencing p 13 line 21.
[44] In my opinion, lying back on the reclined driver's seat asleep is not "being in a position where he could drive", by any reasonable construction of the words.
[45] Exhibit 3 file 1.
[46] Exhibit 4 file 1.

- Mr Murray had entered his car, some time about 9:00pm on the 4th June, after consuming a substantial quantity of liquor;
- Prior to entering his car, Mr Murray had formed the intention to refrain from driving his car while he was under the influence of liquor or a drug, and until he was sufficiently sober;
- Mr Murray used the lever on the driver's seat to recline the back of his seat into the rear compartment of his car, so that the top of the driver's seat was very close to the back seat of the car;
- Mr Murray then lay down on the seat, as reclined, and went to sleep;
- At some time, which is not precisely known, but before the arrival of police, Mr Murray woke up, and felt very hot;
- He accessed the keys to his car, and activated the ignition for the purpose of lowering the driver's window;
- At this time, he still had the intention to refrain from driving while he was under the influence of liquor or a drug, and until he was sufficiently sober;
- After lowering the window, Mr Murray again lay back on the reclined driver's seat, and went back to sleep;
- Mr Murray was woken up by police at about 12:55am on the 5th June;
- By his actions Mr Murray manifested the intention, by overt acts, to refrain from driving his car while he was under the influence of liquor or a drug, and until he was sufficiently sober;
- At all relevant times, Mr Murray was *not* under the influence or liquor or a drug to such an extent that (i) he was incapable of understanding what he was doing; or (ii) he was incapable of forming the intention to refrain from driving his car until he was sufficiently sober;
- At all relevant times, Mr Murray's vehicle was parked in such a way as not to constitute a source of danger to other persons or to traffic;
- Mr Murray had not, within a period of 1 year prior to the 5th June 2020, been convicted of an offence specified in section 79(6)(d) of the *Transport Operations (Road Use Management) Act 1995*;

[83] I find that the defence in section 79(6) has been established. I find Mr Murray "Not Guilty" of the offence with which he is charged. I dismiss the charge, and I discharge Mr Murray.

J M Aberdeen

Acting Magistrate

Mackay
10 August 2021.