CITATION:	*Malogorski v Westrupp* [2006] NTMC 037
PARTIES:	Mark Anthony Malogorski
	v
	Te Tuhi Puru Westrupp
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Court of Summary Jurisdiction
FILE NO(s):	20502712
DELIVERED ON:	29 May 2006
DELIVERED AT:	DARWIN
HEARING DATE(s):	5 May 2006
DECISION OF:	D LOADMAN, SM

CATCHWORDS:

Latent duplicity in charges – failure/refusal by Prosecution to make election – contention by Defence after close of defendant's case a charge should be quashed on the basis of the exhibition of latent duplicity – alternative finding on the facts submissions

REPRESENTATION:

Counsel:

Plaintiff:	Ms Kemp
Defendant:	Mr Rowbottom

Solicitors:

Plaintiff:	Summary Prosections
Defendant:	Withnalls

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 037
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IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20502712

BETWEEN:

MARK ANTHONY MALOGORSKI
Plaintiff

AND:

TE TUHI PURU WESTUPP
Defendant

DECISION

(Delivered 29 May 2006)

Mr David LOADMAN SM:

1. At the commencement of this matter, Mr Rowbottom required the Prosecution in opening the case to specify what overt act or acts was or were alleged to constitute the charge of assault which specified in the information that the (Defendant)

On the 5 August 2004

At Darwin in the Northern Territory of Australia.

1. Unlawfully assaulted John Everard Batton.

And that THE SAID UNLAWFUL ASSAULT involved the following circumstances namely:

i. That the said John Everard Batton suffered bodily harm contrary to section 188(2)(a) of the Criminal Code.

ii. The Prosecutor particularised as requested, according to the Court notes, as follows Puru; (the second given name of the Defendant) hit the victim from behind with an open palm in Dolly O'Reilly's Pub ("Dolly O'Reilly's) and knocked him to the ground. Puru punched him while he was on the ground. The victim then left Dolly O'Reilly's and went down an alley way in company of a security guard walking backwards. He tripped and fell on the ground. The victim then got to his feet and moved away being pursued by the Defendant constantly calling out 'you want a fucking go'. The Prosecutor alleged that the above incident, the last of which in evidence was somewhat expanded on, was a continuing incident and was governed by the provisions of section 310 of the Criminal Code of the Northern Territory. Mr Rowbottom objected to the trial proceeding on the charge based on those overt acts on the basis that the opening disclosed the existence of latent duplicity. Although there has been no transcript ordered it is the Court's recollection that in overruling the objection the Court indicated that there may have to be an election at the end of the Prosecution case, but that the objection at that point in time was overruled.

iii. Although the evidence is confused and or contradictory in some respects the details of that evidence will be dealt with separately. Taking for the purposes of this aspect of the decision, the evidence of the alleged victim as to the assault at face value the Prosecution case involves the following allegations of overt acts said to comprise the assault the subject of the charge: There was a slap to the side of the alleged victim's head which caused him to fall to the floor. While he was prostrate the slap having been to the right side of his jaw, punches were being thrown by the Defendant one of which landed above an eye which may have been the left or right eye the note unfortunately is not clear, and the top right hand side of his head. At that stage the Defendant's demeanour was described as that of a raging bull or furious.

The Defendant was being restrained from further blows being thrown and after the intervention of others the alleged victim removed himself from Dolly O'Reilly's and exited through the front swing doors, his legs he said being like jelly.

Outside Dolly O'Reilly's, in an area described as the beer garden, the victim said that he heard a noise and he was trying to walk to his left past the public bar when he heard clearly the words "you wanna fucking go". Whilst protesting that he had done nothing to the Defendant, the Defendant was beckoning with both hands as if to invite a fight. His friends, that is the Defendant's friends, were trying to restrain him when he broke free of that group of friends and he came at the victim "and he punched me to the lower jaw and neck and I fell into the garden and he tried to assault me there while I was flat on my back." Other people tried to restrain the Defendant and drag him off me. The alleged victim then said he jumped to his feet to try and run around the corner he was seeing stars with legs like jelly when he was near the corner the Defendant came at him again in the same manner as before and he the victim conducted himself in the same manner as before, with his hands raised open palms extended, saying "I've fucking done nothing to you" back peddling while the Defendant continued to invite him to have a go. Eventually said the victim he departed.

iv. At the end of the Prosecution case Mr Rowbottom renewed his objection on the same basis, as at the opening and he referred to the *Queen v Xu Dong Chen* an unauthorised report in the Court of Appeal Supreme Court of Queensland C.A. 129 1997 ("Chen") and to the decision also in an unauthorised report of *McKinnon v the Queen* [2004] NTMC A8 ("McKinnon"). Relying upon these authorities Mr Rowbottom alleged that the Prosecution was bound to make an election as to what overt act

constituted the alleged act said to comprise the relevant overt act or acts forming the basis of the charge. The Prosecution denied the need to make an election and again referred to section 310 of the Criminal Code as justification for the formulation of the charge in the manner she had outlined to the court in the opening. She said that the evidence demonstrated that there was shown that the alleged overt acts were appropriately charged by virtue of section 310 of the Criminal Code as constituting or comprising a single purpose, or disjunctively, overt physical acts which occurred at about the same time.

v. The Court upheld that argument of the Prosecutor and obviously correspondingly did not uphold the submission of Mr Rowbottom that there had to be an election. The Defendant then went into evidence and at the conclusion of his evidence, resolutely Mr Rowbottom contended that even after the closure of the Defendant's case it was still the position in law that the Court must compel the Prosecution to make an election there being room to apply section 34 of the Criminal Code (Provocation) to the incident inside Dolly O'Reilly's and whether or not provocation extended to the incident outside in the beer garden, to consider, in relation to the beer garden events, whether or not there had been consent to a fight or further as to the application of the provisions of section 32 of the Criminal Code relating to a belief as to there being an invitation to fight, extended either by words or conduct or both on the part of the alleged victim. Mr Rowbottom handed to the Court further authorities in relation to this thrice raised submission they being the decision of the Supreme Court of Victoria, Court of Appeal *The Queen v Gregory Charles Suckling* 77 1998 ("Suckling") and the South Australian decision of the Supreme Court of SA *Stratis v Police* SCGRG-98-907 judgment number S6886 [1998] SASC 6886 (7 October 1998). ("Stratis")

vi. In Chen the Defendant had been charged with six assaults on two different police officers Quig a female and Smith a male. No particulars were given as to what overt act constituted charges the before the Court which involved a trial by jury. On the basis there were different defences open to some of alleged overt acts from the others, namely self defence and provocation, it was impossible to say what the jury had found proven, although a continuing course of physical acts so close in time that they could be viewed as one composite activity might have been unobjectionable in the circumstances of that case. Blatant duplicity was exposed said the court which left the appellant without knowledge of the particular act alleged as the foundation of the relevant charge which the Court found resulted in a substantial miscarriage of justice. These matters were not even raised at the trial, but only raised on appeal and the Court opined such failure was not fatal and concluded that the appropriate action was to quash both convictions.

vii. Next in the matter of *Suckling* the relevant charge, charged the Defendant with the destruction of a window, a telephone and an answering machine. The jury had been directed by the presiding judge, from whose decision the appeal had been lodged, that if the jury found any one of the items was destroyed it was incumbent on them to find the Defendant guilty. That raised, said the full court, the proposition that different jurors may have reached different conclusions and no one could know whether there had been unanimity or not. The Court visited a decision of *R v Trotter* (1982) 7 A. Crim R. 8 ("Trotter") This matter involved an indecent assault on a young boy which charged only one assault. The evidence disclosed an indecent assault in a bedroom and an earlier assault after a bath had been taken by the boy. The court held the prosecution should have been required to specify which assault it was that was the subject of the charge and because of the failure to do

so it was impossible to know if there was unanimity on the part of the jury.

viii. Phillips CJ in his judgment in Suckling held that the property itemised was the material allegation rather than particulars of the property intentionally damaged and although somewhat unclear his Honour found that counsel for the prosecution was conceding the jury were entitled to treat the damage as involving two separate acts namely an intentional act involving the window and the other involving damage caused unintentionally during a struggle, there being a difference in location of the two instances of damage and a time lapse, although probably not great, between the two instances. The Chief Justice applied "Trotter" and held that the conviction on the relevant charge was "uncertain producing a miscarriage of justice". He then acceded to further submissions raised by the Applicant's counsel and on the basis of latent duplicity ordered that the count itself should be quashed. The latter order was described by Kirby J "as the remedy which the law now provides for a case of established duplicity". Other authorities are then cited and although he could not preclude the bringing of fresh proceedings he expressed an opinion that further proceedings against the appellant were undesirable.

ix. In "Stratis" which coincidentally was a fracas in a nightclub, there was confused evidence, but it entailed one Dimoglides being struck in the chest and being "floored", getting up and being hit with a clenched fist and then floored then getting up and being hit again and floored a third time. Then he was taken away physically by friends and on the way to a toilet was struck again. A lack of duplicity simpliciter on the face of the information was lacking so conceded counsel for the appellant. He alleged however that the question was one of "latent duplicity". There was reference to *Director of Public Prosecutions v Merriman* [1973] AC

584 607 where Lord Diplock said "the rule against duplicity has always been applied in the practical rather than a strictly analytical way for the purpose of determining what constitutes one offence. Where a number acts (sic) of a similar nature committed by one or more defendants were connected with one another, in the time and place of there commission or by their common purpose, in such a way that they could fairly be regarded as performing part of the same transaction or criminal enterprise it was the practice, as early as the 18th century, to charge them in a single count of indictment." His Honour Mr Justice Wicks held that duplicity is " a matter of form and not of evidence, although in some cases duplicity may be latent in that it is not apparent until evidence has been lead…" There is then some further exposition of the common law.

x. In relation to those events which occurred prior to Mr Dimoglides being uplifted and taken to the toilet his Honour said it would be far too technical to require the prosecution to analyse what occurred blow by blow and to treat each blow as a separate count. On the other hand he held the blow to Dimoglides' head while being escorted to the toilet was sufficiently removed from the other act or acts to be regarded as a separate incident and to be the subject of a separate count in the information. Mr Rowbottom's submissions are that the magistrate who dealt with the matter at first instance had acted in like manner as the court has in this particular matter.

xi. In Stratis because of the two distinct incidents referred to above his Honour finally concluded "I am satisfied that this is an instance of latent duplicity" and on that account, the conviction could not stand. Although his Honour concluded there was sufficient evidence to justify a new trial he declined to so order saying he allowed the appeal, quashed the conviction and dismissed the charge contrarily to the

decision in *Suckling* to also quash the charge (the count) itself. It must be noted however that in none of the jurisdictions in respect of the cases referred to was there a provision analogous to section 310 of the Criminal Code of the Northern Territory.

xii. Whilst it is interesting to recount the pedantic utterings of those who wish to see the death of the common law which has stood in such good stead in the English legal system over centuries, it is always interesting to note that so many aspects of the codification of criminal and other laws really are nothing more than the codification of the common law. That in this Court's perception is exemplified by section 310 of the Criminal Code. Section 310 of the Criminal Code provides as follows;

310. Circumstances where more than one offence may be charged as one offence

(1) In an indictment against a person for an assault the accused person may be charged and proceeded against notwithstanding that such assault is alleged to be constituted by a number of assaults provided they were committed on the same person in the prosecution of a single purpose or at about the same time.

(2) In an indictment against a person for stealing property where the property was stolen over a period of time the accused person may be charged and proceeded against for stealing the property over the period of time, notwithstanding that different acts of stealing took place at different times and it is not possible to identify in all instances each particular act of stealing.

xiii. In McKinnon the Court of Criminal Appeal comprised Martin (R) CJ, Angel and Mildren JJ. The Chief Justice delivered a decision with which the other judges concurred. In McKinnon two "bouncers" threw one Wells to the ground and cuffed him, one grabbed Wells in a choke

hold and lifted him onto a bench. While sitting on the bench limp one of the "bouncers" grabbed him by the throat and threw him to the ground head first onto the pavement. Then a bouncer put Wells back in his seat. When the police arrived one of the "bouncers" in a choke hold lifted Wells up and slammed him down onto the bench.

The Crown, said his Honour, presented the case to the jury with "considerable ambiguity". By reference to the opening and closing addresses for the Crown said his Honour, there was a demonstration that the Crown "presented the entire incident as one continuing incident in which the appellant went too far and from which the jury could pick any one of a number of particular acts as amounting to either or both deprivation of liberty and assault." The Crown had provided particulars of the "overt acts" constituting the offences which were not before the jury. The last alleged overt act in the presence of the police officers was not included in the particulars provided by the Crown. On that basis Counsel for the appellant objected to the evidence of the two police officers being read to the jury which they had requested be read to them.

xiv. At the time the prosecutor admitted that although the incident of banging Wells back into his seat was not addressed in the Crown particulars that event was part of the incident "where he grabbed him behind by the throat, lifted him up and held him there for a period of time". He protested that it was in essence in its terms so close to the particulars provided that it didn't matter. It was slightly different and not a new item. Contrarily, Counsel for the appellant maintained that the Crown case was concerned with a transaction that had ended prior to the arrival of the police and what occurred after their arrival was not part of the charge. The trial judge determined the evidence of the police officers should be read without qualification to the jury and that took

place. His Honour opined "it is a fundamental requirement of a fair trial that an accused be fully appraised of the nature of the case advanced against the accused, including the act or acts which is said by the Crown to constitute the offence as charged and that the jury should have been directed that the incident alleged to have taken place in the presence of the police officers was only part of the total context in which the events had occurred."

xv. Discretely however in respect of the third ground of appeal his Honour dealt with duplicity which is the relevant matter for the purposes of this Court's decision. His Honour said there was little doubt that the Crown case was "beset with significant and undesirable ambiguity." His Honour contrasted the matter before the Court with a situation where, "the Crown relies upon a few punches thrown within a short space of time as the basis of an assault. The applications of force of the appellant to Mr Wells over the period of 15 to 20 minutes he said involved different legal considerations at different stages of the incident. This Court is of course in one sense in an anomalous position because it comprises fictionally both the adjudicator on the law being the magistrate and the jury also being the same magistrate. That would preclude in this Court's finding those bases of upholding the appeal which relate to inadequate or improper directions to the jury in McKinnon's case.

xvi. However his Honour discretely concerned himself with the application of section 310, stating the obvious, that it was designed to overcome in "inappropriate circumstances, the practical difficulties associated with the strict application of the rule against duplicity". The events described were said to have taken place not only in two different segments but over a period of 15 to 20 minutes nevertheless his Honour concluded "it can reasonably be described as one continuous incident".

On that last mentioned basis the complaint, based on the proposition that the charge was bad for duplicity said his Honour could not be sustained. Although there is no exposition of precisely what the "latent ambiguity" was that was ultimately the basis for the Court's decision in respect of this ground of appeal and not withstanding the fact that his Honour had found the charge was not bad for duplicity he continued to say "however, against the background to which I have referred to, (including the way in which the case was left to the jury) there is considerable force in the view that this is a case in which there was such latent ambiguity that the appellant was deprived of a fair trial": (His Honour then cites two authorities which for the purposes of this decision are irrelevant).

xvii. His Honour and the concurring Judges did not make the same orders as in Suckling but concluded that a miscarriage of justice had occurred, declined to order a retrial and enter a verdict of acquittal. This Court is not clear as whether such a power reposes in it. However it must be the case that there reposes in this Court those powers referred to in Suckling. Although discretely this particular aspect of the matter has not been ventilated with Counsel it is difficult for the Court to conceive how any prejudice could be suffered by following Suckling. On the basis that there were two discrete events which occurred at separate moments in time separated by at least 5 minutes, 2 separate locations the potential or actual application of different defences and sections of the Code, by analogy specifically with the decision in McKinnon, this Court concludes that a miscarriage of justice has occurred. Of course in this matter there has not been any finding of guilt or conviction. The Court concludes that the count itself must be quashed on the grounds of the defect of latent duplicity in accordance with the remedy described by Kirby J A, as he now is, in the decision of *Suckling*.

xviii. However lest this Court is not vested with these powers and to ensure or at least endeavour to ensure, that there is no subsequent trial of the Defendant on the same charge the Court will deal with an analysis of the evidence and make it clear as to what its finding would have been absent the upholding of the objection for latent duplicity advanced by Mr Rowbottom. Whilst that may not be legally efficacious it hopefully will preclude any further prosecution of the matter and have it laid to rest.

At the same time the Court will not descend to the level of detail either in the analysis of the evidence or the law which it would have done, but for the decision in respect of the upholding of the objection.

(a) The Meeting between the Defendant and the Victim

2. Openbrouw and Williams are at the bar and see the victim introduce himself to the Defendant. He said to the Defendant that he had been going out with Sam (the Defendant's former partner Samantha the mother of his two children) and had become acquainted with the children and said positive things about those boys. He said after the discussion he gave him a friendly tap on the shoulder and shook hands saying as he walked away "have a good night, mate". In cross examination and talking about the moment in time after the above meeting he said Kouka and himself were standing at the bar talking. He was talking specifically about having dated Samantha and he said to Kouka, "The Defendant shouldn't have a problem about that." Strangely he then said if he did, the Defendant should meet him face to face and he would not in such an event back down. He denied in Court that he had said to Kouka anything in respect of the Defendant's not discharging his duties as a father to his children and as to the potential threat by the Defendant, "if he did threaten me I said I would not back down and why should I". Openbrouw gave no evidence in relation to the meeting.

3. Kouka said that he introduced Batton to the Defendant that he couldn't hear the subsequent exchange of words. Batton he said then joined him at the bar and he said to Kouka amongst other things that the Defendant was not a good father but had really good kids. He also gave a slightly different version of the utterance as being "the Defendant doesn't know how to look after his kids". What is interesting is that he observed the Defendant's demeanour changed from a happy and benign disposition to one of anger.

4. Glenn Hall said that after he had seen the Defendant talking to the victim he observed a change, "and the Defendant's face and body language changed." He looked distressed.

5. In the Police record of interview the Defendant said that after mentioning his relationship with Samantha, Batton said "I've been spending time with your kids and you should spend more time with your kids yourself and this is from a guy I have never seen before" and at another point in time "I know the stuff he had just said to me sort of made me angry because it was from a guy I didn't know who the hell he was and he was coming up to me and trying to tell me to look after my kids and saying that he has been seeing my ex-partner and I've been doing this and that and I and it made just really angry". He says that these utterances provoked him.

6. In the Defendant's evidence in Court the disparaging aspects of the utterances were obtained in the statement by the alleged victim who said "I know your two little boys really well and spend a lot of time with them. You should spend more time with them yourself. I've never met him and I've never seen him and I thought his mention of his relationship with Sam was odd. When he said what he said I was stunned more than anything else. When he said "what sort of a bloke are you" I was pretty taken aback and I took his utterances as a clear implication that I wasn't a good father and should spend more time with my sons and particularly "I wasn't very happy

about what he said at all in fact I was pretty pissed off. I thought about what he said and as he left and I got angry."

7. In cross-examination he conceded that he was sensitive about his ex-partner and his children and that other men being involved with his children does upset him. He said he was not uncomfortable about Samantha having relationships with other men. He was unable to explain why the utterance what sort of a bloke are you was omitted from the record of interview although it was the most distressing thing the victim had said and caused him to go from calm to absolute anger in such a short time.

8. This Court finds that there were utterances of the kind testified by the Defendant and points to the corroboration of at least part of those utterances by the communication of the victim to Kouka. The victim's attitude of being prepared to confront the Defendant if he was unhappy with any aspect of the victim's relationship with Samantha may also give some key to the victim's state of mind. He was for want of a better label "Brittle" or "Bristling" in the Court's perception that is he was looking for trouble and certainly at least expecting it as a possibility.

The Slap to the Jaw and Other Blows Alleged to have Occurred inside Dolly O'Reilly's.

9. The victim says that he felt a "clump" to the side of his head and punches, hitting him above his left eye and the right side of his head (there is some confusion in the Court's note about the blow to the eye). His "raging bull demeanour" was described. He was also described as furious. Openbrouw heard a commotion and saw the victim on the floor, but saw nothing else. Kouka saw the blow with an open right hand by the Defendant and Batton falling to the ground. He also said five minutes had elapsed from the conclusions of the conversation between the Defendant and the victim before that blow was struck. He denied that the Defendant punched Batton on the head and never observed the consequences of any blow on the

victim's person. Sandra Smith saw the victim on the ground. Glenn Hall saw something less than a full swing recalls nobody on the floor and alone says the victim retaliated by punching or pushing and participating in a verbal exchange. He says it was under a minute from the provocative conversation to the first slap. Nagus mainly sees the victim on the floor and no other physical contact. Niki sees him on the floor and in the record of interview the Defendant said after the provocative conversation he sat for a couple of minutes then went to the victim, grabbed him by the shoulder turned him sideways and slapped him with his left hand and described he and the Defendant screaming at each other. Harry sees movement and the victim getting off the ground the Defendant looking a bit angry and did not see any blow by the Defendant to Batton while he was on the ground. Hunnum only heard a commotion. In his evidence in chief the Defendant said that after the end of the provocative conversation he was getting increasingly angry and five seconds to a minute at the most had passed before he walked up and gave him a quick slap. He acknowledged he wanted to hurt him very bad. He did however use his left hand although his right hand is dominant. He alleged that he had never done anything like this before. He says that he then swung at the victim but wasn't sure that it connected although he says the victim grabbed him and he never saw the victim on the ground. In cross-examination he said that he swung at him and wanted to him but he was not feeling threatened by the victim but was really angry. He recalls them swinging at each other.

10. On any analysis of the evidence relating to the provocative exchange and what had occurred in Dolly O'Reilly's this Court's conclusion is that there is no reason to accept the victim's version of what occurred as to the physical contact from the Defendant other than unquestionably the Defendant's slap to the victim's jaw. However, in the event that there was an additional blow aimed at the victim by the Defendant, it is this Court's conclusion that it cannot and does not find that the defence of provocation

which the Court finds is raised by the evidence has been excluded beyond reasonable doubt. It is obviously not for the Defendant to establish that provocation provided a defence, but for the Crown prove beyond reasonable doubt that it could not apply. The actual time lapse between the provocative conversation, as the Court finds it was, and any physical contact from the Defendant cannot satisfactorily be determined. The evidence cannot exclude a reasonable possibility that the time which had elapsed between the provocative conversation and the first slap and any other blows aimed but not successfully landed, did not occur within a minute of the conversation. The Court finds that each one of the criteria in relation to section 34 which had application in the matter is satisfactorily satisfied.

Events Outside in the Beer Garden

11. The victim's version of what occurred is set out in paragraph ii of this decision and will not be repeated. When he was cross-examined in Court he alleged that he was hit by the Defendant outside and that he could have tripped on a koppa's log after that. Bear in mind that this was accompanied by a hot denial that there was any denigration of the Defendant in respect of his capacity as a father which the Court finds was not true. His evidence is tainted by that reality. Openbrouw who alleges he was with the victim when the Defendant emerged through the front entrance from which the victim had himself earlier exited said the Defendant did not hit him prior to his tripping onto his back although he tried to hit him, but did not succeed in making contact. Further that the Defendant did not try to hit the victim when he was on his back and trying to get up; a position from which he did not depart in cross examination. Glenn Hall says that he emerged a couple of seconds behind the Defendant at that moment the victim was standing facing towards the exit. The Defendant approached the victim and another scuffle took place and a few punches were thrown and the victim fell back into the bushes and tripped over. There was confusion about his other observations although no further interaction between the Defendant and the victim. He

was certain that at no stage did he see the victim fleeing and there was an argument between him and the Defendant. Niki says that he observed the Defendant walking towards Hibiscus shopping centre and yelling at the victim who was walking away. In the record of interview the Defendant says that outside in the beer garden the victim and he were screaming at each other and traded blows. He said that when he walked outside the victim was yelling stuff at him, that they took mutual swings at one another, but denied making any contact. Hunnum described a group without specifically identifying the Defendant one of that group, seven metres away from the victim outside in the beer garden. He says he told the person who inescapably must have been the victim to get out of "here" and the victim walked to the bottle shop and he saw no physical contact between the Defendant and the victim at all.

12. In Court Defendant said after the accident inside Dolly O'Reilly's he wanted to get out of Dolly O'Reilly's attend his car in the car park and go home. As he emerged, the victim was standing in front of him in close proximity to a security guard. His first thought was that the victim was "waiting for me" although he shouted at the victim the victim stood facing him which persuaded him that he thought the victim wanted to have a crack at him and he walked towards him. They took a couple of pot shots at each other and his friends tried to pull him back and he conceded he may have made contact but does not recall doing so although he says that the victim "grazed me". The next thing he recalled was seeing the victim with his palms open held at his chest halfway to the ground saying "I want no more I want to go". He kept calling out to him he says, but he fled and the Defendant went to his car and left the scene. In cross-examination he said when he went outside he was not of a mind as he had been inside to "hurt him". When he got outside the Defendant was facing him and screamed at him and he in turn screamed at the Defendant. There was mutual yelling and shoving he said that the

victim was in his way that is in the way of his passage to where his car was parked. To his surprise the victim was still there and not going away.

13. From all of the above evidence this Court is not prepared to conclude anything more than the Defendant approached the victim and that he may have aimed blows at the victim, but does not exclude the victim having aimed blows also at the Defendant. The Court must conclude on any version of what occurred in the beer garden that in so far as self defence might be raised that is not to this Court's finding disproved beyond reasonable doubt or negated by the Prosecution perhaps more elegantly expressed. This Court finds however that it is not unreasonable to accept that the Defendant may have concluded that the victim standing facing him instead of having left in the company of the security guard, yelling and screaming at him, was going to take him on, as they say, particularly bearing in mind from the victim's own evidence, in the event that there was any kind of criticism, anger or jealousy in relation to his relationship with the Defendant's previous partner and the mother of his children, he would take the Defendant on and not back down. In those circumstances the Court finds that the Prosecution has not proved beyond reasonable doubt that the Defendant did not entertain those beliefs pursuant to the provisions of section 32 of the Criminal Code.

14. On that basis the Defendant is entitled in this Court's findings to be found not guilty on the grounds of the Crown's failure to exclude beyond reasonable doubt provocation in relation to the incident inside Dolly O'Reilly's and the application of section 32 to the events in the beer garden.

15. Had the Court not made its finding in relation to the law as evidence by this decision it would have found the Defendant was not guilty for the reasons apparent and set out above.

Dated:

DAVID LOADMAN
STIPENDIARY MAGISTRATE