

CITATION: *Civil Aviation Authority v Jonker* [2008] NTMC 027

PARTIES: CIVIL AVIATION SAFETY AUTHORITY

v

TROY HAROLD JONKER

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Justices Act, Civil Aviation Act

FILE NO(s): 20720666

DELIVERED ON: 24 April 2008

DELIVERED AT: Darwin

HEARING DATE(s): 2 & 3 April 2008

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

CRIMINAL LAW – AVIATION OFFENCES – RECKLESSNESS – CRIMINAL
PROOF – EVIDENCE – INCONSISTENT ACCOUNTS FROM PROSECUTION
WITNESSES

Civil Aviation Act (Cth), ss 7A, 20A

Criminal Code (Cth), Chapter 2

Oggers, “Principles of Federal Criminal Law”, Law Book (2007)

R v Richardson v The Queen (1974) 113 CLR 116

R v Soma (2003) 140 A Crim R 152

Fabre v Arenales (1992) 27 NSWLR 437

Graham v Police (2001) 122 A Crim R 152

Hinton, “The prosecutor’s duty with respect to witnesses: pro Domina Veritae”
(2003) 27 Crim LJ 206

Papamatheos, “Can an inference still be drawn against the Crown for failure to call
a material witness?” (2006) 30 Crim LJ 24

REPRESENTATION:

Counsel:

Informant:	Ms Dixon
Defendant:	Mr Woodcock

Solicitors:

Informant:	DPP (CW)
Defendant:	Woodcock Solicitors

Judgment category classification:	B
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IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20720666

[2008] NTMC 027

BETWEEN:

**CIVIL AVIATION SAFETY
AUTHORITY**
Informant

AND:

TROY HAROLD JONKER
Defendant

REASONS FOR DECISION

(Delivered 24 April 2008)

JENNY BLOKLAND CM:

Introduction

1. On 31 October 2006, the defendant Troy Harold Jonker agreed to fly a film crew in his Robinson R44 helicopter after being engaged to do so by the Australian Broadcasting Commission (ABC). The idea was to follow and film a vehicle being driven by Mr Dwyne Delaney. The purpose of the filming was to draw attention to the introduction of speed limits on highways in the Northern Territory where once there were none. The film made for the 7.30 Report was tendered (Exhibit P3) and played a number of times throughout the course of the hearing with various witnesses making comment about their position vis a vis the helicopter or vehicles, or their role in or opinion about various aspects of the flight. At the heart of the prosecution case it is alleged that Mr Jonker flew in a manner that could endanger certain named persons and that he was reckless in bringing this situation about.

2. He pleaded not guilty to five counts against ss 20A(2) and 29(1) of the *Civil Aviation Act* 1988 (Cth). Section 20A *Civil Aviation Act* 1988 reads as follows:

20A Reckless operation of aircraft

- (1) A person must not operate an aircraft being reckless as to whether the manner of operation could endanger the life of another person.
 - (2) A person must not operate an aircraft being reckless as to whether the manner of operation could endanger the person or property of another person.
3. The effect of s 29 *Civil Aviation Act* when read with s 20A(2) is that as the defendant was the pilot, he is one of a number of entities who can be personally responsible for an offence if the operation of the aircraft results in an offence under s 20A(2).
4. Criminal responsibility concerning the *Civil Aviation Act* is governed by the *Criminal Code* (Cth). Section 7A of the *Civil Aviation Act* specifically makes reference to chapter 2 of the *Criminal Code* (Cth) as governing the general principals of criminal responsibility. As the fault element is *recklessness* under s 20A *Civil Aviation Act*, that is taken to be *recklessness* as defined and applied in the *Criminal Code* (Cth).
5. The particulars in relation to Count 1 are that the reckless flying occurred on or near Stuart Highway approximately 16 kilometres north of Katherine; the allegation is that the defendant hovered or flew very low over the lanes of the Stuart Highway when a vehicle being driven by Barbara Theresa Ambjerg Pederson was travelling at speed. It is alleged that the manner of flying could evoke evasive action of a dangerous nature and/or the manner of operation of the aircraft could cause a potential collision. The particulars of the second Count concern a similar allegation of endangerment save that it is alleged to have occurred approximately 20 kilometres north of Katherine and that the helicopter flew very low over the lanes of the Stuart

Highway where a vehicle was being driven at speed by Jamie Cairncross. The particulars of the third Count are the same as Count 2 save that Kirsty Manser, a passenger in Jamie Cairncross's vehicle was the person endangered. In relation to Count 4 the location is alleged on or near the Stuart Highway north of Katherine and south of Pine Creek; it is once again alleged that the defendant flew very low over the lanes of the Stuart Highway when a vehicle being driven by Dwyne Delaney was travelling at speed and that the operation of the aircraft could potentially cause collision. The particulars of Count 5 mirror those of count 4 save that the person alleged to be endangered was Murray McLaughlan who was travelling as a passenger in Dwyne Delaney's vehicle.

Evidence called by the Prosecution

6. Barbara Ambjerg Pederson was driving from Darwin to Katherine on 31 October 2006. She lives in Katherine and has driven the Darwin - Katherine drive many times in her extensive working life. She told the court that almost 6 kilometres from the Rural College she took a left hand bend and in front of her was a helicopter. She was travelling at 120 – 125 kilometres per hour when she saw the helicopter straight ahead of her approximately ten car lengths, (meaning ten parking bays or thereabouts), directly in front of her and facing her; the helicopter was not still but was hovering. She said it was under one metre from the road surface; it was obviously below the tree line. She told the Court she was shocked, applied the brakes and slowed down. She said she obviously had thoughts of her own safety as she was trying to avoid a collision. She said the helicopter cleared her by a metre or just over; that if she had been driving a larger vehicle such as a Pajero or a Transit bus she thought it might have touched her. She said it was a “pretty little helicopter”; shining burgundy with black skids; there were two people in the helicopter, the pilot was young wearing light coloured jeans and a chambray style shirt, possibly in light denim; he had a cap on and earphones; she wasn't sure if he was wearing glasses. She said she was

shaken and questioning herself about what the helicopter was doing there in her lane. Later in Katherine she reported the incident to police.

7. In cross-examination Ms Pederson agreed she had made her statement some twelve months previously when she met with one of the investigators in Adelaide. She said the statement was sent to her six weeks previously. She estimated the ten car lengths (or parking bay lengths) as being forty metres in front of her. It was suggested to her that given she was travelling at speed, she wouldn't have been able to react in time to avoid the helicopter when her speed and reaction time were considered. She essentially agreed with that proposition. She also conceded uncertainty on whether the helicopter was hovering or manoeuvring. She agreed she was shocked to see the helicopter.
8. Jamie Cairncross who is also a Sergeant in the Northern Territory police but is not involved as I understand it in the investigation of this matter beyond his observations, gave evidence that he and Sergeant Kirsty Manser were driving from Darwin to Katherine and about 20 kilometres out of Katherine he saw a silver Holden/Monaro pull out and take off at high speed. It is not in dispute and the evidence indicates that the driver was Dwyne Delaney. Jamie Cairncross said he accelerated up to 150/160 kilometres an hour to note the registration plate. He said that within ten seconds he saw a helicopter flying towards him on the left hand side of the road flying low and it was no more than eight metres above. He said it turned left sharply in front of him and later turned around and followed the Monaro. Mr Cairncross said he slowed down as he was focussed on the car at the time. He said it was hard to tell how close the helicopter was to the Monaro and he did lose sight of the Monaro over a rise. He said the helicopter was also banking to the right and it was about six metres above the ground directly in front of him. He said he was concerned and was braking heavily as he didn't know if the helicopter was going to land in front of him. He said

there was quite heavy traffic meaning there were three to four cars behind him.

9. He agreed there were no roadblocks or other ways to communicate the fact that the helicopter would be in the area. After he completed his journey he made enquiries with the Civil Aviation Safety Authority. In cross-examination he said that he applied his brakes both times when he saw the helicopter. He was asked to comment on an estimate made by the passenger in his vehicle (Sergeant Manser) who had estimated the height at ten to fifteen metres. On whether ten to fifteen metres could be dangerous he said he may not have been alarmed if it was that height; he said the level of danger also depended on the experience of the pilot and the environment. He said he didn't agree that the helicopter was higher than six metres; he agreed he was alarmed by the Monaro; he said he did not know what the helicopter was doing and he applied his brakes on the unsealed part of the highway.
10. Kirsty Manser is also a Sergeant of police in the Northern Territory Police and was the passenger in Jamie Cairncross's car. Her evidence was that she saw the helicopter about ten metres off the ground and at the time they were following a silver car driving towards Katherine. She said it was in a hilly area with a lot of vegetation. She said the helicopter was directly above Stuart Highway and was a bit worrying; she said it was about ten metres above. She said it was over their vehicle and very low to the ground. It was because of Jamie Cairncross braking and she said she was shocked as she didn't expect a chopper to be on the road; she thought they could have been in an accident. She said seeing the helicopter was out of the ordinary.
11. Simon Manzie is a television camera operator and is Director of "Simon Says" television productions. He was engaged by the ABC 7.30 Report to film the vehicle at various stages. He said it involved flying in a helicopter and the day started early. The idea was to film Dwyne Delaney driving his

vehicle at speeds up to 200 kilometres an hour. He said at about 9.30 or 10.00am the group involved went to the North Australia Helicopters in Katherine and met with the engineers and the pilot (Mr Jonker). There was discussion with the pilot concerning mapping of the relevant area and confirmation of a decision that they didn't want to be near Katherine and ascertained that around 40 kilometres from Katherine was a place where it was safe to film and a safe place to land. The discussion included communication with Mr Delaney's vehicle. Mr Manzie said they went through every part of the planned filming to ensure safety. He said they spent some time discussing the geography including the roads and the necessity not to film near power lines as they wanted to ensure safety. He said he wanted the vehicle to travel between 80 – 100 kilometres per hour but the important issue from his point of view was keeping a constant speed. The communication was to be via hand held and headsets; he said the pilot could communicate through a headset, he thought, to the driver. He said he couldn't hear the communication. He said Mr Delaney and Mr McLaughlan left in the Monaro before he and Mr Jonker and his filming assistant left in the helicopter. He said they went through safety procedures and put harnesses on as the doors of the helicopter were taken off to allow filming. He said there was a lot of discussion with the pilot about procedures. Mr Manzie made various references to his involvement by referring to the DVD (Exhibit P3). He said the distance above various objects was difficult to approximate as he used a zoom during the process; he also used other techniques to reduce vibrations; he said to his knowledge the Monaro was going to travel was 80 – 100 kilometres. He said at no time did he feel unsafe, although he could not put an estimate on how close he was to the Monaro. He said part of the story was to involve a road train and agreed that the Monaro did a "u" turn to follow the road train; he was adamant that he did not get close to the road train but he couldn't be precise about distances. It was suggested to him that the helicopter flew over Stuart Highway and he said that he may have been at an angle. He said at no time

did the helicopter flow low towards any other motor vehicle and at no time was the helicopter below the tree line. He agreed there were no road blocks or signs to divert the public away from the helicopter or the filming. He said that on other occasions he had flown low to film and he didn't have the feeling that he was low on this occasion and didn't in any way feel unsafe. He said there was a safety meeting; they were not near power lines; they were not too close to the road; it was to be a straight stretch of road and that the pilot had talked about safety and finding the best place to film and to keep the speed low. He said he saw nothing to cause alarm and that the pilot took the safety aspects of the job seriously.

12. Mr Peter Lloyd, a truck driver recognised the image of the truck he was driving down the highway; he recalls a car coming in close in front of him; he saw a helicopter off to the right hand side of the road a good 50 or 60 metres away and he said that it was well up above the tree tops. In cross-examination he said he didn't feel in danger at any time but he couldn't recall anything about the pilot communicating with the him.
13. Mark Haslam is an investigator for the Civil Aviation Safety Authority (CASA). He said he received the initial request concerning this case on 29 January 2007 and commenced a formal investigation. He made contact with Mr Jonker on about 1 March 2007 and conducted various searches of records, business records of North Australian Helicopters and searched the log books; he spoke to the Chief Pilot and was given the maintenance and training records. Notices relevant to those records and the extracts from the pilot log book are before the Court in Exhibit P5 and P6. Those records indicate a one hour flight on 31 October 2006 referenced to "R44" meaning the Robinson 44 helicopter. The details are listed as "filming ABC 7.30 Report" and "Stuart Highway". Mr Haslam also obtained the footage from the ABC.

14. Jedadai Dupe was the camera and sound operator working for “Simon Says” TV filming for the ABC. He recalled meeting everybody involved on the morning and discussing the filming with the pilot for around 10 – 15 minutes; he said there was discussion on how to find the Monaro, communication and the two way radios. He spoke of the need to use techniques supportive of stability. He said that mainly Simon Manzie and the pilot directed where they were going; he said they couldn’t find the Monaro for ten minutes and thinks they were out of range; he said they filmed the top of the Monaro and took shots of it driving along the highway; he said the lowest the helicopter went was around the tree line and it was hard to tell if it went lower. He said the helicopter did fly above the road but at those points it was higher than the tree lines and it kept up with the Monaro; he said they had to get the car to slow down as it was often going too fast for the helicopter. In relation to geography he said there were a couple of hilly sections and lots of trees. He said he didn’t think they flew close to any other vehicles and didn’t get dangerously close to any vehicle.
15. Dwyne Delaney gave evidence. The Court was advised he had not given a statement to investigators. He said he had been approached by Murray McLaughlan about a story on the open speed limits. He said he was not present for the discussion with the pilot; he said Murray McLanghlan had the *walkie talkie* in his vehicle; he said he didn’t know of any difficulties; he said the filming went for a few hours and then he said it was an hour at the most; he said he travelled at around 160 kilometres per hour and that the helicopter was keeping up. He said he was unaware how close the helicopter was as he was driving. He said Murray McLanghlan was involved in communications and had made the decision to film the tanker; he did a “u turn” in order to allow for filming his vehicle going past the road train; he didn’t see the helicopter below tree height; he said the country was fairly flat with no hills and he had a good field of view; he said the vegetation was off the road and the road was bitumized. He said it was a

good clear day and there were no fires; he said he had no concerns for his safety.

16. Murray McLanghlan gave evidence. The Court was advised he had not given a statement to investigators. He said the story was to be about the impending reduction of speed limits; he said he had phoned up the helicopter company and booked them and explained what was needed. He said he and others met the pilot Mr Jonker for discussion about what would be required; he did not think it was a risky assignment and was aware that filming would take place beyond the town boundary. He said a stretch of highway was identified as well as areas to land safely. He said the meeting with the pilot went for about 5 – 10 minutes but he could not remember all of the detail of the conversation. He said there was communication between the Monaro and the helicopter by use of a hand held VHS radio and he did not think there had been any difficulties in communication; on reflection he thought there may have been an occasion when he tried to communicate and had to try again; he said the pilot was receiving the radio and he was receiving communications in the front passengers' seat of Mr Delaney's vehicle. He said he was able to observe the helicopter when it was in front of their vehicle; he said the helicopter was above and behind them also; he said he never saw the helicopter at an unsafe height; he said he asked the pilot to get in touch with the road train to advise them about the filming as he thought that would be a good shot. He said he thought the track of the helicopter was beside the highway and not over it and he couldn't remember it being directly above. Mr McLanghlan said that he thought it was *just another shoot* that had been safely conducted.
17. Mr Peter John Beasey, a flying operations inspector for the Civil Aviation Safety Authority gave evidence of his extensive experience over the last 25 years including low flying experience in the military and specialised low flying assignments. He demonstrated his familiarity with the Robinson 44 helicopter, (being the helicopter used by Mr Jonker) and confirmed that

North Australian Helicopters had an operator's certificate. He confirmed Mr Jonker was endorsed to fly the Robinson 22 and 44.

18. Mr Beasey made a number of comments on the footage and certain photos taken as stills from the footage which form part of the evidence (Exhibit P4). In particular he identified from photo number three the visible skids of the helicopter that he considered to be low flying; he thought it was extremely low and particularly as the helicopter was flying in formation with another object. His opinion was the particular operation involved increased risk given it involved the helicopter flying *in formation* with the vehicle; he said there was an increased risk of whether the pilot would see another aeroplane or vehicle; he said at one point there appeared to be 25 metres between the helicopter and the vehicle. He said the closer the pilot went to the target vehicle and the lower he went there was much less time to react. He said the fact that it was a moving object increased the complexity; he said a safe speed for the helicopter would be at 70 kilometres per hour (40 knots). He expressed the view there would be difficulties if the motor vehicle was travelling at 160 kilometres per hour. He said the lowest height a pilot should fly was somewhat contingent on the type of aircraft but here the pilot should not go below 20 metres. He said this was heavily dependent on the type of terrain. He said a helicopter with only one pilot presents an increased risk for unforeseen obstacles and increased risk of accident; to minimise the risks the area would have to be isolated and at a minimum signposted to advise members of the public or the area should be closed. He said to hover or fly towards the vehicle means there would be risk of collision. He agreed that other factors that might make the operation more risky were not present such as flying at night time, mountainous terrain, the presence of other aircraft, high winds and convection updraft, being in a residential area and a pilot unfamiliar with the area. He agreed that those factors were not present. He said he was not relying solely on the footage to calculate distance and that his estimation of the height of the helicopter was

done from the angles. He agreed it was possible that three persons and equipment in the helicopter could not have travelled at 100 knots and he said it would probably go down to 90 knots but the risks were not significantly reduced.

Evidence on Behalf of the Defendant

19. Mr Jonker gave evidence confirming he was licensed to fly helicopters and held a number of endorsements including *low level*, *slings load* and *mustering*. At the time of hearing he had 1700 hours of low level flying experience and at the time of the incident (31 October 2006) he had five hundred hours low flying experience and a total time of 1100 hours. In relation to the work with the ABC he said he was engaged two days before. He said he was aware of the area and knew that he would be flying 30 – 40 kilometres north of Katherine, outside of the town boundary and he flew over the area prior to the commencement of the assignment. He said he met up with all other parties prior to the flight including Mr McLaughlan, Mr Delaney, Mr Manzie and Mr Dupe. He said the group were initially greeted by the maintenance staff. He then spoke to them about the detail about the flight, some of it in the carpark area. He said Mr McLaughlan spoke about what he wanted to achieve in the story. He said when the higher speeds were spoken of, (initially required by Mr McLaughlan), Mr Manzie advised he was able to achieve the effects of speeding by other techniques. It was decided that such high speeds were not necessary. He said it would have been difficult to maintain the higher speeds in the helicopter and that helicopters cannot hold a constant speed. He said Mr Manzie was sitting in the front of the helicopter and he would not have been able to film if the helicopter was at such high speeds bearing in mind the doors were off. He said that the area agreed was a reasonably straight section of a road that would allow for good camera shots; they consulted a map and agreed on an area north of Katherine. In relation to obstacles, he said that was given some consideration but there were not many; the main concern was power

lines and he was aware of a small power line around Edith Falls. He said safety briefings were given about the assignment with all participants; he said the briefing was more extensive with Mr Manzie and Mr Dupe as they were travelling in the helicopter. He said the communication between the subject car and the helicopter was through hand held UHF radio that he supplied to Mr McLaughlan; he said he was in full contact with Mr McLaughlan at all times. He said he thought that Mr McLaughlan would be passing on any communications to Mr Delaney. He said a point to all meet up was agreed just north of the Katherine Rural College; he said on route he flew direct to the Rural College; he said he communicated with the vehicle on its way and established contact moving to a straight section of the road; he said he was liaising with the vehicle; he said he took into account the power line and various other objects and was primarily 15 – 20 metres at the side of the highway; he said he maintained a safe distance at all times from the traffic; in terms of speed he said it would have been around 50 – 60 knots as that was the best speed for filming; he said that the flying time was about an hour. He said he didn't believe he was hovering and he couldn't have been as close as 6 – 8 metres. He said that he was never at a dangerous height or close to any vehicles and he said this was in the context of having done numerous filming operations.

20. In cross-examination it was suggested to him that given the helicopter had the weight of three people and was sluggish he would need more time to respond; he said it depended on the manoeuvre. It was suggested to him that low level flying was inherently dangerous; he said low level flying was not uncommon but agreed there were more issues such as various obstacles to consider. He agreed not all of those obstacles were present when mustering. He agreed that on the day in question some of the filming involved flying on the side of the road but none involved keeping up with or following the vehicle at speeds of 160 kilometres per hour. He said in relation to Mr McLaughlan's initial request he had advised that it would not be possible to

film at the speeds suggested as the helicopter could not keep up and Mr Manzie would not be able to film at those speeds. He disagreed he kept up with the car that was travelling at 160 kilometres per hour. He agrees his reconnaissance flight was done on the day as he was about to meet the others. He said the reconnaissance ended north of the rural college and north of the Ferguson River at about 200 feet. It was suggested to him that he hadn't reconnoitered the area concerning the filming of the road train; he said he had been over that area. He said he was far enough behind the road train not to be disturbed by turbulence. He agreed there were no road blocks and nothing to alert the public; he believed the Chief Pilot had been contacted and spoken to about the job and he had gone through the assignment with the operations manager. He said he believed Mr Delaney was present at the briefing and standing beside his car. He disagreed that the flying on the day should be regarded as a risk in the sense of being a high risk activity described as "formation" flying; he said he didn't believe it to be formation flying as he was flying at a straight level; he said he was above the trees; he agreed it was not a controlled environment but he said no-one was involved that hadn't been briefed. He agreed it was not fanciful to think that there would be other road users on the road at the time; he agreed that the section of the road concerned was not dead straight; he said that Mr McLaughlan had wanted to film a road train and they didn't know if they would come across one but when they did he communicated with the driver of the road train. He agreed the risks are greater when the helicopter flies low to the ground and agreed that there could be collisions if he were under 6 metres; he said he was not aware that people might take evasive action through his flying. He didn't agree he felt under commercial pressure and didn't agree that his judgment was clouded on the day. He disagreed that on the footage the shadow of the rotor blades meant that he was very close; he said that the footage was "zoomed". In photo 6 of Exhibit 4 he disagreed he was parallel to the vehicle, he said he was above the car. He agreed that photo 4 indicated he was to the right of the Monaro and he said

he was to the side of the highway and the subject was zoomed in on. He said he did not recall any cars slowing down quickly; he agreed that at some points there was undulating terrain and single lanes. He said at no point did he hover over the highway at a low point. It was suggested to him that in photo 2 it appeared that he was below the horizon line; he disagreed and said he was at the tree line. He said he complied with the operations manual and had considered the objects that would be necessary to consider in a flight.

21. Mr John Logan, the manager of North Australian Helicopters was called. He is also a helicopter pilot with 9,300 hours flying including 5,000 kilometres of low flying; he had been the manager at North Australian Helicopters since 2006. He said at the time of taking the job the defendant approached him about the safety aspects and he understood it concerned filming a vehicle in motion; he said he believed it sufficiently safe to delegate to Mr Jonker; it was discussed that Mr Jonker would complete the operation in accordance with the North Australian Helicopters operations manual; he said he didn't see anything in the DVD that looked dangerous. In cross-examination he agreed that he wouldn't fly below the tree line and he wouldn't put himself in that position. He agreed with a number of suggested safety steps that were put to him and said he would not film below the tree line a vehicle that was doing 160 kilometres over the highway. He said the certified top speed for the Robinson 44 helicopter with doors was 150 knots and with doors off was 90 knots; he agreed there would be hazards in hovering over the highway. He agreed with propositions that it was important to be at a safe height.

Consideration of the Evidence

22. The prosecution have very fairly called all relevant witnesses – even those that do not support the prosecution case. Is it for the prosecution to decide what witnesses will be called and the prosecutor “determines the course

which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused”: (*R v Richardson v The Queen* (1974) 131 CLR 116 at 119). The prosecution must offer all its proof before a defendant is called on to make his or her defence. (*R v Soma* (HC) (2003) 140 A Crim R 152). The Court was advised that neither Mr McLaughlan nor Mr Delaney had given statements to investigators although Mr McLaughlan gave the film to investigators. There was conferring with Defence counsel who, the Court was told advised the prosecution. The prosecutor of course is not obliged to call a witness where the prosecutor has a strong basis for deeming the witness unreliable or untruthful, nor need a prosecutor call a witness when she does not know the content of the evidence, in other words, there is no necessity to call a witness “blind”: (*Fabre v Arenales* (1992) 27 NSWLR 437 at 450 and I note and have referred to the useful discussions of this area in Papamatheos, “Can an inference still be drawn against the Crown for failure to call a material witness?” (2006) 30 Crim LJ 24 and Hinton “The prosecutor’s duty with respect to witnesses: pro Domina Veritae” (2003) 27 Crim LJ 260). To say it is not uncommon for honest and reliable witnesses to vary in their accounts is an understatement. The prosecutor correctly submits that it is open to the Court to *prefer* the versions of the facts given by Ms Amberg Pederson, Mr Cairncross and Ms Manser as supported by the expert opinion of Mr Beasey. It was submitted by Mr Woodcock that the Court was bound to accept all prosecution witnesses as witnesses of truth and that as the prosecution had elected to call them as part of its case they had to be accepted as credible. Essentially the argument was the prosecutor could not “pick and choose”.

23. Historically there is some support in the older authorities for Mr Woodcock’s view: (see cases noted by Justice Gray in *Graham v Police* (2001) 122 A Crim R 152 at 162 – 163). In the context of the fair presentation of a criminal case and the modern duties of prosecutors as noted above to call all reasonably available evidence, (even if a witness is

thought to be unreliable and even though there are inconsistencies), it is frankly old hat to suggest that the prosecution is restrained from submitting to the Court that evidence from some witnesses is to be preferred for certain identifiable reasons over the evidence of others. The defence submission on this point is rejected. With respect I adopt and follow Justice Gray in *Graham v Police* (2001) 122 A Crim R 152:

“It is now settled that in the criminal court the Crown may call witnesses who give inconsistent accounts of a series of events. The Crown may submit that the court should prefer the account of one witness to that of another. The court can draw conclusions as to credit.”

24. Having rejected the process of fact finding as submitted on behalf of the defendant, even if some witnesses are *preferred* the prosecution must still prove the material facts on which it relies beyond reasonable doubt. The preferred witnesses must still be strong enough to persuade. The divergence of views among the prosecution witnesses here does tend to undermine in a general sense the particulars sought to be proven. I have no hesitation in finding that Ms Amberg Pederson was an honest witness with significant recall and significant accuracy over much of what had occurred, however she herself acknowledges that on her own estimate of speeds and distance and reaction time, her initial observations of the helicopter hovering in front of her could not be correct. I don't discount all of her testimony but there is an issue of accuracy around it. This shouldn't be seen as a criticism of this witness, this event happened quickly and in my mind there is no doubt that the presence of the helicopter did surprise a number of motorists including obviously Ms Amberg Pederson and Mr Cairncross and Ms Manser, although the later two described an incident in not such dramatic terms. The significance in disparity in the distance estimate between Mr Cairncross and Ms Manser make it difficult for me to be satisfied on precisely the height of the helicopter, although I accept they were surprised by its presence. Those

officers were in any event committed to other duties involving the observation of the Monaro.

25. I see no reason to reject Mr Manzie's evidence and he appeared genuine in trying to assist the Court as best he could with his recollection of the filming. He was in an excellent position to make certain judgments about the flight although I appreciate he was concentrating on the filming at particular points. It may be that he was not aware of everything that was occurring around the helicopter. He was however, very directly involved and did not notice anything untoward. He was a witness who by virtue of his position, (front seat passenger in the helicopter with no doors) would have been attuned to any dangers. I appreciate the submission of the prosecution that Mr Manzie and other witnesses were involved in commercial aspects of the flight, however having considered that issue, I do not consider that to be a ground to discount Mr Manzie's testimony. Similarly, although Mr Dupe was not in such an advantageous position as Mr Manzie, I see no reason to reduce the significance of his testimony.
26. I accept Mr Beasey's evidence in terms of generally the issues of safety he had concerns with, however in terms of his estimates and speeds, in drawing the ultimate factual conclusions, there is no reason to privilege his observations of the film above those of other witnesses. This is so in particular when the issue of zooming and other filming techniques as described by Mr Manzie are considered.
27. As noted the Court was told that neither Mr McLaughlan nor Mr Delaney gave statements to investigators. Neither had good recollections on details and it must be noted that of course both were in the vehicle and not necessarily aware of the position of the helicopter at particular points. Mr Delaney's evidence about not being present at the briefings is at odds with all the other witnesses who were present. Although I don't reject his evidence outright, it is of significantly less weight than other witnesses.

Having not made statements, it appears that neither Mr McLaughlan nor Mr Delaney have been in a position necessitating recall of the events in any detail. Their level of recall is far less than other witnesses. To that extent, the testimony of other witnesses is preferred over theirs where there is conflict.

28. Mr Jonker's evidence is supported in the testimony of Mr Manzie and Mr Dupe. The procedural steps he took and following in large part the North Australian Helicopters operations manual was supported by Mr Logan. Mr Peter Lloyd did not appear to have good recollection. I assessed Mr Jonker as cautious and honest and in terms of his testimony I could find no reason to reject it. I note he is of good character and it is appropriate that I remind myself of his good character in assessing his guilt.
29. In terms of any findings beyond reasonable doubt, the mix of witnesses and conflicts in evidence make it very difficult to find with the degree of precision required the material facts as alleged by the prosecution. What the Court is left with in terms of material facts that are proven beyond reasonable doubt is that Mr Jonker did fly the helicopter with two members of the camera crew to film Mr Delaney in his vehicle. He took the issues of safety seriously as is evident in his briefing to other participants and flying generally over the area prior to the filming. He travelled at a safe speed not lower than the tree line primarily to the side of the Stuart Highway but on some brief occasions was directly above the highway. He was not below approximately 10 metres at any stage when over the highway. He did not hover. The presence of the helicopter led to the two motorists having to brake as they had apprehensions concerning the presence of the helicopter in their view. There was no signage, public notice or road blocks to advise other road users that there would be a helicopter flying low, close to and over the highway. Although I do not accept that all material facts have been proven, in my view, accepting a version of the facts that largely accords with the Defendant's, it is still open that the mode of operation of the

helicopter on this occasion could evoke evasive action of a dangerous nature that could result in a potential collision. Despite doubts being thrown on aspects of Ms Ambjerg Pederson's and Mr Cairncross and Ms Manser's testimony, they were startled enough at the presence of the helicopter to brake.

Recklessness

30. As noted above, the fault element is recklessness as defined in the Criminal Code (Cth).

“A person is reckless with respect to a circumstance if:

- (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
- (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

A person is reckless with respect to a result if:

- (a) he or she is aware of a substantial risk that the result will occur; and
- (b) having regards to the circumstances known to him or her, it is unjustifiable to take the risk.

The question whether taking a risk is unjustifiable is one of fact.

If recklessness is a fault element for a physical element of any offence proof of intention, knowledge or recklessness will satisfy that fault element.”

31. The prosecution submits that Mr Jonker fully appreciated the risk that people were travelling up and down the highway at the time and that he had taken no steps to warn the public. It was submitted that there was a substantial risk that people could take evasive action given he was flying close to the ground at speed. He would have to be aware of the substantial risk of causing motorists to take evasive action and causing a potential collision. Although I have not found the facts in precisely the way that the

Crown had alleged, the facts as I have found them still require me to assess whether the operation was conducted with recklessness as it is understood by reference to the Criminal Code (Cth).

32. In terms of the legal analysis of recklessness I have been referred by both counsel and rely significantly on Steven Odgers, “Principles of Federal Criminal Law” Law Book 2007 at 44 – 49. In my view some aspects of the operation undertaken by the defendant could probably be described as a “circumstance”, however the aspect of the prosecution case concerning recklessness as to cause of a potential collision is properly characterised as “a result”. I note Mr Odgers states (at 49) “a result of conduct may not be a particular event but simply the creation of a risk, or possibility, that the event will occur”. From that perspective some of the particulars of the prosecution case clearly rest on the “result”. In the context of the facts as I have found them there is not a significant practical difference between the two. To prove “recklessness” as to the “circumstance” or “the result”, the prosecution need to prove that at the critical time the defendant was aware that his particular conduct was causing a substantial risk of collision or other dangerous event. Given the evidence of Mr Jonker that I largely accept as supported by the evidence in particular of Mr Manzie and Mr Dupe, I cannot be satisfied that at the critical time he was aware of the risk. If I am wrong on that point and if his conduct and lack of awareness is interpreted to mean no more than being wilfully blind of the risk, alternatively the further element must be considered that the risk must be “substantial” in the sense of “it may well happen”. Given the steps that Mr Jonker had taken, notwithstanding that he flew near and over the highway, from his perspective he did not fly in a manner that was likely to require a motorist to take evasive action or to cause a potential collision. This is notwithstanding that clearly two motorists felt some apprehension worthy of braking. As Odgers states, at 46

“The fact that awareness of substantial risk is required means that the tribunal of fact would be required to give close attention to the state of mind of the defendant – whatever the level of risk that actually existed at the relevant time, was the defendant aware that there was a risk and did the defendant believe that the risk was at a level that could probably be described as “substantial”? Presumably it is not necessary that the defendant characterised the level of perceived risk as “substantial”. However, not only must the defendant be aware of a risk, the defendant must be aware that it is at a level that the tribunal of fact regards as sufficiently high to be characterised as substantial. As Gray J stated in *Hann v DPP (Cth)* (at [26]), “[c]onscious awareness of risk is required; it is not enough to show that the risk was obvious or well known”. Of course, the more obvious or well known the risk was, the more likely that a tribunal of fact will infer (beyond reasonable doubt) that the defendant was aware of it and aware that it was a substantial risk”.

33. Further, if there were found to be a substantial risk, given I do not believe Mr Jonker was fully aware of the risk he was posing, it is also relevant to consider whether the risk was “unjustifiable”. Here I take into account that this operation was one that was cleared with Mr Jonker’s employer; he had made significant efforts to make the flight a safe one; if there were some risks that he was not cognisant of or did not completely eliminate, in my view that is not enough to make out *recklessness* as it is defined in the *Criminal Code (Cth)*.
34. I will arrange to have the reasons forwarded to counsel today and note that on 28 April 2008 I will make orders dismissing the charges. Given the conclusion I have come to I would not require Mr Jonker to appear unless the prosecution advise defence counsel there is some other reason he needs to appear.

Dated this 24th day of April 2008.

Jenny Blokland
CHIEF MAGISTRATE