

CITATION: *Inquest into the death of Zachariah Foster* [2007] NTMC 026

TITLE OF COURT: Coroner's Court

JURISDICTION: Coronial

FILE NO(s): A0072/2006

DELIVERED ON: 21 June 2007

DELIVERED AT: Alice Springs

HEARING DATE(s): 3, 4 & 5 April 2007

JUDGMENT OF: Mr Greg Cavanagh SM

CATCHWORDS: **Road accident death, alcohol affected pedestrian, involvement of motor vehicle driven by police.**

REPRESENTATION:

Counsel:

Assisting: Ms Helen Roberts

Police: Mr John Stirk

Judgment category classification: B

Judgment ID number: [2007] NTMC 026

Number of paragraphs: 32

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IN THE CORONERS COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. AA0072/2006

In the matter of an Inquest into the death of

ZACHARIAH FOSTER
ON 6 OCTOBER 2006
AT ALI CURUNG IN THE NORTHERN
TERRITORY

FINDINGS

(Delivered 21 June 2007)

Mr Greg CAVANAGH SM:

FINDINGS

1. Zachariah Foster, the deceased, died on 6 October 2006 at Ali Curung from a blunt head injury caused when he was struck by a police vehicle. The vehicle was being driven by Constable Wayne Burnett of Ali Curing police. His death was reportable to the Coroner pursuant to s12 of the *Coroner's Act*. The deceased was not in police custody at the time of his death and therefore his public inquest is not mandatory but was held as a matter of my discretion pursuant to s15 of the Act.
2. The investigation into the deceased's death was conducted in accordance with police orders, that is general orders D2 'Deaths in Custody' and 'Investigations of Serious and/or Fatal Incidents Resulting from Police Contact with the Public'. The latter general order extends the particular requirements for investigation of a death in custody to a wider range of deaths in which police conduct is to be scrutinised as part of the investigation.

3. The officer-in-charge of the investigation was Detective Sergeant Ordelman of Alice Springs CIB. Objective and thorough coronial investigations are, of course, always necessary but especially so when “reportable deaths” involve police. Public confidence in coronial investigations demands that when police (who act on behalf of the Coroner) investigate death that involves police they do so to the highest standard. Detective Ordelman has done so. He carried out the investigation to a high standard.
4. The inquest was held over three days in Alice Springs. Counsel assisting the Coroner of the inquest was Ms Helen Roberts. I found her assistance to be of a high order and I commend her for it. I note that this is probably the last inquest at which she will be assisting me as she had taken up new responsibilities elsewhere as a lawyer in the Northern Territory. I thank her for her assistance, help and support over the last two and a-half years since she joined me as counsel assisting and as Deputy Coroner.
5. The Commissioner of Police, and the police appearing as witnesses, were represented by Mr John Stirk. The family of the deceased was advised initially by letter, and closer to the inquest by police in person, that the inquest was to take place. Additionally, I note that the holding of the inquest was advertised in the local newspaper well before it took place. A letter advising of the inquest and a full brief of evidence was sent to the Central Australian Aboriginal Legal Aid Service (CAALAS). There were no further inquiries from CAALAS after receipt of the brief and there was no appearance at this inquest by any family members.
6. Section 34 of the *Coroner’s Act* sets out the matters that a Coroner is required to find during the course of an investigation into the death. It sets out my jurisdiction and my powers and the requirements that are imposed on me in relation to my findings. On the basis of the tendered material and oral evidence at the Inquest I am able to make formal findings as required by the Act.

7. Section 34 of the Coroners Act sets out the matters that an investigating Coroner is required to find, if possible, at an Inquest:

“(1) A Coroner investigating –

(a) a death shall, if possible, find –

- (i) the identity of the deceased person;
- (ii) the time and place of death;
- (iii) the cause of death;
- (iv) the particulars needed to register the death under the Birth, Deaths and Marriages Registration Act;
- (v) any relevant circumstances concerning the death”.

8. Section 34(2) of the Act operates to extend my function as follows:

“A Coroner may comment on a matter, including public health or safety or the administration of justice, connected with the death or disaster being investigated”.

9. A Brief of Evidence containing approximately 40 witness statements was tendered at the inquest (exhibit 3) along with eight other exhibits. I heard oral evidence from eight witnesses, including Constable Burnett, the driver of the police vehicle which struck the deceased.

FORMAL FINDINGS

10. On the basis of the tendered material and oral evidence at the Inquest I am able to make the following formal findings as required by the Act.
- (i) The identity of the deceased was Zachariah Foster, born on 1 October 1975 at Willoura in the Northern Territory of Australia.
 - (ii) The place of death was Ali Curing Access Road, Ali Curing. The date of death was 6 October 2006, at 8.00pm.

11. The cause of death was Blunt Head Injury resulting from a Motor Vehicle Collision where he was a pedestrian. Other significant conditions contributing to death but not related to the condition causing death was Acute Alcohol Toxicity.

(iii) Particulars required to register death:

1. The deceased was male.
2. The deceased's name was Zachariah Foster.
3. The deceased was Australian.
4. The cause of death was reported to the Coroner.

(iv) The cause of death was confirmed by post-mortem examination and was Blunt Head Injury resulting from a Motor Vehicle Collision where he was a pedestrian. Other significant conditions contributing to death but not related to the condition causing death was Acute Alcohol Toxicity.

1. The pathologist was Dr Terence John Sinton of Royal Darwin Hospital.
2. The deceased's mother was Ida and his father's name was Grant Foster.
3. The deceased resided at Ali Curing Community in the Northern Territory.
4. The deceased was unemployed at the time of death.
5. The deceased was born on 1 October 1975.

CIRCUMSTANCES SURROUNDING THE DEATH

12. Friday 6 October 2006 was the first day of the Ali Curing sports weekend. Sports competitions and musical entertainments had been arranged over the weekend for residents and visitors from other desert communities. As part of the plans, Brevet Sergeant Libby Andrew had arranged for additional Aboriginal Community Police Officers to work at Ali Curing over the weekend. Ali Curing members at the time were Sergeant Andrew, Constable Del Nido, Constable Burnett and ACPO Brown. Arriving on Friday, 6 October was Senior ACPO Spencer from Kintore, Senior ACPO Curtis and ACPO Watson from Yuendumu and ACPO Williams from Papunya.
13. Ali Curing is a restricted area. Alcohol is not allowed in the community. I heard evidence that it is a regular practice for Ali Curing residents to purchase alcohol from the roadhouses at Wycliffe Well and Wauchope, thirty kilometres and fifty kilometres north of the turnoff respectively, and return to the intersection between the Stuart Highway and the Ali Curing Access Road and sit and drink it. It is the area commonly referred to as the 'bus shelter' or 'the terminal'. It is twenty kilometres from that turnoff to Ali Curing.
14. The police from the area told the inquest that it was rare for a drinker to attempt to walk all the way back to the community. Instead they would wait for a lift or sleep at the turnoff and travel back in the morning. Constable Burnett said he had never seen a drunk person walking along the access road at night-time as occurred in the instant case.
15. A large number of people who had been drinking with the deceased during the afternoon of 6 October were interviewed by police and their statements tendered as part of the brief of evidence.
16. The deceased had been drinking initially under the bridge at Wycliffe Well and later at the turnoff with friends and family. He was drunk. In the early evening he decided he wanted to return to the community. There was no-

one available to give him a lift. He set off anyway, walking along the access road in the direction of Ali Curing. Between 7.30 and 8.00pm that evening ACPO's Curtis, Watson and Williams reached the turnoff after travelling from their communities. Curtis was driving. They noticed that people were sitting on both sides of the Stuart Highway drinking. It was dark, although the evidence suggested it was only a *little bit* dark as it was a well-lit moonlight night.

17. The lights on the police vehicle were on high beam. The police slowed to take the corner and then continued along the access road. About two kilometres along the road Watson, who was sitting in the front passenger seat, noticed a man walking on the right side of the road. He consequently told Curtis to slow down. The man was wobbling like he was drunk. Curtis recalls a man walking on the right side of the road on the dirt. Watson described clearly in evidence that the man crossed from the right side to the left side in front of the vehicle while continuing to walk along towards Ali Curing. The ACPO's slowed down the rest of the way in case there were any other drunken people on the road.
18. Although Curtis had attended the sports weekend the previous year, the police officers were not familiar with the community and the likelihood or not of people being on the roadway. There was no further discussion about the man, although Curtis thought about whether they should pick him up. He dismissed this consideration because the back cage area of the police vehicle was full of swags and clothing and other necessary items for the three police officers who were going to spend the next few days working at the sports weekend.
19. Acting Superintendent Megan Rowe provided a statutory declaration dated 29 March 2007 in which she sets out the powers and procedures relevant to this situation. She says:

“Taking into account the fact that the cabin of the vehicle occupied by the 3 police officers would have limited room for the carriage of

property, the rear caged area of the vehicle would have been filled almost to capacity by 3 bedding swags, even without any additional bags or clothing which the members would have brought with them. There would have been no room to place a prisoner and the provisions of section 22 of the General Order would preclude placing a prisoner with property which may pose a threat to him or the escorts accompanying him. It was impractical to place a prisoner in the rear of the cage without unloading all of the personal property onto the roadway”.

I agree with Megan Row’s conclusion that it was not incumbent on those ACPO’s to pick up the man under the protective powers for drunks contained in the legislation and outlined in s22 of the general orders. Additionally, there was no room for them to place the man effectively in the wagon.

20. Police Officers Burnett and Spencer had set out from Ali Curing at about 6.30pm to conduct vehicle and driver checks along the access road and on the Stuart Highway. Burnett had been on a similar patrol soon after he started his evening shift at 4.00pm along with ACPO Gwen Brown. They were stopping each vehicle that they met along the access road, breathalysing the drivers and searching the vehicles for alcohol and weapons. There was some concern about fighting breaking out between visiting families from the historically warring areas of Willowra and Ti-Tree.
21. About quarter to 8 that night Burnett and Spencer pulled over a car on the Stuart Highway. The driver, Francis Jones, was drunk and he was arrested. He was belligerent. He was capsicum sprayed, subdued, handcuffed and placed in the cage. His two young children, the eldest was nine, were placed on and around the knees of Spencer in the front of the car when they set off.
22. Constable Burnett was conscious of the children. At least one of them was unrestrained in the front seat and so she drove with this consideration in mind in terms of speed and manner of driving. At the turnoff he saw a number of people and also some vehicles and dipped his lights from high

beam to low beam. ACPO Spencer recalled that Burnett put the high beam back on once he was on the access road but Burnett says that was not the case. He recalls the night being very bright and as a result he was able to see very clearly without the high beam.

23. What happened next is described by Constable Burnett in his interview:

“I turned left and headed along the Ali Curing access road towards Ali Curing. About three kilometres along that road I suddenly saw some movement on the road and I’m only guessing but I’m thinking it was only about five to ten metres in front of the vehicle. I didn’t have time to turn um I hit ... I ran over the person that I saw in front of me. I didn’t realise it was even a person until the very last ... very ... very last split second. I stopped the vehicle I said to Jabaltjari ‘Did you see him’ and he said something along the lines of ‘See who?’ or ‘See shat?’ but he indicated that he hadn’t seen anything.

24. I accept the reliability and credibility of Officer Burnett both in his record of interview and in his evidence to me. He further explained he did not have time to steer and miss the deceased; he again used the term a split second. He did not see any colour or contrast on the road but saw movement which he thought was a person lifting his head. It was the movement that gave him the first indication that there was someone there. He heard a thump about the same time that he applied the brakes. He applied his brakes firmly but did not lock them up, still conscious of the children.

25. The photographs and evidence from the crime scheme examiner Senior Constable Spilsbury are consistent with Constable Burnett’s account of where he saw the deceased positioned on the road. The deceased was wearing a black T-shirt and jeans. In the Autopsy Report, Exhibit 9, Dr Sinton comments:

“The wounds to the head, noting the absence of any injuries to the posterior scalp and the bilateral symmetry of the injuries to the arms, shoulder girdles and chest, were consistent with the deceased being struck on the head whilst supporting himself from the elbows”.

That is to say the deceased was in a prone horizontal position. The deceased had a blood alcohol concentration of .273 at the time of death.

26. Constable Burnett ran back about 50 metres, shone his torch, told ACPO Spencer what to do and told ACPO Spencer his reactions to what had occurred. Constable Burnett then ran the 50 metres to where the deceased was and shone his torch on the deceased. Due to the nature of the head injuries, it was immediately obvious that he was dead. He went back to ACPO Spencer and told him the person had passed away or was gone. Constable Burnett told ACPO Spencer to drive back to Ali Curing to get B/Sgt Libby Andres to come out immediately. ACPO Spencer did not recall this part of the conversation. It seems likely that he did not hear or understand this instruction at the time. At this stage ACPO Spencer had not seen the deceased on the road.
27. Burnett decided to return to Ali Curing. When he returned to the vehicle to drive from the scene he tried to radio Brevet Sergeant Andrew to tell her what had happened and what he was doing. He received no answer from the radio call.
28. He continued to use his radio all the way back. He knew that Brevet Sergeant Andrew had a hand-held radio with her as she was out and about around the community organising a blue-light disco. The evidence is that at 8.00pm, she was on stage of the disco making announcements and organising a dance competition for the children. The music was too loud to hear the radio. Constable Del Nido was with her. The other ACPO's who had just arrived did not have their radio on channel one.
29. With the clarity of hindsight, and given the fact that the deceased was dead, it was not quite as urgent as Constable Burnett believed at the time to leave the scene and return to Ali Curing. No-one was in need of urgent medical treatment and there would have been no disadvantage suffered by taking a few minutes to think about the options and making some further attempts to

radio back to Ali Curung. Having said that, the evidence reveals that the radio calls over the next 10 minutes at least would not have been successful and certainly the police vehicle containing the prisoner and the children could not remain at the scene indefinitely.

30. It was unfortunate that the police officers back at Ali Curung were out of radio contact, for if the accident had not resulted in immediate death and there was a need for urgent medical attention and assistance on the roadway, that could not have been easily arranged. This is not a criticism but with hindsight it might be said that given that such a big weekend had been arranged, it was unfortunate that all of the police officers were out of radio communication due to their involvement in the blue light disco.
31. When Constable Burnett arrived back at Ali Curung he drove straight to the park where the disco was being held. He got out of the vehicle and walked towards Libby Andres. Everyone who saw him, including ACPO Watson who had never met him before, could tell that something was wrong from his demeanour. He said to Brevet Sergeant Andres that he hit someone on the road and he was dead. He then collapsed. Arrangements were made for him to be looked after. Andrew went to the scene with Constable Del Nido. She arranged for Spencer to return to Ali Curung immediately for medical attention. The crime scene was set up. The superintendent was contacted. Constable Burnett was breath tested with a zero result.
32. I have no criticisms to make of the actions of Police Officer Burnett and indeed of any of the police members that night.

Dated this 21st day of June 2007.

Greg Cavanagh
TERRITORY CORONER