



CORONERS COURT OF NEW SOUTH WALES

Inquest:	Inquest into the death of Aaron Magarry
Hearing dates:	17 & 18 August 2015
Date of findings:	18 August 2015
Place of findings:	NSW Coroner Court - Moree
Findings of:	Magistrate Sharon Freund, Deputy State Coroner
Catchwords:	CORONIAL LAW – Cause and manner of death, Death in Police Operation, Drive in manner danger, Police Pursuit
File number:	2013/387501
Representation:	Mr J Harris instructed by Mr S Milesi, Crown Solicitor's Office as Counsel Assisting the Coroner; M G Lower instructed by Mr D Malcolm for the family of Mr Magarry; Mr B Haverfield instructed by Mr M Nibbs for the Commissioner of NSW Police;
Findings:	<i>I find that Aaron Stanley Magarry died on 23 December 2013 at Carnarvon Highway, Moree from multiple injuries as a result of a single motor vehicle accident.</i>

Non-Publication Orders:	<p>Non- publication order made pursuant to section 74(1) Coroners Act 2009 in relation the following:</p> <ol style="list-style-type: none"> 1. Exhibit 1, Tab 34 "Safe Driver Policy version 7.2 (01.07.10)": <ul style="list-style-type: none"> * page 22; * page 24 - "Responding to Urgent duty" dot points 3 & 4, * page 25 all the words from "RE - initiation to Termination of the pursuit" to three lines below * page 26 "pursuit guidelines" numbers 2, 4, 6 and 9 * page 27 Vehicle categorisation for Pursuits - first and second dot points * Pursuit Response Point (1) Drivers and Escorts" second dot point (e) and fourth dot point; * Page 28 dot points 1, 2, 3, 4 and 8; and * Page 31 - Termination of Pursuit dot points 1-9 inclusive. 2. Exhibit 1, Tab 34a 3. Exhibit 1, Tab 34b 4. The name of the deceased's daughter.
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REASONS FOR DECISION

Introduction

1. This is an inquest into the death of Aaron Magarry, who was only 23 when he died on 23 December 2013. Mr Magarry who was described by those that knew him as a "gentleman" and a "caring and giving man" he is survived and clearly much missed by his mother Tanya Magarry, father Troy Wilson, brother Blake, sister Kiara, his young daughter and a clearly loving extended family.
2. Mr Magarry died as a result of the injuries he sustained when he was ejected from the motor vehicle registration number QYW052 ("**the Motor Vehicle**") when it hit a tree at about 11pm on 23 December 2013 on the Carnarvon Highway, Moree ("**the Accident**").
3. In the car with Mr Magarry was Jesse Girard who was also ejected from the Motor Vehicle as a result of the Accident. He survived with serious injuries however has very little memory of the events leading up to or of the Accident.
4. At the time of the Accident the Motor Vehicle was being followed by a Highway Patrol Vehicle driven by Senior Constable Brendan Kross with its warning lights activated. Accordingly, as this is a death that occurred during the course of a police operation, this is a mandatory inquest pursuant to section 23 and 27(1)(b) of the *Coroners Act 2009*.
5. As outlined by Counsel Assisting, Mr Harris this inquest has considered the following issues:
 - A. Who was the driver of the Motor Vehicle?
 - B. Whether Mr Magarry was under the influence of alcohol or drugs at the time of the accident?
 - C. Whether Senior Constable Cross engaged in a pursuit of the Vehicle?
 - D. Did Senior Constable Kross act appropriately in the circumstances? and
 - E. Are there any recommendations arising out of this inquest?

The function of the Coroner and the nature of the inquest

6. The role of a Coroner as set out in s. 81 of the *Coroners Act 2009* is to make findings as to:

- a) the identity of the deceased;
 - b) the date and place of a person's death;
 - c) the physical or medical cause of death; and
 - d) the manner of death; in other words, the circumstances surrounding the death.
7. The Coroner is also able to make recommendations pursuant to section 82 of the Act in relation to any matters to improve public health and safety.

Background and Events leading up to the Accident

8. In December 2013, Mr Magarry was on bail and was due to appear at Moree Local Court on 15 January 2014.¹ His bail required him to report to Moree police station every Monday between 8am and 8pm, which he had been doing. However, on Monday 23 December 2013 he failed to report as he was required to do. This is the first time he had failed to report and the reason why is not clear.
9. The evidence indicates that on 23 December 2013, Mr Magarry had spent some of that evening at an area called "the Tree", which is a local hangout on Balo Street, Moree. He was with his friend Jesse Girard and they were sitting in the Motor Vehicle which was a blue Holden V8 Commodore with Victorian plates. The Motor Vehicle was owned by Mr Girard, who had obtained it in Victoria and driven it to Moree a few weeks previously.²
10. Who was driving the car at the time of the accident is an issue to which I will return. Neither Mr Magarry nor Mr Girard held a licence that allowed them to drive a "high performance vehicle" such as the V8 powered Commodore.³ Moreover, Mr Magarry's licence had been suspended for 3 months from 5 November 2013.
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11. Sam Phelps, a friend of Mr Magarry gave evidence that:

¹ Exhibit 1, Tab 34C.

² Mr Magarry also owned the same model car, though it was black.

³ Clause 32(1) Road Transport (Driver Licensing) Regulation 2008.

⁴ Exhibit 1, Tab 31, Traffic Record Report.

"On 23 December 2013, I went into town about 8:30pm. I drove my ...motor vehicle ..and parked near the tree....When I got there, Jesse and Aaron were already out the tree in Jesse's car... I stopped and spoke with both Jesse and Aaron. Aaron was seated in the driver's seat and Jesse in the front passenger. Aaron and Jesse looked normal and didn't appear to be on anything. We spoke for awhile before Aaron and Jesse left to get a packet of smokes...

...

About 30 minutes later, Jesse and Aaron came back to the tree. Aaron was still driving the Vehicle. I walked over and spoke with Jesse and Aaron. I noticed then it looked like both of them had taken something. They had red eyes..."⁵

12. Shortly after this, Mr Magarry and Mr Girard drove off.⁶
13. It is uncontroversial that at this time police were conducting stationary random breath testing ("**RBT**") on either side of Boggabilla Road, Morree near Webb Avenue. The RBT site was about 2km further north from "the Tree".⁷
14. Constable Hildrew, was stationed at the RBT and her role was to signal vehicles to pull into the RBT. A number of cars ahead of the Commodore did so - including one driven by Mr Phelps.
15. It was the evidence of Constable Hildrew inter alia that⁸ :
 - a) She heard and saw the Motor Vehicle approach the RBT;
 - b) She signalled to it to pull over into the RBT;
 - c) The Motor Vehicle appeared to initially pull in however it then accelerated heavily and continued past the RBT heading north;
 - d) She saw two people in the car and could give a brief description of the driver;
 - e) Despite having prior dealings with Mr Magarry she did not recognise the driver of the Motor Vehicle as Mr Magarry;
 - f) As part of her night shift duties on 23 December 2013 she had checked who had and had not reported pursuant to their bail requirements that day. She

⁵ Exhibit 1, Tab 19 at [8] - [9].

⁶ Exhibit 1, Tab 36 at [4].

⁷ Officers Noal, Smith, Bottcher and Mildrew, tabs 10 to 13.

⁸ Exhibit 1, Tab 13, at [4] and [10].

had noted that Mr Magarry had failed to report however, had yet to create an event to advise other officers about his failure to appear

16. Coincidentally, as Mr Magarry and Mr Girard failed to stop at the RBT and accelerated past, Mr Phelps and his girlfriend Georgina Brooker had been pulled over at the RBT. He corroborates the evidence of Constable Hildrew and stated in evidence inter alia that:

- a) he was sitting in his car at the RBT with his driver's window down;
- b) he heard the Motor Vehicle which was being driven by Mr Magarry with Mr Girard in the passenger seat before he saw it because it was a loud vehicle he turned to watch them coming;
- c) he then observed "he boosted it, her revved the guts out of the engine and dropped the gear to make it go faster, he would have been travelling at least 110km per hour, the female police officer was standing in the middle of the road, and turned looking at the car, she shook her head at the vehicle"⁹
- d) his girlfriend Ms Booker, then called Ms McMechan and told her that Mr Magarry had just driven through the RBT¹⁰;

17. At about this time Senior Constable Kross, who was alone in a marked Highway Patrol car, had just finished dealing with an unrelated driver who had stopped just north of the RBT and had pulled into a car park near the junction with the Carnarvon Highway. The evidence of Senior Constable Kross¹¹ was inter alia that:

- a) he just pulled in to the car park outside "Sig's Takeaway" with the patrol car facing towards the road and facing Northbound toward Boggabilla Road;
- b) he had switched off the lights of the patrol car;
- c) he had stationed himself at a position in order to both observe people stopping short of the RBT or observe people failing to stop at the RBT;

⁹ Exhibit 1, Tab 19 [14];

¹⁰ Exhibit 1, Tab 19 at [15].

¹¹ Exhibit 1, Tab 9 and oral evidence on 17/08/15;

d) he heard the Motor Vehicle approach prior to seeing it pass at speed and then turn left onto the Highway;

e) he immediately activated his warning lights and siren and drove off onto Boggabilla road to begin following the Motor Vehicle;

f) although he initially activated both the lights and sirens of the patrol car he almost immediately deactivated the sirens¹²;

g) the reason he followed the Motor Vehicle was he intended to stop it. He was concerned about its speed and the way it was being driven and he conceded that he thought it may have gone through the RBT;

h) while following the Motor Vehicle he made no contact with police radio or with any of the police conducting the RBT as to what was happening;.

18. The Highway Patrol car had an In Car Video ("**ICV**") which was activated at the same time as the lights and sirens.¹³ It back captured a few seconds of footage. The ICV shows:

a) the Motor Vehicle passing the patrol car and Senior Constable Kross starting to follow the Motor Vehicle at about 11.02pm;

b) the patrol car turn left onto the Highway and attempt to catch up with the Motor Vehicle which can be seen in the distance;

c) the Motor Vehicle increasing speed away from the police patrol car, as there are points within the footage that the tail lights of the Motor Vehicle are not visible;

d) the patrol car reaching speeds of up to 185 kmph as it follows the Motor Vehicle;

e) at no time does the Patrol Car catch up with the Motor Vehicle until after the accident.

f) In less than a minute, and at a point approximately 1.9km along the Highway, the ICV shows the brake lights of the Motor Vehicle as it approaches a left hand bend and then it goes out of sight.

¹² Exhibit 1, Tab 9 at Q25 - he also activated the siren, but immediately deactivated it prior to driving off.

¹³ Exhibit 1, Tab 7.

19. At just before 11.03pm, Senior Constable Kross arrived at the scene of the Accident. It was 57 seconds after he had commenced driving.
20. Senior Constable Kross exited his vehicle and at that point a Body Worn Video ("**BWV**") on his personal radio was activated.¹⁴ That video was not played at the inquest but it forms part of the brief of evidence. The video shows Senior Constable Kross approaching Mr Magarry's body, which was in front of the police car by the roadside. He had obviously not survived the Accident.
21. Around a minute later, Senior Constable Kross informed police radio about the accident and an ambulance was called.¹⁵ The ambulance officers arrived at the scene at 11.17pm. Mr Magarry was confirmed deceased and was not taken to hospital.
22. Other police attended and a critical incident was declared.

Was Mr Magarry the driver of the Motor Vehicle?

23. Although both Mr Magarry and Mr Girard were ejected from the Motor Vehicle on its impact with the tree, the following evidence clearly indicates that Mr Magarry was the driver at the time of the Accident:
 - a) Firstly, the evidence of Mr Phelps who saw the Motor Vehicle as it failed to stop at the RBT and drove past:

*"I looked at the car and saw Jesse seated in the passenger seat and Aaron driving the vehicle as it drove past me, they continued on the Boggabilla road, turning left into the Carnarvon Highway after Sigs Cafe...."*¹⁶
 - b) Secondly, the evidence of Senior Constable Gretel Robertson whose evidence was during the course of the inquest that as a result of an analysis of the trajectory of the debris from the vehicle and the location Mr Magarry, who was thrown over 74 metres from the site of the impact, was found, indicated that he was the driver¹⁷; and

¹⁴ Exhibit 1, Tab 8.

¹⁵ Tab 8; see also

¹⁶ Exhibit 1, Tab 19 at [15] and oral evidence on 17 August 2015;

¹⁷ Exhibit 1, Tab 24 at [51];

- c) Finally, the injuries sustained by Mr Girard are consistent with him being seated in the front passenger seat and wearing a seatbelt (he has significant injuries to his left arm and shoulder) whilst the injuries to Mr Magarry, which included the amputation of his right arm at the shoulder are consistent with him being in the drivers seat and wearing a seatbelt.

24. Accordingly I am satisfied on the balance of probabilities that Mr Magarry was the driver of the Motor Vehicle at the time of the Accident.

Was Mr Magarry under the influence of alcohol or drugs at the time of the accident?

25. The Post Mortem report dated 7 February 2014 revealed that the blood sample taken from Mr Magarry post mortem was found to have present 0.013 g/100ml alcohol, 0.04 mg/L amphetamine and 0.19 mg/L of methylamphetamine¹⁸.
26. Expert opinion was obtained from Dr Judith Perl, forensic pharmacologist her report dated 16 July 2014¹⁹ found inter-alia that:
- a) As the amount of alcohol detected in Mr Magarry's blood was very low and was only detected in his femoral blood, it was likely due to post mortem changes and not to Mr Magarry consuming alcohol prior to the Accident²⁰;
 - b) The blood concentrations of methylamphetamine and amphetamine detected in Mr Magarry would have been reflective of the concentrations at the time of his death and accordingly at the time of his driving;
 - c) The methylamphetamine concentration was in the toxic to potentially fatal range²¹;
 - d) high doses of methylamphetamine are associated with "altered perceptions and judgment and increased aggressive or risk taking behaviour during the acute phase of intoxication"²²

¹⁸ Exhibit 1, Tab 4;

¹⁹ Exhibit 1, Tab 39;

²⁰ Supra at [4];

²¹ Supra at [11];

²² Supra at [13];

e) Methylamphetamine is metabolised partially to amphetamine, although illicit preparations of "speed" may contain a mixture of both methylamphetamine and amphetamine²³;

27. Accordingly, I am satisfied on the balance of probabilities that Mr Magarry was under the influence of methylamphetamine (also known as "ice") at the time of the Accident.

Was Senior Constable Kross engaged in a pursuit as defined by the NSW Police Safe Driver policy?

28. It is uncontroversial that at the time of the Accident the Motor Vehicle being driven by Mr Magarry was being followed by a patrol car driven by Senior Constable Kross. The issue is whether Senior Constable Kross was engaged in a pursuit at the time.
29. It was the initial opinion of the Officer in Charge of the investigation, Detective Senior Constable Rebecca McKenzie that:

*"At the time of the incident... highly likely that Magarry was fully aware of the police vehicle following him and would have known the intention of the police was to stop his vehicle due to his manner of driving. I believe Magarry was driving at excessive speed in an attempt to avoid apprehension by the police as he was aware he was a suspended driver and was in breach of his bail. As such, I believe this incident would be deemed to be a police pursuit"*²⁴

30. A pursuit is defined under the Safe Driving Policy²⁵ under part 6 which states:

"PURSUIT: A pursuit commences at the time you decided to pursue a vehicle that has ignored a direction to stop.

An attempt by a police officer in a motor vehicle to stop and apprehend the occupant(s) of a moving vehicle when the driver of the vehicle is attempting to avoid apprehension or appears to be ignoring police attempts to stop them.

*A pursuit is deemed to continue if you FOLLOW the offending vehicle or continue to attempt to remain in contact with the offending vehicle, whether or not your police vehicle is displaying warning lights or sounding a siren"*²⁶

31. However I note that The Safe Driving Policy also makes reference to Traffic Stops, and states:

²³ Supra at [18];

²⁴ Exhibit 1, Tab 6 at [122];

²⁵ Exhibit 1, Tab 34;

²⁶ Supra at page 25;

"Traffic Stops

*It is permissible for police to perform traffic stops...or reduce the distance to an offending vehicle without informing VKG of a response code or activating warning devices. However police must take reasonable care and it must be reasonable that warning devices are not used....*²⁷

32. It was the evidence of Senior Constable Kross that at the time he was following the Motor Vehicle he:
- a) Intended to stop the Motor Vehicle²⁸;
 - b) He immediately turned off his sirens off as "that's what I do um every time I go to stop a car"²⁹
 - c) He drove out onto the road and onto the Carnarvon Highway and "all I could see ahead was a set of tail lights"...."So I accelerated and tried to catch up to him..³⁰
 - d) That he "was just trying to um, catch up to the vehicle. I, I thought if I get, catch, close enough to it I, I it's going to be a pursuit obviously um, I would've had to call a pursuit, and I would have called a pursuit..³¹
33. Senior Constable Kross's evidence in this regard is in my view corroborated from the recording of the audio that occurred when he came across the scene of the accident where he stated to VKG "I was just trying to catch up to it. Was almost about to call a pursuit when they've appeared to have lost it"³²
34. I found Senior Constable Kross to be a witness of truth, he did not seek to embellish any of the answers during the course of the inquest or the interview he gave to investigating officers. His evidence is clearly corroborated by the BVW transcript. Accordingly, I am satisfied on the balance of probabilities that Senior Constable Kross was not engaged in a pursuit at the time he was following the motor vehicle.
35. However, even if I had been satisfied that he was engaged in a pursuit (which I do not accept that he was) as defined by the Safe Driver Policy, the tragic outcome would not have been avoided. There was all of 57 seconds between Senior Constable Kross pulling out after observing the Motor Vehicle speeding past his

²⁷ Exhibit 1, Tab 34b, [27];

²⁸ Exhibit 1, Tab 9, ERISP A48;

²⁹ Supra A25;

³⁰ Supra at A27;

³¹ Supra at A71;

³² Exhibit 1, Tab 8, Transcript of BVW page 2.5;

location at the car park outside "Sig's takeaway" and the Accident. If he had contacted VKG as he was required to do under the Safe Driving Policy there was little if any time for them to respond.

Did Senior Constable Kross act appropriately in the circumstances?

- 36. Senior Constable Kross on 23 December 2013 observed the Motor Vehicle being driven by Mr Magarry being in a manner that could only be described as dangerous. It was speeding.
- 37. He sought to stop it.
- 38. To do so he attempted to catch up to it.
- 39. The evidence indicates he was unable to do so.
- 40. He has clearly been deeply affected from this terrible tragedy but he is not to blame. He was simply carrying out his duties that fateful evening.
- 41. Accordingly, I am satisfied on the balance, that his actions that evening were appropriate in all the circumstances.

Recommendations

- 42. Having considered in detail the Safe Driving Policy, I note that there are some inherent ambiguities contained within it, particularly in relation to the definition of a pursuit. However, I note that Deputy State Coroner Magistrate Dillon in his findings in relation to the death of Hamish Raj made a comprehensive list of recommendations to the Commissioner of Police and I note from the submissions of Mr Haverfield that those are currently being reviewed. For those reasons I decline to make any recommendations.

Conclusion

- 43. The death of Mr Magarry is a tragedy. He leaves behind a loving family wondering why he was driving a car under the influence of toxic drugs in a manner that only could be described as foolhardy. If only he could have foreseen the ramifications of his actions that night. Drugs and reckless driving are a lethal mix and unfortunately for Mr Girard and Mr Magarry's family they will live a lifetime with the consequences.

Findings

Accordingly, I now turn to the findings I am required to make pursuant to section 81 of the Coroners Act 2009:

I find that Aaron Stanley Magarry died on 23 December 2013 at Carnarvon Highway, Moree from multiple injuries as a result of a single motor vehicle accident.

I close this inquest.

Magistrate Sharon Freund

Deputy State Coroner

Moree

18 August 2015