

CITATION: *Police v Stuart Ross Wallin* [2004] NTMC 049

PARTIES: GARNET ALAN DIXON

v

STUART ROSS WALLIN

TITLE OF COURT: Summary Jurisdiction

JURISDICTION: Court of Summary – Alice Springs

FILE NO(s): 20321353

DELIVERED ON: 14 April 2004

DELIVERED AT: Alice Springs

HEARING DATE(s): 28, 30 January, 5 March 2004

JUDGMENT OF: M Little

CATCHWORDS:

REPRESENTATION:

Counsel:

Prosecution: J Burness
Defendant: R Goldflam

Solicitors:

Prosecution: Police Prosecutions
Defendant: NTLAC

Judgment category classification:

Judgment ID number: [2004] NTMC 049

Number of paragraphs: 146

IN THE COURT OF SUMMARY JURISDICTION
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20321353

BETWEEN:

GARNET ALAN DIXON
Police

AND:

STUART ROSS WALLIN
Defendant

REASONS FOR JUDGMENT

(Delivered 14 April 2004)

Ms M LITTLE SM:

1. The defendant, Stuart Wallin is charged that on 10 October 2003 at Alice Springs he unlawfully assaulted a police officer, namely Constable Hamilton, contrary to section 189A of the Code, that he assaulted a police officer, namely Constable Brand, contrary to section 189A of the Code, that on that same date he resisted members of the police force in the execution of their duty, and further that he behaved in a disorderly manner in the police station, namely Alice Springs Police Station.
2. The defendant pleaded not guilty to the charges. I remind myself that prosecution bears the onus of proving and each and every element of the charges beyond reasonable doubt.
3. Defence indicated at the commencement of proceedings that they objected to the admissibility of certain of the police officers evidence and in particular evidence of all events from the moment when the police effected the taking of the defendant into protective custody.

4. The hearing proceeded with all evidence being taken and that objection noted. I will be summarising the evidence taken and then will make a ruling on the voir dire point prior to dealing with the substantive matters. I accept Mr Goldflam's analysis that, if I reject the evidence from the time of the taking the defendant into protective custody, that counts 1 to 3 will fail for lack of evidence.
5. The first witness to be called was Constable Chris Brand of the Alice Springs Police Force. On 11 October 2003 he was working in the Traffic Section, with Constable Jennifer Hamilton, on the evening shift from 3pm to midnight. At approximately 11pm they were driving back into the police station. As they approached the roundabout at the intersection of Parsons Street and Bath Street they saw a person walking who appeared to be highly intoxicated. He was staggering along the street and having difficulty maintaining his balance. He appeared to be making his way to the Coles Complex on Bath Street.
6. Constable Brand was driving the vehicle. He did a lap around the small roundabout to have a closer look at the person. He stopped the vehicle and spoke to the man. His evidence was that the man said he was going to Coles to buy some beer and a few other bits and pieces. Constable Brand was aware that whilst Coles was open, it was not possible to buy beer at that time of the night. At that time he was of the view that something needed to be done in relation to the man and in particular that the man needed to go home. He was concerned that if the man continued walking in the area he could be attacked or hit by a car. Constable Brand said he didn't really know what sort of danger, if any, the man posed for anybody else. He was concerned that something would happen to the man himself, due to the man's level of intoxication. He formed the view that the man was highly intoxicated. Officer Brand decided at that time that the man needed to be taken into protective custody or some other action needed to be taken. He said that it was not uncommon for police to speak to someone on the side of the road, decide that they need to be taken home and then ascertain whether there is someone at home to care for them. He said it was not uncommon for people to be thrown in the back of the XR6 and taken home. He said that at that time he had formed the view that the man needed to be PC'd (that is taken into protective custody) or something definitely needed to be done.

7. He then drove to the back of the police station to see if there was a crew; as it was on change of shift there were usually crews there and they could get a police van. He said that because they were in a traffic sedan, fitted with radar and lasers, making it uncomfortable for people to get into those vehicles, it is better to have the opportunity to transport people in a paddy wagon. They drove into the back of the police station and were unable to find anybody else in the parking area. He said they decided they could call on the radio and deal with this person themselves.
8. He then drove out of the lane at the back of the police station and he could see the defendant speaking to a lady collecting trolleys over near the Bath Street taxi rank. Constable Brand identified the defendant Stuart Wallin as the person that he had seen on this occasion. There was no issue with identification in the case. The witness observed that the man appeared to be having trouble balancing whilst he was speaking to the lady. He was of the opinion that the woman looked flustered or worried, so it was definitely time to go and speak to the defendant.
9. Constable Hamilton and he got out and approached the man. As the police approached the man, the lady left. There was no one else around. Constable Brand approached the defendant and asked what he was doing. The police officer could not recall the exact conversation, but he said something to the effect of the man needing to get a taxi to go home. The man said that he intended walking and then he started to get quite aggressive towards the police. There were no taxis at the rank at the time. The officer said that the man said words to the effect that he was going to Traeger Avenue or somewhere down that way.
10. The defendant started to become aggressive and moved his left foot towards Officer Brand and clenched his fists. His face started to go red and he was yelling things to the police. The officer could not recall all of what was yelled but one expression he did recall was, "Why are you picking on white people, you should be locking up Abo's". The Constable recalled that the man said for him to "fuck off" three times. The man was still talking about going to the Coles Complex and he was becoming aggressive. At this time he felt that the man needed to come with the police because his level of aggression may be a danger to other people, if not himself, because he still appeared highly intoxicated.

11. Constable Brand then told the man he was going to take him into protective custody. The man was still swearing and being aggressive. At this stage he had not touched the defendant. Both he and Constable Hamilton then grabbed the defendant by the upper arm (Constable Hamilton to the left arm and Constable Brand to the right) and they intended to lead him towards the police vehicle. They attempted to move the man. The defendant threw himself on the ground after a couple of metres. The evidence was the man started to walk a little bit and then he said words to the effect of “making them work for it”.
12. As the police were attempting to get the defendant back up he grabbed out at Constable Hamilton, grabbing her shirt and pulling her towards him. He was kicking his legs around apparently in an attempt to kick both police officers. Constable Brand received two kicks to the right-hand side of his upper body. He was leaning over the defendant, trying to get a hold of him, when he was kicked. Constable Hamilton receiving a knee strike to the right side of her face and the defendant was holding her.
13. Constable Brand then knelt down and punched the defendant in the head several times. He believed he punched the man approximately three times. He said he did this because he was not able to get any OC spray out as Constable Hamilton was still being held by the defendant.
14. He believed that one of these blows caused an abrasion to the upper right side of the defendant’s head. He was then able to roll the defendant onto his stomach, get his hands behind his back and he handcuffed him. At this stage Constable Hamilton assisted with the containment of the defendant.
15. At some stage the witness had pressed his radio emergency beacon button. As a consequence other police officers arrived. The first person he recalls arriving was Constable Michael Curtiss and then a police caged car arrived occupied by Senior Constable Hickey and Constable Conroy. The defendant was handcuffed and placed in the rear of the cage car. He was taken to the watch-house.
16. After the arrest Constable Brand noticed that Constable Hamilton’s shirt was open and he could see her bra. She had a large scratch on her right breast area and two buttons were ripped open. He also noticed swelling underneath and around her

right eye area. Constable Hamilton was upset and prior to returning to the watch-house he and Constable Hamilton stayed outside for a few moments.

17. When he arrived back at the watch-house he noticed the defendant was being held down by three or four police officers and was in the process of being searched. He was kicking out and screaming and yelling abuse at the police. He was saying things such as, "I'll see you in court," and that they would be sued. Constable Brand recalled that the defendant was also saying these sorts of things after the incident when they had him in handcuffs and before he went into the cage.
18. A videotape was then played recorded at the Alice Springs Police Station Watch-house on 11 October 2003, the relevant time period being 23 hours, 12 minutes and 16 seconds to 23 hours and 25 minutes. At the time the defendant was in the watch-house. The witness gave a commentary of some of the persons that were seen on the video and the location of the defendant. The video became exhibit P1.
19. The witness received mild bruising but no serious effects as a result of the incident. When the defendant was handcuffed the witness told him that he was under arrest for assault police.
20. The witness was then cross-examined. The witness agreed that he made a statutory declaration with respect to that incident on 11 October 2003. He agreed that he was making an honest and truthful account of what had occurred.
21. The witness agreed that in his statement he said that the woman who was talking to the defendant appeared to be uncomfortable with the man's presence. As a consequence of that observation he drove the vehicle over to the side of the road and attempted to speak to the male. He said that whilst he could not agree exactly what street the man said he lived on, he recalled that it meant the man would have to walk past the Royal Flying Doctor Service lawns and pass Billy Goat Hill, which he described as a major hot spot. He agreed he could not recall which street had been named and that it was possible that the man did not say he lived in Traeger Avenue.

22. In his statement he said that he gave the man his options, namely that he could walk home, catch a taxi or spend the night in the Alice Springs Watch-house in protective custody. He also agreed that he had said in his statement that whilst they were talking to the man he thought about driving him home. He agreed that in his statement he then said, "Stuart Wallin then told me to fuck off. I again gave him the option of going home. I did this about three times." He agreed that in his statement he stated that Stuart Wallin responded by telling him to fuck off and that he would do what he wanted.
23. Constable Brand made a second statutory declaration on 9 December 2003. He agreed that in this statement he said that at the time he had been seen at the roundabout on the corner of Parsons and Bath Street he observed the man to be seriously affected by alcohol and that he decided at this time that Wallin would have to be put into protective custody due to the observations made as to his level of intoxication. Constable Brand's understanding of protective custody is when somebody is seriously affected either by alcohol or a drug and they are going to be a threat to themselves or to other people. He stated that protective custody is basically for the person's own protection.
24. He said that in s.128 of the Police Administration Act an officer has to make a wise decision based on the way the person is before they make a decision on whether the person is to go into protective custody. He also said that when someone is taken into protective custody the police need to make the decision whether we leave them on the street or whether they are a danger to themselves or the public. He said if the police were able to take them home to a place where somebody is able to look after them, and it transpired that no one was able to look after them, there may be a difficulty if the person was not being cared for.
25. He said that it was his recollection that he said to Wallin that he should go home. He recalled that Wallin said he was going to the Coles Complex to buy some beer. He denied that he said words to the effect of, "If you are on the street in 5 minutes we'll lock you up."
26. It was put to him that he had said earlier in his evidence that the man was going to buy some beer and a few bits and pieces. I queried the question being put to him

at the time as my notes indicated that he had said the man was going to buy some beer. The transcript at page 6 confirmed Mr Goldflam's recollection and the witness answered that he believed the man had said he was going to buy some beer.

27. It was then put to him that it was denied that the man had said that he was going to Coles. It was suggested that the man had said he was going to the taxi rank. The witness denied that. The witness agreed that the man did in fact go to the taxi rank immediately after he had been spoken to by the police.
28. In cross-examination a statement from Dianne Kaye Sargeant was exhibited as exhibit P2. In that statement Ms Sargent says, inter alia, "I did not feel threatened by Stewie at all. His behaviour was not offensive towards me. He was drunk but he did not cause me any problems." As it transpired the writer of P2 knew the defendant hence she called him Stewie. While the witness agreed that he believed the woman was looking uncomfortable, he was not able to specify what had led him to this conclusion. He said that when the police arrived she seemed quite happy as she was leaving.
29. Brand denied that he told the defendant, "If you are on the road in 5 minutes we'll lock you up." Brand did recall the defendant saying at some stage that he was going home. Brand denied that the defendant said he could not walk. He did not recall that the defendant said, "I've got a back injury, I've got to get a cab." Whilst he agreed the man was in the general area waiting for a cab, he disputed that it appeared that the man was waiting for a taxi. The witness said he could not recall the man saying he was going to get a taxi, but the witness agreed he did say, "You're coming over with us."
30. He said it was a fluid situation and that the man was not at the same constant. This was a reference to his aggression level. As the man's aggression levels were changing, his options were changing. He said as his aggression levels raised the options for the defendant going somewhere by himself of getting into a cab started to diminish and the officer needed to form other options. He said it got to the point where the only option for the man was to come with the police.

31. In the officer's second statement he said as follows; "Wallin would have to be put into protective custody due to the fact of my above observations." In response to Mr Goldflam's question; "So if that statement is correct and true then weren't you thinking about options when you came back to visit him near the taxi rank?" The response was; "When you see a highly intoxicated person, okay, generally your options are as we've been through before. Now there are always options when you speak to those people. I mean not every case is the same in relation to protective custody."
32. He said that when they were speaking to the defendant at the taxi rank the defendant's aggression level started to rise quite quickly. The witness denied that he and Hamilton pushed the man to the ground. He agreed that he did not see the defendant punch Hamilton at any point.
33. The witness said that the defendant was swearing and carrying on. He could not recall at any stage the defendant asking them to let go or to get off him. He could not recall anything about a back injury being mentioned by the defendant.
34. In re-examination the witness gave evidence that a person is first spoken to to ascertain whether they need to be taken into custody. The options, once they are taken into custody, is that if there is someone that can look after them they can be taken home, if that fails they must be taken to DASA, the Drug and Alcohol Centre on Schwarz Crescent, and they will be left there. If they are refused entry into DASA then they will be taken to the watch-house. He said that after a person is spoken to you make a decision as to what can be done with that person. He said it is also based upon their aggression.
35. The witness said that prior to coming to court for these proceedings he had not been aware that the defendant had a back injury. He noticed when the defendant was walking in and out of court that he appeared to be stooped over.
36. The next witness to be called was Jennifer Hamilton. She is a Constable of Police at Alice Springs and on 11 October 2003 was on traffic duty with Constable Brand. At about 11pm they were driving south along Bath Street towards the roundabout intersection of Parsons and Bath Street and she saw a Caucasian man staggering along the footpath towards the intersection. She said his steps were

slow, deliberate, unbalanced and unsteady. Her partner and she made mention of how intoxicated he seemed. They did another lap around the roundabout to come back to speak to him.

37. Constable Brand spoke to him. She could not recall exactly what he said, but she remembered that Constable Brand asked him if he was all right and the man answered that he was and that he was on his way to buy beer. She could not recall any further of that conversation. She said she and her partner went to the police compound and as there were no car parked there, they decided to stay in their vehicle. She said that it was hand over time and they take the overflow from about quarter to 11 until about quarter past 11 while the crews do a hand over.
38. The Coles taxi rank is directly across from the police station driveway. As they drove out, they saw the defendant was there standing talking to a lady, who the witness called a Coles lady. He was using a trolley rail to lean on. They drove over to the taxi rank, parked and approached the defendant. Constable Brand spoke to him again. The lady that the defendant was talking to left.
39. The witness stood to the left and behind the defendant and Constable Brand had his full attention. Constable Brand spoke to him about his intoxication level. The witness assessed that the man was seriously affected by alcohol. She formed this view based on a number of factors: he was leaning on the rail, he had been staggering when he was walking, the fact that he said he was going to buy beer, which the witness deemed as unusual given the bottle shop closed at 9pm, and his speech was animated. While Constable Brand was speaking to the man he slowly raised the volume of his speech and he was swearing. His speech was slurred but not seriously slurred. She said Constable Brand was giving him options such as go home, catch a cab, “don’t just sit here in the dark, you are drunk, make your way home.” She recalled that the defendant was saying things such as for Constable Brand to “fuck off” and “Why don’t you do some real work, you’re only picking on me because I’m white” and “why don’t you go and lock up some Abo’s.”
40. She said that the defendant was yelling at Constable Brand by this stage and Constable Brand told him three times, “Make you way. Move on or you will be

arrested for protective custody.” She said that each time Constable Brand said this Mr Wallin told him to fuck off. Constable Brand then said, “You are now under arrest on s.128. You are in protective custody. We are now taking you to the watch-house.”

41. The witness noticed that whilst Constable Brand was talking to the man he was clenching and unclenching his fists. Each officer took an arm and they went to lead him to the sedan. Constable Hamilton had him by the left arm and they had moved less than 2 metres when the defendant sat down and said that he would make them work for it. He said, “Fuck off, leave me alone.”
42. As the defendant lay on his back he raised his leg and kicked Constable Brand in the chest and from there it was fast moving. She recalled that she had released him with one hand and was holding him with one hand so she could open the rear door of the car. He punched her other arm in the elbow, so she would let go of him. She said that was when the man kicked Constable Brand in the chest. She said that whilst the defendant was on his back he was kicking upwards and then he swung at her. She leant back and his fingers raked at the front of her. She said that her shirt buttons were ripped and her chest was scratched. She said as she came back she got a kick to the face with his boot. Her head went back and his boot then came down on top of her head. He then grabbed the back of her head and pulled her towards him. She thinks that she may have been kned in the face but there was a lot happening at this time. She recalls wrapping his legs up while he was still on his back. She recalled at one stage having her cheek against his upper thigh and she looked and saw the back of the watch-house and saw a member come out of the car park, headed towards his car.
43. She recalled she got punched but she did not know the order of how things happened. She was swollen and in pain afterwards. She had a black eye, a swollen jaw and a lump on her head. She had scratching to the back of her neck and scratches down the front chest/breast area. She said she believed the scratches to the back of her neck occurred when the defendant pulled her head towards him.

44. As she was holding on to the legs of the defendant she saw Constable Michael Curtiss run over to where they were. Constable Brand was saying, “Roll on to your stomach, face down, face down.” She grabbed hold of the man’s ankles and put a figure four lock on his legs, holding one up against his bottom.
45. Other police and a police van arrived. The defendant was lifted up and placed into the rear of the police van. Later on she saw the defendant in the watch-house area; the defendant was in the reception area on the ground, struggling, and he was yelling abuse at police officers. She stood and watched this for a couple of minutes, then stepped over the defendant and went behind the reception desk to make computer enquiries with respect to the defendant.
46. She said he was saying that he was going to “sue” and that us “cunts were fucked”. She took his licence from his wallet to look up his name on the PROMIS system.
47. This witness was then cross-examined. She agreed that she quickly formed the view that the defendant was very drunk when she first saw him. She said there was some discussion as to what the defendant was going to do and she said that he wasn’t right for him to be left where he was. He was intoxicated, and he did not need to be staying in town. She said as they left the defendant the first time they had decided to get a van. So she said there was no direct discussion as to what was going to be happening, but it was a fairly good indication that that was where he was going to go. She said at the roundabout words to the effect of: “see where he’s at” were used when discussing what would happen with the defendant. By this she meant that the officers would see where he was; was he at Coles, was he at the taxi rank, was he making his way home? As it transpired he was at the taxi rank when they came back. She said he was at the upper level, by the rail for trolleys. She said he was talking to a woman who apparently worked for Coles. She agreed that he was not moving away from the taxi rank area. She agreed that at no stage did he make any attempt to walk off and there were no taxis around.
48. She denied that at the roundabout he said he was going to make his way to the taxi rank. She said that he said he was going to buy beer. She did not remember whether Officer Brand had said to him at that stage for him to go home. She said

she did not remember Officer Brand saying “If you are on the street in 5 minutes we’ll lock you up.” She could not recall the defendant saying he was going home and could not recall him saying he could not walk, he had a back injury or he’s going to get a cab.

49. She agreed in her statement that nowhere did she mention that Brand told Wallin he should get a taxi home. She agreed that, in effect, Brand was saying to the defendant, “Make your way home, move on or you’ll be arrested for protective custody.” She agreed that Brand was telling the defendant to make an effort to go somewhere. She agreed in her statement that she said, “I heard Brand say that if he did not start to make his way home he would be apprehended for protective custody and taken to the watch-house.”
50. She said that she could not recall details of the entire conversation with Brand and that she was behind Brand while he was talking to the defendant. She agreed that as Brand was talking to the defendant he was becoming more and more agitated, upset and saying inappropriate things. She agreed that the defendant was, in effect, directing the police to go away and leave him alone. She agreed he was in an agitated state when he was apprehended by the police.
51. She denied that when she grabbed his left arm that she pushed his arm up his back some way. She said that there was a struggle and that originally when the defendant went to the ground it was on the footpath area, but because of the struggle they ended up on the asphalt/road area. She disputed that he either fell down or was pushed down by police officers. She said as he went to the ground he said, “I ain’t fucking going nowhere. I’m going to make you cunts work for it.”
52. She agreed that the defendant and the Coles lady appeared to be in conversation. She did not hear any of that conversation. She agreed there was nothing about the Coles lady that caused her to think that she was fearful or concerned about the defendant speaking with her.
53. She said that as far as she could tell the defendant just wanted to argue. She could not recall him saying he was wanting to catch a taxi, but she did remember him saying he was staying where he was. She could recall that home was mentioned,

but she could not recall whether he said he was wanting to go home. She did not remember the context of when home was being mentioned. She did not recall the word “taxi” or the word “cab” being mentioned.

54. She recalled him saying, “Get your hands off me,” after they had apprehended him. She did not recall him complaining of a bad back. She could not recall Curtiss having his knee on the defendant’s back and she did not know exactly where he was being held down.
55. The next witness called was Constable Michael Curtiss. He said on 11 October 2003 he finished evening shift at 11pm. He had packed up his gear, signed off and walked to the back of the police station where his car was parked on Bath Street. He noticed Constables Hamilton and Brand talking to a Caucasian male at the Coles taxi rank. He said he did not take much notice because he had just finished work and he was more interested in going home at that stage. As he was watching he saw the Caucasian male and Constable Brand fall to the ground. He said Constable Hamilton was in a stooped over position and the Caucasian male struck her in the head four times with a fist action. The witness indicated a jabbing motion with the right clenched fist. He then saw the Caucasian male on the ground grab the front of Constable Hamilton’s shirt with his left hand and he pulled her towards him. Her head bounced off his left knee. Officer Curtiss then ran across Bath Street. He put his knee into the middle of the man’s back. He said at that stage Constable Hamilton wrapped her arms around the bottom of his legs and the man’s back was towards the witness.
56. He and Constable Brand handcuffed the man. By that stage there was a lot of other members who had come running out of the station. The man was then placed in the back of the vehicle and taken to the watch-house. He then proceeded to go home.
57. He was then cross-examined. He agreed that he made his statement on 9 January 2004. He did not make any notes or statements at the time of the incident.
58. He was the width of the road away from what was occurring, (the width of Bath Street). He agreed that the defendant was standing in the area where one would stand if they were waiting for a taxi and that Hamilton was slightly behind the

man. He saw the people talking and then he saw Constable Brand and the defendant fall to the ground. He said he didn't see anybody grab anybody or anything; it was just like someone had pulled a rug out from underneath them and they both went to the ground. He was sure that Constable Hamilton was struck to the left side of the head. He agreed it was possible that one of the punches hit her on the left elbow. He also agreed that it was possible one of the punches was heading in the direction of Constable Hamilton's head and that she moved and therefore it did not connect.

59. He also agreed that it was possible that the hand, which eventually became connected with Constable Hamilton's shirt, had got caught up and this caused the rip to her shirt. He was adamant that Constable Hamilton was punched in the head more than twice and that is why he reacted by running across the road; her safety was paramount at that stage. He said that he believed the man had grabbed Constable Hamilton on her shirt using his left hand, not his right hand.
60. He agreed that when he placed his knee in the man's back he did that forcefully. He said there was a lot of people yelling and he could not tell who was yelling. He did not recall anyone yelling, "get off me," or "let me go," or words about "my back."
61. The next witness to be called was Constable Dupont. He said he was on General Duties on 11 October 2003 and at approximately 11.30pm a male Caucasian was brought into the watch-house, carried by three police officers. He was placed on the ground where he was kicking and ranting. He was told to calm down. The man was swearing at police officers, using words such as cunt, that they were fucked and that he was going to sue the police.
62. He refused to be searched and the witness and two other officers had to restrain him on the ground for the search to occur. He refused to get to his feet after being requested to do so and continued swearing at the police officers. He was then dragged to one of the cells and he refused to get onto his feet.
63. He recalled that the man was complaining about his back – saying that he had a sore back. He agreed that there was a number of complaints about his back. The witness did half hourly checks up until 6 o'clock in the morning and during those

checks the man appeared to be asleep, lying on the floor. On some occasions he was calling out and swearing during the night. The man said that he couldn't sleep on the mattress because of his back. He lay on the floor for the majority of the night. That was the end of the prosecution case.

64. The defendant then gave evidence. He said that he lived at unit 1/23 Telegraph Terrace and that he was currently off work with a back problem. He said he had been off work for 2 years. He said he had been living at that address in October 2003. He said that on the night in question he had been drinking at the Pints Club with friends. There was a farewell party for a friend. He had drunk between a dozen to 15 beers and perhaps three or four spirits. He said he arrived at the Pints Club between 5:30 and quarter to 6 that evening and that he finished drinking approximately half past 10 – quarter to 11. He had not drunk any alcohol prior to getting to the Pints Club.
65. He was pretty drunk when he left the Pints Club. He said that because there were so many people out the front of the Pints Club waiting for a taxi he went straight to the nearest taxi rank, which was the Coles taxi rank on Bath Street.
66. He recalled at the roundabout on the corner of Parsons and Bath Street that a male police officer asked him where he was going. He recalled responding that he was going home. He said that the officer said if he saw him on the street in 5 minutes time he was going to lock him up. He does not recall responding to that statement.
67. He then walked directly to the taxi rank and was waiting there for a taxi. He could not recall saying to the police that he was going to buy some beer at Coles. He said that he did not remember talking to the lady who was collecting trolleys.
68. He said the next thing he remembered was the male officer standing in front of him and the female officer behind him and the male officer asking him what he was doing. He said that he repeated that he was going home and that he was waiting for a taxi. He said that the male officer said, "I thought I told you if I see you on the street again then I was going to lock you up." He said that he repeated that he was going home and that he could not walk home because he had a back

injury and he was waiting there for a taxi. He said that the male officer's reply was, "No you're not, you're coming with us."

69. He said that around the time of the incident he could walk between 10 and 15 minutes, which was about one block and that was as far as he could walk before he had to sit down and rest as a consequence of his back injury. He said he had walked from the Pints Club to the taxi rank, which was one block.
70. He said he could not recall leaning on the trolley rail at the taxi rank. He said that the most comfortable position for him is lying down, but if he cannot lay down it is either to sit or to lean against something to take the weight off his back. He said when the police said, "You're coming with us," he was shattered. He said he knew what was coming and all he wanted to do was to go home. He said he was not bothering anyone; he was just waiting for a taxi and all he wanted to do was go home to bed.
71. He said that the police officer did not give him any options as to how he could get home. He agreed that it was probably true that he did get angrier and angrier and that he was using swear words and saying not very nice things. He said he did not recall at any point giving the police officer his home address.
72. He said as soon as the police officer said that he was going with them, the female officer grabbed him on the left side and the male grabbed him on the right side. He said they proceeded to bend both his arms up as far as they could up his back and he started screaming out that his arms were hurting. He said he felt like his arms were going to be dislocated or broken. A struggle took place. The next thing he remembered was being thrown to the ground, face first on the concrete and being punched to the head four or five times, to the side of the head and to the back of the head. The last thing he remembered was a bloke dropping his full weight on his knee into his lower back.
73. He saw Doctor Sue Bain at Central Clinic two days after this incident. He said he had lumps and bumps on his head, about five of them, and he had some skin off his forehead where he had hit the concrete. He said he had difficulty moving his arms at the elbows from where they had been twisted and the doctor had arranged

for an X-ray on the elbows. Some ligament damage was isolated. He said his back had not been the same since the incident.

74. He said it was not very long between when the police officer approached him at the taxi rank and when the struggle started – he said it would have been within a couple of minutes. He said he could not recall having his fists clenched when he was speaking with the officers. He remembered hitting the concrete face first, and telling them that he had a back injury and to get off his back as he was in pain. He said that the male officer was punching him in the head and he was half unconscious by then.
75. The next thing he remembered was waking up in a cell the next morning. He caught a taxi home the next morning. He said he had no recollection of punching or trying to punch Officer Hamilton.
76. Mr Goldflam then tendered a report of Doctor Lewis, dated 10 July 2003 and that became exhibit D3. That report was for the limited purpose of establishing that the defendant had a pre-existing back injury. That report will not be used for any other purpose.
77. At the end of examination in chief the matter was adjourned from 28 to 30 January 2004.
78. At the commencement of proceedings on 30 January 2004 prosecutions made an application that I disqualify myself. That was as a result of some comments made prior to the medical report being tendered, which became D3. I declined to disqualify myself. I do not propose giving detailed reasons for that decision, unless requested to by the parties. My observations of the defendant throughout the proceedings, including from the opening moments on 28 January 2004, were that this defendant was in considerable pain as a result of some condition. It quickly became apparent that the condition related to his back. Throughout the proceedings he demonstrated considerable pain by moving in a very rigid fashion and demonstrating facial expressions consistent with pain. Any time he moved from a sitting to a standing position it was apparent that this was an extremely difficult move to make. He was uncomfortable in a seated position at all times.

These observations were consistent throughout the day of the hearing on 28 January 2004.

79. A hypothetical fair-minded observer must have observed all that I observed prior to assessing whether my comments would give rise to an apprehension of bias. I formed the view that such a person would not conclude that there was a reasonable apprehension of bias and declined the application made by Ms Burness.
80. The defendant was then cross-examined. The defendant said he had had approximately 12 to 15 beers on this night and several spirits. He agreed with the estimate of three to four spirits. He was drinking at the Pints Club, for approximately 5 hours. He thinks he was drinking bourbons and coke. The witness said he does not usually drink spirits but rather he usually drinks beer. He agreed he was pretty drunk. He agreed with the police officer's evidence that, for example, he was highly intoxicated (Officer Brand) and that he was seriously affected by alcohol (Hamilton).
81. He also agreed he had blank spots in his memory about that night. He agreed that he could recall speaking to Dianne Sargeant, the lady at Coles.
82. The defendant spoke about the limitations related to his back injury and said that his back was marginally better prior to the incident involving the police. He said that he could not stand upright at the time of the incident and that he was walking the same as he is today (meaning the day of the evidence). He said that he had difficulty getting into normal cars.
83. On the night in question he got a lift with friends to the Pints Club and he presumed he would get a lift home with someone. He decided he needed to go home before everyone had finished drinking and went to look for a taxi. He decided that he would be waiting a long time at the Pints Club for a taxi so he walked to the nearest taxi rank. He said that his back was not as bad as it is first thing in the morning and that alcohol is a very good anaesthetic. He then said he had great difficulty, even after he has had something to drink, just to walk that short distance. He had told Doctor Lewis sometime before this incident that he could not get in and out of taxis (D3). He agreed that on this occasion, with the

amount of alcohol he had consumed, he would have been able to get into a taxi. He denied that he was exaggerating his back injury.

84. He said that he could not recall what happened in the watch-house but that subsequent to the incident on 11 October 2003 his back injury was aggravated. He recalls waking up in the watch-house the next morning, and his back was very sore. He was sore in the head, the back, the arms, shoulders and elbows. He said that his back pain was not at its worse but it was quite painful. He said that he was still walking bent forward and he had difficulty bending. He agreed it was possible that he put on his shoes within a couple of minutes at the station. (He had given evidence previously that it took a long time to put his shoes on). He said that he thought he was still intoxicated the morning when he woke up in the watch-house. He said he could not really remember having his picture taken before he was bailed and he could not recall holding the photograph board. He agreed that alcohol eases the pain to a certain extent. He said that whilst there was not as much pain as there was prior to him starting drinking there was still a fair amount of pain in his back on this occasion.
85. He agreed that the night was a little bit patchy. He denied saying that he was going to buy beer. When it was put to him that he could not discount that possibility he said he had no reason to go and buy beer; firstly because he knew the bottle shop was shut and secondly because he had beer at home. Once again it was put to him that he could not discount the possibility that he had said he was going to get beer and he agreed with that proposition.
86. It was put to him that it was possible that the police officer did not threaten to lock him up if he was not off the street in 5 minutes. He said he heard that very clearly, and denied that it was possible that the police officer did not say that.
87. He conceded that he could have been argumentative with the police and also that he could have said to the police words to the effect that they were only picking on him because he was white and they should go and pick on Abo's. He said it was not possible the police officer had told him he should go home, to either walk or catch a taxi. He said he was absolutely sure the second time the police officer spoke to him the police officer said something along the lines of, "I thought I told

you if you were on the street in 5 minutes time I was going to lock you up.” He said that in his mind he was 100% sure he was given no other options.

88. He could not recall telling the police officer to “fuck off,” but said he could have said that. He agreed that he got quite loud and aggressive. He said as soon as both police officers took his arms behind his back there was a scuffle and he ended up on the ground. He said they dragged him to the ground, face first. He denied that he had dropped to the ground and said he was thrown to the ground by both police officers. He agreed that he could have said words to the effect of, “I’m going to make you work for it.” He said he did not recall kicking the male police officer in the legs and he did not recall kicking out his legs at all. He said it was possible that he kicked his legs out because he could have been struggling. He said he does not recall punching the female officer. He said it was possible that he punched her. He said he could not recall striking her at any time. He said that she could have got hit in the struggle. He does not remember seeing her shirt ripped. He said he could have said something about going to sue the police but he could not remember. He said from the point of being punched in the head he does not remember anything until the next morning, when he was let out at the police station. That was the end of cross-examination and there was no re-examination.
89. That was the evidence for the defence. Submissions were made by Mr Goldflam on the voir dire question and then substantive issues.
90. The defence submission was that on the basis of both fairness and public policy, the Court should exercise its discretion to exclude all evidence from the point of time when the police purported to take the defendant into custody, pursuant to s.128 of the Police Administration Act.
91. Section 128 of the Act reads:

“(1) Where a member has reasonable grounds for believing that a person is intoxicated with alcohol or a drug and that that person is in a public place or trespassing on private property the member may, without warrant, apprehend and take that person into custody.”
92. Section 127A of the Act defines “intoxicated” to mean:

“seriously affected apparently by alcohol or a drug.”

93. In this case there is no dispute that Mr Wallin was intoxicated within the meaning of s.127A of the Act. That was conceded in submissions.

94. Section 131 of the Act sets out:

“(1) The member of the Police Force in whose custody a person is held under this division may, at any time, without any further or other authority than this subsection, release that person or cause him to be released without his entering in to a recognizance or bail, into the care of a person who the member reasonably believes is a person capable of taking adequate care of that person.

(2) A person in custody shall not be released under subsection (1) into the care of another person if the person in custody objects to being released into the care of that person.”

95. This division of the Police Administration Act is commonly referred to as Protective Custody. As was noted in submissions the word “protection” is not mentioned in the sections in that division. However, some of the references, including the need to search and take any items that are likely to be used to cause harm to the person or another person, the fact that a person can be released into the “care” of another person and the fact that the period the person is to remain in custody is only so long as that person remains intoxicated, point to a conclusion that the powers in this division relate to the protection of the person in custody and as a consequence the protection of others.

96. The case of *Doolan v Edgington* 110 A Crim R 19 is of assistance on this point, when considering the way powers under s.128 are to be exercised and the purpose of the legislation. Former Chief Justice Martin stated at page 20:

“The word “protection” or the like is not used in the legislation, but there is power in the police under s.128 (3) (a) and (b) to search a person so taken into custody and, inter alia, to remove from the person any item that is likely to cause harm to himself. The power is not of

direct application in this case, but it does point to the concern of the legislature that an intoxicated person may cause harm to himself and to enable the police specifically to act to reduce that prospect.”

97. The apprehension of the person is without warrant and is instigated upon an exercise of discretion by a member of the Police Force. It is only a member of a Police Force (as defined in s.4 of the Act) who can apprehend and take a person into custody in these circumstances. I concur with Mr Goldflam’s submissions that the exercise of the discretion must be undertaken in a proper fashion, and for proper reasons.

98. In the case of The Queen v Anderson 113 CLR at 177 at page 189 the High Court states:

“It is a general principle of law, applied many times in this Court and not questioned by anyone in the present case, that a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office; ought to confine himself... The Courts, while claiming no authority in themselves to dictate the decision that ought to be made in the exercise of such a discretion in a given case, are yet in duty bound to declare invalid a purported exercise of the discretion where the proper limits have not been observed. Even then a Court does not direct that the discretion be exercised in a particular manner not expressly required by law, but confines itself to commanding the officer by writ of mandamus to perform his duty by exercising the discretion accordingly to law.”

99. In this case it is being submitted that the actions of officers Brand and Hamilton be declared invalid as they were not exercised properly.

100. The case of Chapin v Suttie 110 CLR at 321 at page 345 the High Court sets out that the discretion conferred in the legislation being considered in that case was not unfettered – that it was limited by the apparent policy and purpose of the Act.

I regard that statement as being relevant and persuasive in these circumstances. The discretion to be exercised pursuant to s.128 of The Police Administration Act is not an unfettered discretion. When considering the circumstances when the powers are to be used pursuant to s.128 we must consider the apparent policy and purpose of the legislation.

101. In this case the purpose of the legislation is primarily that of protection – protection of the individual and protection of other persons. It is not clear from the legislation as to whether either of these purposes prevails over the other. The question of whether other persons are at risk and need protection from the intoxicated person is linked to the state of intoxication of the person. It is to the intoxicated person whom the police directs their attention and the police make an assessment as to that person’s level of intoxication and the risk of harm (if any) to themselves and or other persons, and the need (if any) for protection.
102. I was also referred to the case of *Innes v Weate* 1984 Tas R 14 where Cosgrove J from the Supreme Court of Tasmania states at page 19:

“A constable on duty is representative of the community, at large, and his duty is to the community, not to any one citizen. The courts, while recognising that, as such a representative, he is invested with a wide discretion, have never been slow to restrain his actions in the interests of liberty, and confine the exercise of the discretion to intervene to cases where such intervention is properly called for and reasonably carried out. The legislature also has carefully scrutinised the authority of constables, sometimes extending it, sometimes narrowing it. The duty of constables arises from the law and is circumscribed but it.”

And further states at page 21:

“It is important that a constable should have a wide discretion to act swiftly and decisively: it is equally important that the exercise of that discretion should be subject to scrutiny and control so that he should not too easily or officiously clothe himself with the powers of the State and by so doing affect the rights and duties of other citizens.”

I adopt the sentiments set out in Innes v Weate.

103. The powers the police have pursuant to s.128 of the Police Administration Act are exercised in circumstances which can involve volatile people, usually greatly affected by alcohol or a drug and volatile situations. The initial assessment of the person may exclude the possibility that they are intoxicated. I would regard the situation as likely to be fluid (except in the most extreme cases where a person is apparently unconscious due to their level of intoxication). A police officer is necessarily empowered to assess the situation to ascertain if there are grounds to place the person into custody pursuant to s.128 of the Act.
104. It was submitted that in this case the exercise of a discretion was not proper or reasonable; that there was an improper exercise of a discretion in this case.
105. The case of Bunning v Cross 141 CLR at 54 was referred to. Commenting upon the case of Ireland their Honours stated at page 74:

“What Ireland involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to in force the law. This being the aim of the discretionary process called for by Ireland it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader question of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.”

106. In the case of DPP v Carr [2002] NSWSC 194 Acting Justice Smart stated at paragraph 27 that he agreed with the submission made by counsel that there was no need to define the term improper, as what will be an improper exercise of power will vary from case to case and will be determined by reference to the relevant facts and circumstances of each case. He cited with approval the case of

Customs and Excise Commissioners [1969] 1 WLR 1163 at 1171 where the Court stated that their task was:

“... is to look at the mischief at which the Act is directed and then, in that light, to consider whether as a matter of common sense and every day usage the known, proved or admitted or properly inferred facts of the particular case bring the case within the ordinary meaning of the words used by Parliament.”

107. That approach appears to be appropriate when considering s.128 of the Police Administration Act.

108. The case of Carr also refers to the decision of Justice Bleby in *Robinett v Police* [2000] SASC 405. When considering the question of whether an exercise of discretion by police was improper, three questions were said to arise for consideration:

“The first is whether the conduct is of a type that could give rise to the exercise of the public policy discretion. Second is whether the conduct caused or contributed to the commission of the offence. If the answer is ‘yes’ to both those questions, it must then be asked whether it called for the exercise of the discretion to exclude the evidence.”

109. I reiterate that the question of protection is to be given the upmost consideration when an exercise of discretion pursuant to s.128 is being considered. An exercise of power pursuant to s.128 of the Act involves an interference with a person’s liberty and a police officer has no power save the power in s.128 of the Act to take a person, without warrant, into custody in these circumstances. (A person can of course be arrested and placed into custody upon suspicion of a commission of an offence). It is also clear from case law that a person can move from being in custody pursuant to s.128 of the Police Administration Act, then be arrested upon suspicion of a commission of an offence and with their status moving from a person in protective custody to a person under arrest. (*Japaljarri v Cooke* 19 NTR 19).

110. Once in custody, police can hand the person to the care of another person. The fact that they are taken into custody pursuant to s.128 of the Act does not mean that they will necessarily stay at the Police Watch house. That is a separate decision to be made, though the decision arises from the fact of being taken into custody pursuant to s.128 of the Act.
111. The exercise of discretion by the police officers to take the defendant into protective custody must now be considered as to whether it was a proper exercise of their discretion, in light of all the circumstances in the case.
112. I will first make some observation as to the witnesses evidence and their creditability.
113. The defendant's memory of the night is severely impaired by his alcohol consumption. I find that the fact that he cannot remember talking Kay Sargeant, the Coles lady and a person whom he knew, is more than ample evidence to indicate that his memory of the night is deficient. He agreed that he probably used the offensive and crude language the police said he used. His evidence can only be given limited weight due to his state of intoxication.
114. The defendant's account is a selective and he has a spasmodic recollection of the incident. For example he only recalls some parts of what the police say and at no stage does he recall in detail his responses. He has no recollection whatsoever of speaking to the Coles lady (that is someone he knows) yet he is able to recall conversations he had with the police after he the conversations he had with the lady as well as conversations prior to the conversation with the lady. It perhaps could be argued that interactions with a police officer are likely to be more subject to a clear recollection than with a casual acquaintance. I find that he was not a credible witness.
115. I find that Officer Brand, whilst somewhat imprecise in some of his answers, was a witness who was attempting to do his best and that he was an honest and reliable witness. I find that Officer Hamilton was an honest and reliable witness. Her account is corroborative of the account of Officers Brand and Curtiss.

116. A primary submission of defence with respect to the exclusion of the evidence related to statements made by Officer Brand on the question of when the decision was made as to whether this defendant would be taken into protective custody. In particular it was noted that, on one reading of the evidence, it could be said that there are various versions on this question. It was submitted that in the first statutory declaration it was stated that the decision was not made until after the defendant had been spoken to at the taxi rank, and in the second statutory declaration the decision was made at the roundabout. It was submitted that the two statutory declarations are irreconcilable. In evidence the witness said that it was clear that something needed to be done and that the man needed to go home and later he had said that the man needed to go into protective custody or some other action needed to be taken. Officer Hamilton's evidence is that there was no doubt that the defendant was being considered for protective custody and that explained going to see if there was another vehicle available. That occurred immediately after observing and then speaking to the defendant at the roundabout, but before speaking to him at the taxi rank. So while not ruling out the possibility that he may not be taken into protective custody, they were seeking another vehicle to effect an apprehension.
117. I am not in agreement with the submissions made by defence on this point. The submission by the defence does not take account of the possibility that there may have been some halfway point reached upon discussions between the police and the defendant. The evidence of officer Brand was somewhat imprecise on this point – at times he failed to distinguish between protective custody as a power and the question whether someone would be kept in police custody (as opposed to being placed into someone else's care) whilst in protective custody. But such failure does not inevitably lead to a finding that the actions of the officers on that night were improper. I am of the view that there was a slow but sure transition from concern for the welfare of the defendant to concern for the risk he may play to other persons whilst intoxicated should he remain in public place in particular as a result of his rising levels of aggression. I find that at all times the police officers intended to return to the defendant and that they went to the police station to ascertain whether they could find another vehicle. I find that it was not solely or even primarily as a result of seeing the defendant speaking to the woman at the

taxi rank that they returned to speak to the defendant, but that they intended returning to him after they sought to locate another vehicle.

118. I find that they proposed taking some action with respect to the defendant as a result of his state of intoxication. The first approach they made (at the roundabout) confirmed their initial observations that he was highly intoxicated. They then went to find another vehicle and to use the words of Constable Hamilton went to see “where he was at”. I find that the police officers were acting in the interests of the safety and protection of the defendant when they spoke to him at the roundabout and when they spoke to him at the taxi rank. I see nothing improper in their actions on either occasion.
119. The powers they have pursuant to s.128 of the Police Administration Act can also be seen to be responsibilities which are placed upon police officers while they are on duty. Once they had ascertained that the defendant was severely intoxicated and wandering the streets at 11pm at night, they could well have been criticised if they did not follow up their initial contact with him and seek to ensure that he was either taken to a place of safety or on his way home. The evidence of Constable Hamilton was that the defendant just seemed to want to argue. The evidence of both officers is that his levels of aggression increased at the taxi rank, as evidenced by him clenching his fists, being argumentative, increasing the volume of his voice, and using the offensive and provocative language.
120. I accept that Officer Brand was seeking to ensure that this defendant was not vulnerable to attack and in particular I note he was concerned that this man may be walking past the Billy Goat Hill area which he identified as a hot spot. I do not accept the defence submission that Officer Brand made the decision to take the man into protective custody because of the manner the officer was being spoken to. It is clear that the police had concerns about his level of intoxication and immediately made inquiries at the roundabout. The initial concern was for the protection and safety of the defendant. As his behaviour escalated and the risk that he may pose to other persons increased, their approach altered in that they then were concerned for the safety of other persons, in addition to concerns about the safety of the defendant.

121. I find that in all the circumstances of the case that, at all times, the police were concerned for the safety and protection of the defendant. I accept that the situation was a fluid situation and warranting of intervention by the police. I stated earlier s.128 of the Police Administration Act empowers police to undertake certain actions and, in my view, the section places a responsibility upon police to act should they ascertain that a person might be so affected by alcohol that they warrant protection pursuant to s.128 of the Act.
122. I find in the circumstances of this case that the defendant was given ample opportunity to make his way home or have a sensible dialogue with the police on the question of how he was to get home or what his options were. I reject the defendant's evidence that he was not given any options and that he was told that if he was not off the streets in five minutes he would be locked up. I reject the defendant's evidence on these points based upon the findings of credit as set out above and the gaps in the account he has given.
123. The officers did not apprehend the defendant immediately. I find that they did not exercise their power improperly. They gave the defendant ample opportunity to seek alternatives other than to be taken into protective custody.
124. With respect to the question of taking a person into custody pursuant to s.128 of the Act I find that there is two stage process: first the person is taken into the physical custody of a police officer pursuant to s.128 of the Act and secondly a decision is made as to where the person will be located while they are held pursuant to s.128 of the Act. The act of taking a person into custody does not necessarily mean that they will held at the watch house or police station during the relevant period.
125. I find that the defendant did not cooperate with the inquires that the police were making and that, probably due to his state of intoxication, he became aggressive and hostile towards the police. I find that it was open for the police to conclude that he may well be aggressive and hostile towards other persons should he not be taken into protective custody. I accept that there were no persons in the immediate vicinity of the defendant however it was not open to the police to conclude that, because there was no persons in the immediate vicinity at the precise time that

they recognised that this defendant was becoming aggressive, that no other persons would be potentially at risk should they leave the defendant at the taxi rank (a public place) in the state he was in.

126. As I have previously stated the police must make a decision based upon the facts and circumstances as they find them. The fact that this defendant so quickly become aggressive and gave every indication of his aggression increasing even further, for example by the clenching of his fists and being argumentative, meant that the police were not only empowered to act but were required to act.
127. It could be argued that it was the intervention by the police that led to this defendant's aggression levels increasing when they did. The police did not speak to him until they have driven around the roundabout and confirmed their original observation that he was heavily intoxicated. They then approached him at the roundabout. The answers they were given to their questions and their observations of him were such as to lead them to believe that this person was at risk. Their observations of him confirmed the level of intoxication they had originally noted. Had the defendant not been as intoxicated as he was, it is likely that he would have been able to have a rational discussion with the police without his aggression levels escalating as quickly, and to the extent, they did, when the police were speaking to him at the taxi rank.
128. It is my view it was reasonable for the police officers to conclude that this defendant was in need of protection pursuant to s.128 of the Police Administration Act. It is also my view that the police involved did form the opinion that this person was potentially subject to s.128 of the Act and that they acted properly in assessing him and then speaking to him once again at the taxi rank. This did not bind them to take him into custody; it was not a decision that had to be carried into effect irrespective of later conversations or interactions with the defendant.
129. The police did not take the defendant straight into protective custody as they approached him at the taxi rank. If they had made the statement that the defendant alleged they had made, why did they not take him immediately to the police vehicle? It is my finding that once they approached him at the taxi rank they gave

him ample opportunity to resolve the matter without them taking him into protective custody, or if they did take him into protective custody, for him to be given the opportunity of going home or be taken to DASA.

130. All evidence is consistent on the point that the defendant was so intoxicated that he was within the definition of intoxication which is in s.127 A of the Police Administration Act.
131. I find that the police were not acting outside of their powers to speak to him to ascertain whether he was within the definition of intoxication in the Act. I find that they were not acting outside their powers to speak to him on the second occasion at the taxi rank.
132. It is my finding that there was no decision made as to where the defendant would be taken pursuant to a protective custody apprehension at the time they initially spoke to him at the taxi rank. It is my finding that it was not until his behaviour became much worse and that his levels of aggression had risen, such that he himself had limited his own options, that the police were then bound to make a decision to take him to the watch house. Any other option would have placed other persons in potential danger. This was the decision made by Officer Brand at the taxi rank. There was nothing improper about the decision.
133. I find that the police were not outside their powers to decide to take this defendant into protective custody pursuant to s.128 of the Police Administration Act. Then there was a further decision as where the defendant would be kept whilst he was in protective custody. I find that at all times prior to them taking the defendant by each arm they were acting properly and within their powers. I find that they acted appropriately in deciding that, as he was becoming increasingly aggressive, the watch house was the most appropriate option for him once he was in protective custody. I find that whilst they had made a decision that he was to be placed into protective custody prior to arriving at the taxi rank, there was no decision made as to where he would be held or where he would be going prior to the increase in his aggression levels.
134. I find that the apprehension was lawful and proper in all circumstances of the case and that the evidence challenged on the voir dire is admissible. Having made the

above findings, there are no grounds to exclude the evidence based upon matters of public policy.

135. The evidence under challenge being admitted, it is now necessary to consider the substantive offences. I rely upon my findings on the voir dire on questions of credit and factual matters (where relevant) when considering the offences.
136. The prosecution has the onus of proving each of the elements of each of the offences beyond reasonable doubt. I find that at all time the police officers were acting in the execution of their duties. I find that the account given by Officers Brand and Hamilton as to the blows inflicted upon them as being a credible and consistent accounts and I accept their evidence. I reject the defendant's suggestion that he accidentally reached out and may have scratched the chest area of Officer Hamilton. I find that at all times the defendant was acting in an intentional and deliberate way to inflict blows upon Officer Hamilton.
137. Officer Hamilton gave evidence that she had released the defendant with one hand and that she was holding him with one hand so she could open the rear door of the car when the incident escalated. The witness said the defendant punched her in the other arm, in an effort, she believed, for her to let go of him. I find that such action on the part of the defendant was deliberate and intentional and indicative of the fact that the defendant was acting in an intentional way to seek to get out of police custody or at the very least make their job more difficult. This is also consistent with the evidence of the police officers that the defendant said he was going to make them work for it, a comment which the defendant agreed he may have said. I find that the defendant concentrated his attack upon Officer Hamilton. Almost simultaneously he acted in a way which lead to Officer Brand being pulled to the ground. I reject the defendant's version that he was thrown face first to the ground. I find it was the defendant's own actions which lead him to end up on the ground.
138. Shortly after he was apprehended the defendant struggled violently.
139. The case of *Jabaltjari v McKinlay* 18 NTR 8 at page 11 Toohey J states:

“There is long standing authority that a person unlawfully apprehended by a police officer is justified in resisting and endeavouring to escape from that officer, provided he does not use undue violence.”

140. At the time the defendant was taken into custody it is likely that he was of the view that he should not have been apprehended by the police. The comments he made with respect to Aboriginal people make it very clear that he saw the powers of the police as not applying to himself and his particular circumstances. There was a real possibility that he believed he was being unlawfully apprehended and further comments that he made, such as that the police would be sued, indicate that his belief was along those lines.
141. I am of the view that the defendant did use undue violence in seeking to challenge the apprehension made by the police in these circumstances. Had he resisted without using undue violence I would have considered whether his resistance amounted to justification.
142. The witness Curtiss initially was not concerned when he saw the police officers speaking to the Caucasian male and indeed did not appear concerned when the male and Officer Brand went to the ground. He was proposing to go home and even the falling over of the Caucasian male and Brand did not cause him to move across the road. When he saw Officer Hamilton being assaulted he immediately came to her assistance. That reaction of Officer Curtis corroborates the evidence of Officers Hamilton and Brand that Officer Hamilton was being subjected to a sustained and serious assault. It is not a response consistent with witnessing someone who is flaying about and acting in a drunk and disorderly manner. I don't think I would be doing Officer Curtiss a disservice to suggest that he would have continued on his way home in those circumstances.
143. There was no suggestion that it was impossible for the defendant to carry out the acts which constituted the alleged assault and for resistance to the police. He has a serious back injury and I do find that at the relevant time he had a serious back injury. Nevertheless there is no suggestion that his back injury mean he could not carry out these acts. He gave evidence that the pain he was in restricted his movements. He also gave evidence that when he was intoxicated he was less

restricted by pain and accordingly his movements were not as restricted as when he was sober. And in this case he was heavily intoxicated.

144. I find that prosecution has proven Count 1 beyond reasonable doubt and there was not authorisation justification or excuse for the acts of the defendant. The evidence of the defendant does not cause me to have a reasonable doubt, as to the findings I have made. I find that Count 1 is made out. The assault upon Officer Hamilton consisted of numerous blows to the chest and head and commenced with a punch to the elbow. While the raking at her chest area was no doubt unpleasant, the blows to the head were the worst serious aspect of the assault upon Officer Hamilton. The assault upon Officer Hamilton was sustained. The acts constituting the assaults upon this officer were the same acts relied upon to make out the majority of the resist police charge.
145. I find Count 2 is not made out. I find that the 2 blows inflicted upon Constable Brand were made in the course of the defendant's struggle and I can see no evidence that they were intended to connect with anyone but rather were acts of resisting police. I find that an unlawful assault was not committed upon Officer Brand. Officer Brand was acting in the course of his duties as the blows connected - he was leaning over the defendant on the ground trying to get him up, as the blows connected with him. The defendant's attention was directed at Officer Hamilton at this time and he was assaulting her. I find the defendant not guilty of Count 2.
146. In light of the above findings, I find that the defendant resisted police (namely Officer Brand) in the execution of his duties and that such resistance amounted to deliberately falling to the ground and inflicting 2 blows to his upper body. The defendant's evidence does not cause me to have a reasonable doubt with respect to Count 3. I find the defendant guilty of Count 3. The blows to Officer Hamilton are not part of the resist arrest. I find the evidence of the police witnesses sufficient to find the defendant guilty of Count 4. Once again, the defendant's evidence does not cause me to have a reasonable doubt as to Count 4.

Dated this 14th day of April 2004.

Melanie Little
STIPENDIARY MAGISTRATE