CITATION: *[2006] NTMC 073*

PARTIES:	ANDREW KEVYN LITTMAN
	v
	SAMUEL JAMES WATSON
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20525166
DELIVERED ON:	1 September 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	13 April 2006, 8 August 2006, 14 August 2006
JUDGMENT OF:	Mr Trigg SM

CATCHWORDS:

S 189A Criminal Code
Ss 144(1) and 158 Police Administration Act
Words & Phrases – "in the execution of his duty"
Power to search after arrest – "believes on reasonable grounds it is necessary to do so"

REPRESENTATION:

Counsel:

Complainant:	Ms McDade & Mr Fisher
Defendant:	Mr Loizou

Solicitors:

Complainant:	Summary prosecutions
Defendant:	NAAJA

Judgment category classification:	A
Judgment ID number:	[2006] NTMC 073
Number of paragraphs:	214

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20525166

[2006] NTMC 073

BETWEEN:

ANDREW KEVYN LITTMAN
Complainant

AND:

SAMUEL JAMES WATSON
Defendant

REASONS FOR DECISION

(Delivered 1 September 2006)

Mr TRIGG SM:

1. On 9 November 2005 the complainant laid a complaint against the defendant and an information charging the defendant with five offences allegedly committed on the 18th October 2005, at Darwin, namely:

1. Drove a vehicle, BMW sedan VIC TLQ-211 on a road Chin Quan Road and at the intersection with, Gilruth Avenue, he turned right at a no right turn sign at the intersection.

   Contrary to Regulation 91(1) of the Australian Road Rules.

2. did unlawfully assault of a police officer, namely Constable Geoffrey Hawkins, whilst in the execution of his duty.

   And the said assault involved the following circumstance of aggravation namely:

   (i) The said police officer thereby suffered bodily harm.

   Contrary to section 189A of the Criminal Code.

3. Did resist a member of the police force in the execution of his duty.

   Contrary to section 158 of the *Police Administration Act*.

4. Drove a motor vehicle, namely BMW sedan VIC TJQ-211, on a public street, namely Maria Livers Drive, while having a concentration of alcohol in your blood equal to 80 milligrams or more of alcohol per 100 litres of blood, namely, 135 milligrams of alcohol.

   Contrary to section 19(2) of the *Traffic Act*.

5. Behaved in a disorderly manner in a police station, namely, Darwin Police Station, Watchhouse.

   Contrary to section 47(c) of the *Summary Offences Act*.

2. On 29th December 2005 the matter was adjourned to 13th April 2006 at 10.00 o'clock for hearing. On 13th April 2006 the matter came before myself but the defendant was not in attendance. The matter was stood down and eventually recalled at 12.08 by which time the defendant had appeared. The defendant presented a notice of adjournment slip which had been given to him by the Court which clearly advised him to be at Court at 2.00pm. Hence, the adjournment slip appears to have been a Court's error and the defendant's failure to attend at 10.00 o'clock was understandable in the circumstances.

3. The matter then commenced before me. The five charges were read and the defendant pleaded not guilty to each of the five charges.

4. The first prosecution witness called was Constable Hawkins. He advised me that on the 18th October 2005 he was working with Police Officer Glen Ryan and they were working from 3.00pm to 1.00am on general duties. They were working in a marked Hi-lux police caged van.

5. Officer Ryan was not called to give evidence in the prosecution case although he clearly would have been a relevant and material witness. No

explanation was offered during the prosecution case for this oversight. I do not know why he was not called. If he was reasonably available (and I have no evidence before me to suggest that he was not) then he should have been called.

6. Constable Hawkins stated that he was called over the police radio to attend Mindil Beach at about 9.30pm on 18th October 2005 to assist another police unit with an arrest. As a consequence he and Ryan attended the Mindil Beach car park. On arrival, he observed two other police officers (O'Neill and Gray) speaking to a male person (the defendant) near a BMW motor vehicle. He also observed another male on the other side of that vehicle and he appeared to be watching.

7. Constable Hawkins said that he approached O'Neill and the defendant. He heard O'Neill tell the defendant that he was under arrest for the purpose of a breath analysis and the defendant was then directed towards Hawkin's police van.

8. Hawkins said that the defendant was not complying and he was stating that he wanted to go back to his car and he turned towards it. The BMW was in the opposite direction to the police van.

9. Hawkins positioned himself between the defendant and the BMW and put his right hand out to block him. The defendant tried to push past him but Hawkins told him to just turn around and go straight to the police van. The defendant tried to push past again stating "I want to get my shit out of the car".

10. Hawkins put his left hand on the defendant's right arm just above the elbow to turn him around towards the police van. Ryan also assisted at this stage and gathered the defendant's other arm. The defendant was then turned around and was being lead back towards the police van at which stage he began to struggle and push back towards Hawkins to go the other way. The defendant said "let me go you can't hold me". Hawkins told him to keep going to the police vehicle but he kept struggling.

11. When they got the defendant to the side of the police vehicle Hawkins asked him to put his hands up on the police van and asked him if he had any “sharps”. (*In closing submissions, Mr Fisher suggested that this was a reference to needles. However, this was never suggested to be the case in evidence. It is not an expression that I am familiar with. I am unable to find that it was a reference to needles. I take it be a reference to sharp objects in general*).

12. At this stage (*and I note that according to Hawkins there were no words spoken be the defendant before he reacted*) the defendant broke free of Gray’s hold (*and thereafter Gray appears to have had no real involvement according to Hawkins*) turned and threw punches at Hawkins upper body and face with both fists. Hawkins was deflecting the blows and the blows were hitting his arms.

13. A struggle ensued and the defendant pushed back onto Hawkins. Hawkins lost his balance and fell back onto the police sedan (which was parked parallel to the police van) and the defendant came at Hawkins with a flurry of punches which Hawkins was still trying to defend. Hawkins slid down the side of the police sedan and ended up on the ground.

14. While this was happening the defendant was saying “you’re fucked cunt, you can’t hold me”.

15. Hawkins was then aware that O’Neill came in and assisted and tried to subdue the defendant but he wasn’t sure how. He did note that O’Neill was behind the defendant.

16. Hawkins said the defendant continued to attack him as he was falling down and he was over him. As a consequence all three (Hawkins, O’Neill and the defendant) ended up on the ground or kneeling. O’Neill and Hawkins were eventually able to gain control of the defendant.

17. Hawkins said that when the defendant was on the ground he was kicking out at the police with both legs, Hawkins was trying to get control of his

legs. Hawkins believed that he took a couple of blows to his lower legs as a result of these kicks.

18. Hawkins said that they eventually restrained the defendant with the help of all four police officers and the male was on his back with police holding his arms and his legs. Hawkins said he was on his legs.

19. After the male was being held for some time the male said “you cunts have broken my back”.

20. Hawkins said that police then released the grip on the defendant and directed him to get up and go to the police van but he didn’t. Police repeatedly directed him to get up and go to the police van as they believed he was faking injury. He said that at this stage police were still holding the defendant but were not holding him down.

21. The defendant allegedly then sat up and he was again directed to stand up and go to the back of the police van. Allegedly the defendant then continued swearing at police and again stated that his back was broken and said “if you want me moved you will have to drag me”.

22. Hawkins said that he and O’Neill then each took hold of one of the defendant’s arms and dragged him backwards towards the police van. The defendant was again asked to stand up and get into the back of the police van and he again refused. Hawkins said that the police then lifted him up and he sat himself onto the ledge on the back of the police van. The defendant was told to push himself in and he eventually grabbed the cage and pulled himself in after a minute or so. Hawkins said that he then reached in to push the defendant further into the cage so that he could shut the door and the defendant began kicking out with both legs but he was able to dodge the kicks.

23. Hawkins said that he and Ryan (*this is the first reference to Ryan throughout the whole incident*) then closed the door.

24. Given this evidence, it is surprising that the defendant was not hand-cuffed before being placed into the back of the police van. Further, given that Hawkins says he never got to search the defendant, it is even more surprising that he wasn't searched after being restrained and before being placed in the back of the police van. Whatever reason Hawkins had for wanting to search the defendant before the incident, he had an excellent reason for doing so after the alleged assault. Yet, for some reason, which remained unexplained on the evidence, the defendant was not searched.

25. Hawkins said that the male continued to say words to the effect of "you've broke my back, you'se are fucked, cunts. You'se are fucked, I am going to kill you all".

26. Hawkins said that the defendant continued to call out and swear and threaten to kill them and the police discussed what to do next. Hawkins and Ryan then drove the defendant towards the Darwin Police Station. He was still yelling out "my back's fucked". Hawkins pulled into a bus bay on Gilruth Avenue and supposedly asked the defendant if there was anything wrong but the male refused to talk to them so as a consequence, Hawkins positioned the spotlight on top of the police van into the cage and turned it on. His reason for this was in case the male was threatening self harm. He said that was why they pulled over because he was making allegations about his back.

27. The police van continued its journey towards the Darwin Police Station and the defendant was apparently kept under observation. He was apparently still yelling out and kicking out.

28. When the police van arrived at the watch house they reversed into a sally port where Hawkins placed gloves on and then returned to the police van. Other Constables had come out as they were expecting them. It is clear from ExP4 that there were only two police officers who alighted from the police cage vehicle.

29. Hawkins said the defendant was still on his back in the police van and was yelling out "I'm not getting out of here". Hawkins said that he helped lift the

defendant out from the police van with Taylor, O'Neill and Auxiliary Dash. He was placed onto the concrete ground and appeared to be lying motionless. The defendant was directed into the watch-house to be put on the breath analysis but he ignored the request. According to Hawkins the defendant's eyes were fluttering and his muscles were tensing up. According to Hawkins the defendant was not being restrained (although I note from the computer CD Exhibit P4 that Hawkins had his boot on the defendant's right wrist). The defendant did not get up so he was carried into the breath analysis room by Hawkins, O'Neill and Taylor. In the breath analysis room he was placed in a chair sitting upright.

30. According to Hawkins the defendant's arms appeared limp by his sides and he was not saying anything.

31. O'Neill was in the operators seat giving directions as to how to do the breath analysis and at first the defendant was saying nothing. According to Hawkins at times he opened his eyes and looked around the room, he was not being held and he was not being restrained. Then Hawkins said he suddenly became responsive and adhered to instructions and completed the breath analysis.

32. Hawkins said the defendant then pointed at him saying "I'll fucking kill you, you had better like your life now cause I will fucking hunt you down and shoot you, I hope you are a good shot because I will fucking shoot you". In addition, the male also allegedly said "I'll get a bomb and blow you all up, I'll fucking kill youse all".

33. Hawkins said that during the breath analysis the male was handcuffed due to his previous violence. The breath analysis was completed and the male was told to go to the watch-house counter. Hawkins went with him. At the counter the male was physically searched by Hawkins. The male was then told to turn around and go towards the cells but he again said "I will fucking kill you".

34. As a result of the incident Hawkins said that he received a graze to his right knee, his shirt was ripped, he had pain in the front of his head, temple

and neck pain in the middle. He also had a bleeding finger. His pants were also ripped and there was a hole in the knee. The radio on his left epaulet was dislodged.

35. Hawkins later said that he had pain in his right knee and neck and a severe migraine type headache. The next morning he went to his doctor at Casuarina and he had difficulty walking due to a swollen and painful knee. He had a red painful lump on his left temple and he had a severe headache which was getting worse and any movement caused neck pain.

36. A medical report of Dr Kyeyune was tendered without objection. This report became ExP5. In this report it is noted:

> "Geoffrey Hawkins presented to me on 19th October 2005 complaining of headache has scrapes/grazes to the right knee. He said that he had sustained the same the previous evening in an altercation with a suspect he was trying to apprehend in the course of his duties at Mindil Beach. He had not suffered any loss of consciousness or concussion. He was worried that he may have contracted something from the suspect in the scuffle. He also added that he has had headaches before due to shoulder/neck problems. Examination revealed him to be in good general condition.....He was not limping....He had superficial scrapes/grazes to the right knee that were a bit tender but without swelling".

37. It is inconsistent that Hawkins says he had difficulty walking, and the doctor has specifically noted that he was not limping. The extent of injuries alleged by Hawkins is not supported by ExP5. Hawkins said that he was given Nurofen and referred to remedial massage but there was no mention of either of these things in ExP5. He also says he was referred to a physiotherapist and later went there until February 2006. He said he initially had physiotherapy twice a week for a number of weeks. He said that his knee came good after a week but he was unfit for work until 27th October apparently due to problems with neck movements and migraine headaches, none of which appear to be specifically mentioned as an injury in ExP5. The only mention is that he had suffered them before, not that he was suffering them when he saw the doctor.

38. I am unable to find that Hawkins did suffer any injury to his neck in this incident, or had any difficulty walking, or had any migraine or other form of headaches, given that no complaint of any such problems is recorded in ExP5. I am only able to find that he had superficial injuries, and not sufficient to interfere with his health or amount to bodily harm. It is surprising that Hawkins "was worried that he may have contracted something from the suspect in the scuffle", as this does not appear to have been a reasonable possibility on his evidence.

39. In cross-examination Hawkins confirmed that when he first took the defendant to the police vehicle he told him that he was going to be searched and asked him if he had any "sharps" on him, he also said that he told him to put his hands up on top of the van. However, he said that he did not actually search the defendant.

40. I now turn to consider the evidence of the other witnesses.

41. Acting Sergeant Wayne O'Neill was on 18th October 2005 working on traffic duties with Constable Tara Gray in a police sedan. At 9.30pm he observed a motor vehicle pull onto Gilruth Avenue from Chin Quan Road by turning right against a no right turn sign. There was a left turn only sign also at the road.

42. As a consequence of this observation O'Neill followed the motor vehicle which was a BMW with Victorian registration plate TJQ 211 with two persons in the motor vehicle. He apprehended the BMW motor vehicle in the Mindil Beach carpark area.

43. After the apprehension O'Neill alighted from his vehicle and walked up to the driver of the vehicle, informed him of his name and the reason for the apprehension and asked if there was any reason for his driving. The defendant (who was the driver of the motor vehicle) said there was no reason he was just returning the motor vehicle to the owner as he had been working on it.

44. O’Neill asked the defendant for his licence which was produced and this confirmed that the defendant was Samuel James Watson.

45. O’Neill then returned to his motor vehicle and retrieved his traffic infringement notice book and began writing out an infringement notice. The defendant got out of his motor vehicle and walked to O’Neill and started speaking to him. As a consequence, O’Neill noticed that there was a smell of liquor on the defendant’s breath and his eyes were bloodshot. O’Neill asked the defendant if he had been drinking and the defendant advised that he had been, that he had had one at lunch time but he had been drinking heavily the night before.

46. O’Neill retrieved his alco-test and instructed the defendant how to blow into it. The defendant blew into the alco-test as instructed and the reading was positive. As a consequence, O’Neill called for a police van to attend.

47. O’Neill asked the defendant the time of his last drink and he was told that it was lunch time and that it was one bourbon.

48. Shortly thereafter a police van arrived with Hawkins and Ryan in it.

49. O’Neill then asked the defendant if he had any medical conditions. The defendant was a bit agitated and stated that he had no medical conditions but he did have a problem that he doesn’t like police and he likes to fight. O’Neill apparently told him there was no reason for that. *(Apparently Hawkins did not hear this exchange as he gave no evidence of it, but Ryan did*).

50. O’Neill then informed the defendant he was now under arrest for the purpose of a breath analysis and he would be taken to the police station for a breath analysis and that may be under the limit so there was no need for any aggression.

51. The defendant then walked to the back of the police van and O’Neill was filling out his notebook on the bonnet of his sedan using a torch as it was dark. (*I note that O’Neill gave no evidence to suggest the defendant tried to*

go towards his car at all, let alone twice, and no evidence to suggest that the defendant was resisting in any way. Nor did he suggest that any physical contact was made with the defendant at this stage.)

52. O'Neill heard Hawkins say to the defendant that before he gets into the police van he is going to search him and the defendant replied "don't fucking touch me or I'll kill you" (*yet Hawkins gives no evidence of any such words*). He then heard a scuffle. On his evidence he did not see how it commenced.

53. O'Neill then turned and he saw the defendant swinging at Hawkins with roundhouse punches. The defendant then swung Hawkins over to the police sedan by his shirt and was pinning him over the car with a forearm to his neck.

54. O'Neill then moved quickly to the defendant and grabbed him by his ponytail and dragged him to the ground while the defendant still had Hawkins. All three of them went to the ground and the defendant was still fighting and kicking out.

55. The defendant said something about the disc in his neck (*Hawkins referred to it as a problem with his back, and Gray said nothing about it*) going out and the police stopped to check the defendant out and the defendant kept fighting and kept kicking out with his feet. The defendant was then restrained. The defendant was rigid kicking his legs.

56. They got the defendant to the police van and O'Neill then took details off the passenger. (*O'Neill gave no evidence of any particular difficulty getting the defendant into the back of the van. Nor did he refer to any actions by either Gray or Ryan.*)

57. O'Neill then drove back to Darwin Police Station as he was going to perform the breath analysis.

58. When the defendant arrived in the back of the police van it was O'Neill who attended and opened the back of the police van. The defendant was lying

motionless in the police van. The defendant was rigid. The defendant had to be physically lifted out of the police van onto the ground where the defendant lay. (*This is clearly shown in Ex P4*).

59. O'Neill moved his knuckles on the defendant's chest to wake him up (*this is also clearly shown in ExP4)* and then touched the eyelids of the defendant (*this in unable to be seen in ExP4 as a police officer is blocking this view*) which were flickering. This indicated to O'Neill that the defendant was conscious. He also noted that the defendant was holding his arm stiff and his legs stiff at times as well (*this is not clear from ExP4*). As the defendant would not get up he was physically carried into the breath analysis room (*as shown on ExP4*).

60. In the breath analysis room the defendant was cuffed as O'Neill was scared that the defendant was going to lash out at someone. In the breath analysis room the defendant was leaning back with his eyes shut and his head back.

61. O'Neill pulled out the breath analysis form and started filling that out and was asking questions on the form. There were no responses to a number of these initial questions. O'Neill got half way down the form and then the defendant sat up and said "wait wait wait I'll do your form". In addition, the defendant was making what O'Neill said were idle threats such as "I know where you live you dog, I'm going to get you, you dog, I hope you've got a safe place to live".

62. O'Neill then recommenced the operators book asking the various questions and recording the answers thereon. He then started the drager alco-test 7110. He input the information required, names etc. The machine then did a self test. He placed a fresh mouth piece on the machine. The machine was operational and came up with zeros.

63. O'Neill then informed the defendant that this was a breath analysis implement and that he was authorised to use it and it was in good working condition and ready to use. He then advised the defendant that he required him to submit to the breath analysis and he told him how to blow. He placed a separate mouth piece in his own mouth and showed the defendant

how to do it. The defendant then took a deep breath and blew into the machine and provided a sufficient sample. The machine analysed the sample of breath as having a reading of .135%.

64. Exhibit P1 was the drager alco test 7110 book which O'Neill completed and signed.

65. Exhibit P2 was the Form 1, certificate on performance of breath analysis that O'Neill dated and signed at 10.10pm.

66. Exhibit P3 was the drager alco test 7110 printout from the machine which O'Neill signed and passed a copy of to the defendant.

67. Exhibit P4 was the computer CD of what had occurred both in the sally port when the defendant arrived, when he was carried out of the sally port area and of the whole time the defendant was in the breath analysis room. After viewing Exhibit P4 O'Neill stated that the defendant was cuffed outside the breath analysis room before he was brought into it. I find that O'Neill is mistaken in this regard. It is clear, and I find, that the defendant was not cuffed until he was in the chair in the breath analysis room. The defendant was cuffed before he sat up and began taking an active part.

68. Constable Tara Gray also gave evidence. She was working with Acting Sergeant O'Neill on the 18th October 2005. They were in a police sedan.

69. At about 9.30pm they were driving on Gilruth Avenue when they noticed a motor vehicle turn right onto Gilruth Avenue contrary to a no right turn sign from Chin Quan Road. This vehicle was apprehended.

70. O'Neill got out of the police vehicle and spoke to the driver and then returned to the police vehicle to fill out a traffic infringement notice. There were two people in the apprehended vehicle. The driver of the motor vehicle (the defendant) exited the motor vehicle and came to O'Neill and talked to him. Following this conversation O'Neill got an alco test to which the defendant submitted. O'Neill then called for a police van.

71. O’Neill continued speaking to the defendant and the police van arrived. O’Neill asked the defendant if he had any medical conditions and the defendant said that I only have one thing, I have a bit of a problem with police I get agro and like to fight.

72. O’Neill then told the defendant that he was under arrest for the purpose of a breath analysis and explained what was going to be involved. O’Neill told the defendant to go to the police van (*up to this point her evidence is wholly consistent with O’Neill*) but the defendant started going to his motor vehicle.

73. Hawkins intercepted the defendant and the defendant said “I want to get my shit”. Hawkins again directed the defendant to the police van. Hawkins took hold of the defendants arm and directed him to the police van and Gray placed herself on the left arm of the defendant to help escort him.

74. At the police van Hawkins asked the defendant to put his hands on the police van for a search. The defendant pulled free of Gray’s grip and threw a punch at Hawkins head saying “I’ll kill you, you dog” (*whereas O’Neill said “don’t fucking touch me or I’ll kill you”, and Hawkins gave no evidence of anything being said*).

75. The defendant then pushed Hawkins into the police sedan and Gray tried to help. O’Neill came across and helped.

76. Gray saw the passenger coming towards the situation so she placed herself in the way and stopped him from getting any closer and Ryan (*the first real mention of Ryan in any of the substantive evidence*) helped with that.

77. The defendant was subdued, but he continued resisting. Gray said that when the defendant was being placed in the police van by Hawkins and O’Neill he was struggling against them just trying to free himself from their grip and once in the back of the police van he was yelling. (*Her evidence, from the time the defendant was directed to the police van is fairly consistent with that of Hawkins*).

78. The defendant said “I’m going to shoot every copper here you have no idea. I’m not talking cunt”.

79. Gray then drove to the watch-house with O’Neill.

80. At the watch-house the defendant refused to get out of the police van and he pretended to be unconscious. The defendant was carried to the breath analysis room and he was handcuffed.

81. In the breath analysis room the defendant submitted.

82. The defendant was saying “I’m going to fucken kill you. I’m going to hunt you down and kill you. I hope you’re a good shot”.

83. After the breath analysis the defendant said I don’t want bail you had better lock me up I am going to blow you up.

84. The only other witness to the event at the time of the original apprehension who gave evidence was the passenger in the defendant’s motor vehicle Jason Trudgett, and he was called in the defence case.

85. Trudgett was in the motor vehicle with the defendant when it was stopped by police. He said that they took a wrong right hand turn as they didn’t know there was a sign up there. After the apprehension the defendant was told that it was because there was a no right turn sign. Then he was advised of the smell of alcohol and the defendant submitted to a breath test. Gray was at the front of their car getting the numbers off the registration sticker. She then went to the back of the motor vehicle and he turned round to follow her and a police van then turned up.

86. Trudgett stayed in the motor vehicle and heard that they were going to take the defendant down to the Police Station. Trudgett then got out. He heard police saying they were going to drive the BMW motor vehicle back to the police station and Trudgett got out to tell them that he would drive that motor vehicle. He was asked what he had had to drink and he said nothing. They got a breath test out and tested him as well and that was done by O’Neill.

87. Trudgett saw police escorting the defendant to the back of the police van. He said that the defendant had asked if he could get the rest of his identification and they said no you can't. (*This is not inconsistent with what Hawkins and Gray said in their evidence*). When the defendant got to the back of the police van the defendant went to turn around and started to say something, he said "can't I just ..." and two police officers pushed the defendant into a third police officer who was up against the police van.

88. Trudgett was asked whether the police had hold of the defendant prior to the incident occurring and he said that they did not. He went on to add that it was like they were ready for something to happen like they were standing there waiting to do something to him.

89. This assumption or conclusion was not supported by any facts as to what the police were actually doing. I am unable to accept this gratuitous opinion evidence.

90. Trudgett said that three police officers had arrived in the police van. This evidence is contrary to the evidence of Hawkins, O'Neill and Gray. It was not suggested to any of the three police officers that there was or might be a fifth police officer at the scene. There was not a third police officer in the police van when it arrived at the watch-house as seen on ExP4. I am unable to accept that there were five police officers at the scene.

91. As this was happening Trudgett said that O'Neill was on the bonnet of his car doing the paperwork. I accept that. He then said that the female police officer (Gray) was at the front of the police vehicles to keep an eye on him. This was not put to Gray or any of the other police witnesses. There would appear to be no good reason to keep an eye on Trudgett at this stage, so this does not make good logical sense.

92. Trudgett said that he then asked Gray why are they bashing him and Gray said they are not bashing him they are restraining him for resisting arrest.

93. Trudgett said that when the defendant was pushed one of the police officers got in the way and fell down. He then got up. He said that the

defendant was pushing the police away and one police officer was still holding the defendant.

94. Trudgett then said that the little police officer came to him and the two big police officers were looking after the defendant, then O'Neill came in and grabbed the defendant by the hair and put his knee in his back. I accept that O'Neill did that.

95. Trudgett then called out they're punching him at which they (unspecified as to who) opened up their hands and started slapping the defendant.

96. Trudgett went on to say that O'Neill pulled the defendants hair back with his knee and that the other two police officers were trying to get his arms, restrain his arms back, but I seen one of them start throwing punches at him and then I yelled out. It was at that stage that he was told by Gray to calm down and not to move.

97. Trudgett then said that the defendant then went unconscious as he hit his head up against a wheel arch. At that he said the police all stood back and the defendant then woke up and said that he didn't feel right the bastards knocked me out. The defendant was looking around dazed. (*This is contrary to the evidence of the police officers and was not put to each of them in their evidence. No mention is made of any alleged complaint of injury by the defendant to his head or neck*).

98. Trudgett then said that the police then threw the defendant in the back of the police van and this was done by all three police officers. He said the defendant wasn't struggling then. Presumably the defendant was calling out because Trudgett said police were telling him to shut up. The police vehicles then left and Trudgett then took the motor vehicle and delivered it to its owner.

99. The evidence of Trudgett was not substantially discredited during his cross-examination. I am therefore unable to reject it out of hand. I am unable to find that it is untrue or a concoction. Passages of his evidence are supported by the evidence of some of the police witnesses.

100. It was clearly raised in cross-examination and in the evidence of Trudgett that the defendant was not resisting being taken to the police station for breath analysis, but that he did want to get something from the car first. This request was declined by Hawkins at least once. It was further raised that at the police van that the defendant turned to say something to police and he was then pushed by a police officer. I am unable to find beyond all reasonable doubt that this did not occur.

101. As to what triggered the incident, the subject of Charges 2 and 3, the evidence is not totally clear:

> Hawkins said: When they got the defendant to the side of the police vehicle Hawkins asked him to put his hands up on the police van and asked him if he had any "sharps". At this stage (*and I note that according to Hawkins there were no words spoken be the defendant before he reacted*) the defendant broke free of Gray's hold turned and threw punches at Hawkins upper body and face with both fists.
>
> O'Neill said: O'Neill heard Hawkins say to the defendant that before he gets into the police van he is going to search him and the defendant replied "don't fucking touch me or I'll kill you" (*yet Hawkins gives no evidence of any such words*). He then heard a scuffle. On his evidence he did not see how it commenced.
>
> Gray said: At the police van Hawkins asked the defendant to put his hands on the police van for a search. The defendant pulled free of Gray's grip and threw a punch at Hawkins head saying "I'll kill you, you dog" (*whereas O'Neill said "don't fucking touch me or I'll kill you", and Hawkins gave no evidence of anything being said*).
>
> Trudgett said: When the defendant got to the back of the police van the defendant went to turn around and started to say something, he said "can't I just ..." and two police officers pushed the defendant into a third police officer who was up against the police van. (*He gave no evidence of hearing anything said about a search, or hearing the defendant say anything before the physical altercation started, or anything about a search at all*).

102. In cross-examination, Mr Loizou put to Hawkins that the defendant had been pushed into him, and further put that the defendant did not throw any punches at him whatsoever. Both suggestions were rejected by Hawkins. In cross-examination, O'Neill stated that the defendant walked to the police van of his own free will, and the spark seemed to have been the search of

his person. This would appear to be supposition as O'Neill was not watching what was happening but could only hear, as he was looking down writing. If there was a push on the defendant, O'Neill would not have been able to see it. The words he says he heard (which are different to what Gray heard) could equally be in response to a push as they could have been to a comment about being searched. In cross-examination, Gray was asked if the pulling away from her by the defendant and the punching action towards Hawkins was in response to Hawkins attempt to search him, and she said that it was. Further, she stated (*contrary to the evidence of Hawkins and Trudgett*) that Hawkins had commenced to search the defendant, and his hands were on the defendant's body.

103. In my view, the evidence is not simple. For example, it was not put to Gray in cross-examination that the defendant was pushed into Hawkins by another police officer. Further, it was not put to her that the defendant did not throw any punches at Hawkins. Similarly, neither proposition was put to O'Neill either. I am not surprised that the first proposition wasn't put as O'Neill was not in a position to see that if it did occur, but in my view, the second proposition should have been put.

104. On the evidence, I find that what occurred this night was as follows:

- The defendant was returning a car he had been working on to a customer, and was very close to where he was to return it;
- The defendant was apprehended for turning right at a no right turn intersection;
- O'Neill decided to give the defendant a traffic infringement notice for that;
- The defendant approached O'Neill to discuss the situation;
- When he did so O'Neill noticed a smell of alcohol on the defendant and required him to submit to a breath test;
- The defendant submitted to the breath test which returned a positive result;

- The defendant was informed that he'd have to go to the police station for a breath analysis;

- Things were going from bad to worse for the defendant and he was getting agitated;

- A police van arrived to take the defendant to the police station;

- The defendant told O'Neill within the hearing of Gray (but not Hawkins) that he had a problem in that he doesn't like police and he likes to fight;

- The defendant was told that he was under arrest for the purpose of a breath analysis and directed towards the rear of the police van;

- O'Neill started writing out his notes on the bonnet of his car using a torch to help see and stopped paying attention to the defendant;

- The defendant became less impressed;

- The defendant wanted to go to the car he was driving to get his "shit";

- Hawkins would not let him, blocked his path and told him to go to the van;

- The defendant tried to go past Hawkins but he placed his hand on the defendant's arm turned him around and started to escort him towards the rear of the police van;

- This annoyed the defendant even more;

- The defendant walked towards the back of the police van accompanied by Hawkins and Gray;

- The defendant stopped (it was this action that Hawkins probably interpreted as the defendant pushing back) and began to turn to say something to police;

- Hawkins pushed the defendant (not particularly forcefully), in order to stop him from turning, towards the police van, and told him he was going to be searched and asked him if he had any sharps;

- The defendant turned quickly saying he was going to kill Hawkins and began throwing punches at him;

- A scuffle broke out between the defendant and Hawkins during which some of Hawkins clothes were torn, and some blows were landed by the defendant to Hawkin's body;

- O'Neill quickly came in and grabbed the defendant from behind;

- The defendant was subdued by O'Neill and Hawkins;

- The defendant claimed to have hurt his back or neck in the incident, but was not noticeably incapacitated by the same;

- O'Neill confirmed that the defendant's anger and verbal aggression thereafter was directed mainly towards Hawkins.

105. By the breath analysis reading and the observations of O'Neill the defendant was not showing signs of being heavily intoxicated by alcohol. He was (as per my observations in court referred to later herein) a naturally aggressive person, and it would not take a lot to fire him up, especially if he was already cranky, as he was this night.

106. The other witnesses called were all in the prosecution case and related only to what occurred at the Darwin watch-house. Police Auxiliary Rebecca Durco was on duty in the watch-house on the 18th October 2005 as watch-house keeper.

107. At about 10.00pm Hawkins and Ryan attended with the defendant. She noted the defendant lying on the ground with his eyes tightly clenched and fists clenched in the sally port, she then went back inside. The next involvement with the defendant was after he had been brought from the breath analysis room.

108. Durco said that the defendant was extremely aggressive towards police officers. He was verbally abusive he was saying things like "fucking cunts. I'll kill you copper cunt. I'll kill you in front of your family you copper cunt".

109. Durco said that the defendant would not answer any of the questions that she was putting to him and was taken to cell F5 still with the handcuffs on.

110. Durco said that while the defendant was in the cells he was banging his head against the walls and yelling “fucking copper cunts”. When the defendant was asked if he wanted the cuffs removed he said to her offsider “come in here and I’ll kill you you copper cunt”.

111. Durco finished duty at 11.00pm and the last observation of him was that he was still yelling, banging his head and being aggressive to police.

112. Police Auxiliary Clayton Dash was also working at the watch-house on the 18th October 2005 until 11.00pm.

113. Dash went into the sally port when the defendant arrived and the defendant was lying in the back of the police van. He was directed to get out of the van several times but he made no response. He assisted in taking the defendant out of the police van. The defendant was laid on his back on the concrete. The defendant’s eyes were closed but he was peeping through and his palms were clenched really tight. O’Neill asked the defendant to hop up and walk into the watch-house but there was no response from the defendant.

114. O’Neill was flicking the defendant’s eyelids lightly and each time the defendant moved away. They then picked up the defendant and carried him into the watch-house foyer and into the breath analysis room and sat him in a chair.

115. Dash said that the defendant was sitting up straight with his arms tight and his eyes flickering. (*I could not observe either of these thins on ExP4*). The defendant remained non-compliant.

116. Dash was directed to handcuff the defendant due to his previous behaviour of assaulting a police officer and he did so.

117. Dash then left to attend to other duties. His next dealing with the defendant was when he was brought out of the breath analysis room. The defendant was searched at which time he became very aggressive he

flurried around a bit and he was restrained by Hawkins and one other (*Hawkins gave no evidence of any such difficulty*).

118. The defendant was verbally abusive as well and the words that stuck in Dash's mind were "I'm going to fucking kill youse".

119. After the search the defendant was taken to cell F5 and they had to go through a yard. Within the yard the defendant was kicking out and really backing up saying "I'm going to fucking kill youse". The defendant was eventually overpowered and placed in a cell. In the cell the defendant was kicking the glass and yelling out the same things. He was very loud.

120. Dash checked on the defendant about fifteen minutes later and asked if he could take the cuffs off but the defendant told him to go away. The defendant said "You can fuck off you copper cunt. You and your copper mates. I'm going to kill you in front of your family you fucking auxiliary cunt".

121. The defendant continued kicking the glass and Dash logged what the defendant had said.

122. Dash re-attended later with Auxiliary Norris and again asked if they could take the cuffs off and was again basically told to go away don't touch me.

123. Dash re-attended with Ryan to do a section 140 tape but the defendant didn't want to participate and he didn't acknowledge. Once the tape was turned off the defendant said that we created our own terrorist and he was going to blow us up. Dash logged what the defendant had said.

124. Dash said that they wanted to get the cuffs off him but they couldn't do so. He said the defendant was unapproachable and thrashing about. The defendant warned that he was going to run his head into the wall. The defendant banged his head into a toilet partition three to four times very hard and appeared to knock himself out. Dash said that the Watch Commander told him to leave the defendant which they did.

125. First Class Constable David Taylor also gave evidence. He was in the watch-house at about 10.00pm when he heard an aggressive person was being brought in so he stayed to assist if needed.

126. Taylor said that the defendant appeared to be faking semi-consciousness and he was holding his arms and legs taut. He said he also saw him blink on occasions.

127. The defendant was laying in the rear of the police van on his back with his arms and legs taut and when asked to get out of the police van he didn't comply. Four members lifted the defendant out of the police van and took the defendant to the breath analysis room.

128. The defendant was placed into a seat and he was then cuffed due to the difficulties earlier. The defendant allowed his head to lie to the side or the rear and then part way through the breath analysis procedure the defendant regained full consciousness and agreed to comply.

129. O'Neill did the breath analysis and .135% was shown on the machine and a receipt was printed.

130. The defendant started to say to Hawkins "I'm going to fucking kill you. Shooting him. Blowing him up".

131. Taylor felt it necessary to stand by and when the defendant was taken to the watch-house reception he then left.

132. First Class Auxiliary Ferdinand Cheam also gave evidence. He was on duty in the watch-house on the 18th October 2005 from 11.00pm. The defendant was already in the watch-house when he started duties.

133. The defendant was highly agitated, fairly aggressive, swearing and cursing, banging and kicking the cells, making a lot of ruckus, kicking the perspex and the walls. He also saw the defendant head butting the perspex as well and a number of times he ran his head at the perspex and the wall.

134. Cheam said there were numerous attempts to calm the defendant down and each time the defendant talked over them saying things like “don’t come in the cell I am going to kill you”. As a result police decided not to enter the cell.

135. Cheam said that the defendant made comments that if police attempted to enter the cell he would either kill them or even himself.

136. At 3.00am police decided to make an attempt to remove the cuffs with the help of a number of police officers. Before entering Cheam told the defendant what was going to be happening. Police officers entered the cells had to ground stabilise the defendant and the cuffs were removed. Police then withdrew and closed the doors. From then until he finished shift at 7.00am there was not much more out of the defendant.

137. I accept the evidence as to the defendant’s behaviour in the watch-house. This evidence was effectively unchallenged. I find he was verbally and physically aggressive, making threats to shoot, kill or blow up police. He was refusing to let anyone take the cuffs off him and threatening to hurt anyone who tried. He was kicking at the door, walls and perspex of the cell. He was head-butting the walls and door of the cell. His behaviour continued for many hours.

138. The defendant did not give evidence as he was entitled to choose to do. No adverse inference can be drawn against the defendant in that regard. However, I did have the opportunity to make some observations of the defendant during the course of the hearing. Whilst Hawkins was giving his evidence the defendant called out that it was lies. I had to warn the defendant to restrain himself. When ExP4 was played the defendant declined the opportunity to watch it saying they could have set me up. During the evidence of Cheam the defendant interjected and told him to “fuck off”. I stopped proceedings and again advised the defendant of the right of a witness to give evidence without comments from him. Whilst talking to the defendant he tried to talk over me and refused to be quiet despite my requests. I adjourned the court and asked Mr Loizou to talk to

his client. Upon court resuming I'd arranged for a court guard to be in attendance and advised the defendant that if there was any further interruption from him he may be placed in custody.

139. As a consequence I did not form a favourable impression of the defendant as a person. He clearly was not a person who would be slow to react, or slow to anger. He did not strike me as being a "reasonable man".

140. I will now turn to consider each of the charges herein based on the aforementioned evidence.

141. On the evidence before me I am satisfied beyond all reasonable doubt that:

> on the 18th October 2005;
>
> at Darwin in the Northern Territory of Australia;
>
> the defendant drove the said BMW motor vehicle;
>
> on a road namely Chin Quan Road;
>
> and at the intersection with Gilruth Avenue turned right at a no right turn signal at the intersection.

142. I find that this was contrary to *r 91(2) of the Australian Road Rules*. I note that the complaint alleges that it is contrary to *regulation 91(1)* but this is the provision in relation to no left turn. I do not consider that this error is fatal to the charge and it is clearly a mistake and no substantive point turns on it. I therefore find the defendant guilty of Charge 1 but amending the charge to record the proper Road Rule number.

143. The evidence of the police officers in relation to Charge 1 was uncontested and the evidence of Trudgett effectively confirmed the fact that the defendant was guilty of this charge. No possible or arguable defence to this charge was raised on the evidence before me.

144. I further find beyond a reasonable doubt that:

> on 18th October 2005;

at Darwin in the Northern Territory of Australia;

the defendant drove the same BMW motor vehicle;

on Maria Liveris Drive as well as on Chin Quan Road and Gilruth Avenue;

whilst having a concentration of alcohol in his blood equal to 80 milligrams or more of alcohol per 100 millilitres of blood namely 135 milligrams of alcohol;

contrary to *s 19(2) of the Traffic Act*.

145. I therefore find the defendant guilty of Charge 4.

146. There was no evidence effectively challenging any of the police evidence in relation to the drink driving charge. There appears to be no good reason for this charge being contested other than to put the prosecution to proof.

147. I am further satisfied beyond all reasonable doubt that:

on the 18th October 2005;

at Darwin in the Northern Territory;

the defendant behaved in a disorderly manner at a police station namely the Darwin Police Station Watch-house;

contrary to *s 47(c) of the Summary Offences Act*.

In particular I find that the defendant was swearing at police, the defendant was threatening to kill police, the defendant was threatening to blow up police, the defendant was threatening to shoot police. The defendant was yelling and screaming. The defendant was refusing to allow police to remove the handcuffs and was threatening violence upon the police if they attempted to do so. The defendant was kicking at the cell walls and door. The defendant was head butting and running at the cell perspex, the cell walls and the toilet wall.

148. I therefore find the defendant guilty of Charge 5.

149. The evidence of the various police officers and auxiliary's as to what occurred in the police station was effectively unchallenged and again I see no reason why this charge was defended other than to put police to proof.

150. I now turn to consider charge 2. *S 189A of the Criminal Code* states as follows:

> (1) Any person who unlawfully assaults a police officer in the execution of the officer's duty is guilty of a crime and is liable to imprisonment for 5 years or, upon being found guilty summarily, to imprisonment for 2 years.
>
> (2) If the police officer assaulted –
>
> (a) suffers bodily harm, the offender is liable to imprisonment for 7 years or, upon being found guilty summarily, to imprisonment for 3 years; or
>
> (b) suffers grievous harm, the offender is liable to imprisonment for 16 years.

151. Clearly the prosecution must prove beyond all reasonable doubt, in order to prove charge 2, that:

> On the 18th October 2005;
>
> At Darwin;
>
> The defendant;
>
> Did assault Geoffrey Hawkins;
>
> Without authorisation, justification or excuse; and
>
> At the time of the assault Hawkins was a police officer; and
>
> Hawkins was in the execution of his duty as a police officer.

152. It is necessary for the prosecution only to prove intent in relation to the assault, it is not necessary to prove intent in relation to the other elements of the offence, namely that the person assaulted was a policeman and that he was acting in the execution of his duty (see: *The Queen v Reynhoudt* (1962) 107 CLR 381).

153. When Hawkins arrived he was in a marked police caged van, and he was in police uniform (his radio was torn off his epaulet). No issue was taken that Hawkins was not a police officer. By the matters that were put in cross-examination the issues appear to be limited to whether the defendant did

assault Hawkins at all, and whether Hawkins was in the execution of his duty. Mr Loizou argued that Hawkins was not acting in the execution of his duty when he decided to search the defendant. He went on to submit that if Hawkins was not so acting then the charge under *s 189A* is not made out.

154. The defendant had been placed under arrest for the purpose of taking him to the Darwin watch-house to submit to a breath analysis. He was in the custody of Hawkins for that purpose, as it was he and Ryan who were to convey him.

155. It is clear that the execution of a police officer's duty does not end with effecting an arrest but includes conveying the arrested person to the appropriate place to be formally charged (see: *Thomson v C* (1989) 67 NTR 11). I would add for current purposes that it equally extends to conveying a person to a place for a breath analysis in accordance with the *Traffic Act*.

156. A police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of that duty for as long as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease to act therein (see: *R v K* (1993) 118 ALR 596).

157. Accordingly, as the defendant had been lawfully arrested Hawkins was in the execution of his duty in wanting to convey the defendant to the watch-house for the purpose of a breath analysis. The question is whether he did "anything outside the ambit of his duty so as to cease to be acting therein."

158. On the factual findings (as set out above) I would not find that Hawkins had stepped outside his duty at least prior to the indication that the defendant was going to be searched. The defendant was in police custody. It was open to Hawkins not to let the defendant go towards his car and away from the police van. It was necessary for Hawkins to get the defendant into the van, and to use reasonable force, if necessary, to effect that purpose.

159. Mr Loizou relies upon the purported search to suggest that Hawkins had moved outside the ambit of his duty. This requires closer analysis. The defendant did not give evidence, and hence I do not know why he started throwing punches at Hawkins. On the evidence there appear to be only seven possibilities:

1. because he was pushed;

2. because he was told he was going to be searched;

3. because Hawkins had placed hands on him and started searching him;

4. because of a combination of 1 and 2;

5. because of a combination of 2 and 3;

6. because of a combination of 1, 2 and 3; or

7. for some unspecified unrelated reason.

160. The suggestion that the reason was because of possibility 2 was squarely raised in the cross-examination of O'Neill. The suggestion that the reason was because of propositions 2 and 3 was squarely raised in the cross-examination of Gray. In my view, having been raised on the evidence the prosecution has the onus of satisfying me that the search was in the execution of Hawkins' duty. If it was not, then, on the authorities that I will turn to shortly, the defendant was entitled to resist it.

161. Hawkins was not asked specifically, and therefore he did not tell me, why he decided to search the defendant prior to placing him in the back of the police van. A police officer has a number of different powers to search a person granted to him by legislation (for example: *s 144(1) of the Police Administration Act*; *s 95(1) of the Liquor Act*; *s 119(1) of the Police Administration Act*; etc). The right to search a person is not, in my view, at large. It is a potentially embarrassing intrusion upon the privacy of the individual to be searched. It should only be done when necessary and only when there is good reason for doing so.

162. Further, in my view, any police officer who is intending to search a person must turn their mind to which specific power they are intending to rely upon, as each has different requirements to be satisfied before a search is permitted.

163. In my view, at common law (unless a situation of emergency exists that renders it impossible or impractical, or the person is unconscious) before attempting to search any person, the officer should inform the person of his intention to search and give a reason as to why he intends to do so (see: *Brazil v Chief Constable of Surrey* (1903) 3 ALL ER 537). In my view, *s 144(1)* has not removed this obligation. Hawkins gave no reason to the defendant, nor did he offer any reason after the event in court.

164. It is not permissible, in my view, for an officer to search a person at large, and then after the search to attempt to create a pre-existing reason based upon what may have been located in the search. As will appear later in these reasons the officer must have the necessary state of belief or suspicion before he attempts a search. The only way this can be truly known is if the officer verbalises the reason for the search before it is attempted. Failing this the power of search is open to abuse.

165. It appears that if Hawkins was relying upon any power to search it was under *s 144(1) of the Police Administration Act*.

166. *Section 144(1) of the Police Administration Act* states:

> "(1) Where a person is in lawful custody, a member of the Police Force may search his person, the clothing that he is wearing and any property in his immediate control and may use such force as is reasonably necessary for this purpose, if he believes on reasonable grounds that it is necessary to do so –
>
> (a) for the purpose of ascertaining whether there is concealed on his person, in his clothing or in that property, a weapon or other article capable of being used to inflict injury upon a person or to assist him to escape from custody; or
>
> (b) for the purpose of preventing the loss or destruction of evidence relating to an offence."

167. Accordingly, this power to search is not at large. A police officer only has a limited right to search, and only if he or she believes that either of (a) or (b) applies, and only then when the police officer has reasonable grounds for that belief. Accordingly, the starting point is to ascertain what the police officer believed (and in the instant case Hawkins was not asked and therefore did not tell me what his thought process was) and then to assess the grounds on which that belief was formed to come to an objective decision as to whether the grounds were or were not reasonable. Without knowing what Hawkins believed prior to requiring a search it may not be possible to objectively assess the reasonableness of his grounds.

168. It is interesting to note that prior to 20 April 2005 after the word "custody" in *s 144(1)* the extra words "on a charge for offence" were included within the section. These words were omitted by *Act No. 11 of 2005* with effect from 20 April 2005. Prior to that amendment it would not have been possible to have searched the defendant at all because he was not in custody for any offence. In the Second Reading Speech at the time that this amendment was made the following was said:

> "The final amendment gives police the power to search any person they take into lawfully custody. Currently, section 114 of the Act restricts police to searching persons who are in lawful custody on charge of an offence. Police take people into lawful custody for a range of reasons. For example, a person may be held to enable police to question the person or undertake an investigation or further investigation. The lack of a power to search any person taken into lawfully custody, or who initially attends the watch-house, poses a risk to the police, other inmates and to the person themselves. This amendment would enable police to perform a non-intimate search on that person."

169. I note that the reference to s 114 in the second reading speech would appear to be in error and clearly must relate to *s 144*. Accordingly, it is clear that Hawkins had the power and right to search the defendant but only for one of the purposes permitted in *subsections (a) or (b),* and then only if he believed on reasonable grounds that it was necessary to do so. The right to search is therefore limited. Given that the defendant was in custody for the purpose of a breath analysis *subsection (b)* would not

appear to apply as there could not have been a loss or destruction of any evidence relating to any offence.

170. I note in passing *s 144(5) of the Police Administration Act* which states:

> "Nothing in this section shall be taken to prevent the search of the person of a person, or of property under the control of a person and the removal from that person of any property for safe keeping upon his being admitted as an inmate of a gaol, lock-up, prison or like place after being charged with an offence".

171. Accordingly, once charged and before being locked up there is an absolute right to search, but until that stage is reached there is not. If it were the intention of the legislature to allow police to search every person in custody as of right, or as a matter of routine practice, then it would have been easy to have said so (by deleting all words after the word "pupose"). The legislature has chosen not to, but rather has opted for a limited power to search only, and one which is open to scrutiny.

172. In the instant case the defendant was placed under arrest (pursuant to *s 23(7) of the Traffic Act*) for the purpose of a breath analysis, to ascertain whether he was committing an offence under *s 19 of the Traffic Act*. That offence is a regulatory offence. He was not under arrest for the commission of any crime. He was not suspected of having committed any offence of violence. There was no evidence to suggest that he had any warrants outstanding against him. There was no evidence to suggest that he was known to any of the officers who attended at the scene. It was a routine traffic apprehension. A police van was called for by O'Neill because it was his policy not to convey arrested persons in the back of a sedan.

173. Without any direct evidence from Hawkins as to his reasons for wanting to search the defendant all I have is the surrounding facts and some inferences which can be drawn from it. According to Hawkins he specifically asked the defendant whether he had any "sharps". However, Hawkins did not tell me that he believed the defendant may have any sharp objects on him and if so what the basis of that belief might have been.

174. In the case of *Brazil v Chief Constable of Surrey* (supra), the Queens bench division dealt with a situation where the appellant, a female, was arrested for acting in a manner likely to cause a breach of the peace and was taken to a police station, where she was told by a police woman that everyone bought into the station had to be searched for their own safety. Before any attempt had been made to search her she struck the police woman (the first assault) and had to be restrained. It was held in that case that:

> "A police constable could not justify a search simply on the basis of a general rule; instead, the constable had to consider in each case whether in the particular circumstances a search was necessary. Since there was no evidence in respect of the first assault that the police woman had considered whether a search was necessary she could not be said to have been acting in execution of her duty when she was assaulted.
>
> Because a search involved an affront to the dignity of a person a police constable was not normally entitled to carry out a search without first telling the victim of the search why it was necessary in the particular case".

175. The case of *Perkins v Police,* a New Zealand case decided by the Court of Appeal in Wellington [1988] 1NZLR 257, dealt with the right to search under the *Arms Act*. In that case Bisson J (who delivered the judgment of the Court) applied the decision in *Brazil's case* and stated:

> "This was a situation in which common law principles which were not expressly excluded nor entirely replaced should supplement the statutory requirements. Accordingly, although section 60(3)(b) did not require the constable to name the section and subsection of the Act before commencing the search he should in most cases first inform the person he proposes to search of his identity, if not in uniform, and a in a general way state the reason for and authority for the proposed search. There may be exceptional circumstances where it is not reasonably possible to do so, as might occur when dealing with firearms or explosives, when, for reasons of safety, time does not permit any formality prior to making the search".

176. I am not aware of either case being directly applied in Australia, but in the case of *State of New South Wales v Riley,* (2003) 57 NSWLR 496 @ 501, in the Court of Appeal of NSW, Sheller JA said:

Lord du Parcq said (in *Christie v Leachinsky* [1947] AC 573 at 600) that the omission to tell a person who is arrested at, or within a reasonable time of, the arrest with what offence he is charged cannot be regarded as a mere irregularity: “Arrest and imprisonment, without a warrant, on a charge which does not justify arrest, are unlawful and, therefore, constitute false imprisonment, whether the person making the arrest is a policeman or a private individual”.

The same principle applies to other restraints imposed upon persons. In *Brazil v Chief Constable of Surrey* [1983] 1 WLR 1155; [1983] 3 All ER 537, the Queens Bench Division held that a personal search by police officers imposed a restraint on a person's freedom to which he should not be required to submit unless he knew in substance the reason for it; see per Robert Goff LJ (at 1162; 542). See also the decision of the New Zealand Court of Appeal in (2003) 57 NSWLR 496 at 502 *Perkins v Police* [1988] 1 NZLR 257 at 262.

177. In the book “*Search and Seizure in Australia and New Zealand*” published by LBC Information Services in 1996 at page 111 it is noted:

> “Common Law has always upheld the right of the police to search persons in custody, that is, persons who have been arrested. This rule of law has always been looked upon as reasonable and necessary in law enforcement, for the protection of the officer against attack by concealed weapons and to protect the prisoner from harming himself or herself”.

178. And over at page 112:

> “The aim of the post arrest search is usually two fold: to locate items which may provide evidence of the offence and to remove anything from the prisoner which he or she might use to do harm to him or herself, or to other persons. In the words of Donaldson LJ in *Linley v Rutter* (1981) QB 128 at 124, responsibility of a police officer in such a search for evidence and potentially harmful items is to:
>
> “...take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime such as, for example, malicious damage to property”
>
> If such a search of a prisoner in custody is a mere routine then there has been no proper prior consideration of its necessity, then it is unlawful and possibly grounds for a civil action in trespass, according to Goff LJ in *Brazil v Chief Constable of Surrey*.”

179. *S 144(1) of the Police Administration Act* appears to generally pick up on the common law, but requires in each case of a search for the police officer to turn his or her mind to whether it is necessary to search a particular person for reason (a) or (b) and, if so, on what basis.

180. In the instant case Hawkins has not stated what his belief was or the basis for it. Accordingly, there is no direct evidentiary basis laid on which I can decide that the belief (if one was held) was on reasonable grounds or not.

181. Mr Fisher (who took over as counsel from Ms McDade) relied on the case of *Maines v Roy* [1990] 1 WAR 508 to overcome this possible difficulty. That case dealt with *section 49 of the Police Act* which allowed a police officer to stop, search and detain a person reasonably suspected of having or conveying anything stolen. Nicholson J examined a number of authorities and at pages 514 to 515 said:

> From the wording of s 49 itself and from this examination of authorities I consider the following propositions emerge:
>
> 1. There must be an actual or concrete suspicion actually entertained by the relevant police officer.
>
> 2. The suspicion must be held at the time the power of stop, search and seizure is exercised.
>
> 3. The reasonableness of the suspicion must be established by examination of the facts upon which it was formed.
>
> 4. It is not essential that the relevant officer should actually swear he held such a suspicion.
>
> 5. The existence and reasonableness of the suspicion may be inferred from a combination of the proved facts themselves and the way in which the complainant acted.
>
> 6. It is appropriate for the above purposes for the police officer to state the nature of information received either in examination or cross-examination.
>
> 7. Evidence of possession of information simpliciter will not materially assist the prosecution to discharge its onus unless more is known about its credibility.

182. In that case a relevant fact was set out at page 510 as follows:

> Constable Dillon was asked by the prosecutor whether the reason he wanted to search the defendant was because of what he was told. He said that was correct and that he had a reasonable belief that the respondent was carrying stolen property and that the respondent had committed an offence. Constable Dillon was not cross-examined in relation to the basis of his belief.

183. Accordingly, in that case the officer did state that he held the requisite belief, he confirmed that was because of what he was told, but he was not apparently asked what he was told. In my view, it would have been preferable if he was, otherwise I do not understand how the court is supposed to objectively assess the reasonableness of the belief. As Crawford J found in *Nicholas v Fleming* [1959] Tas SR 165 (when dealing with the issue of whether something was "reasonably supposed to be stolen property") the supposing must be subjective, in that it must be held by a particular person, but the test as to whether the supposing is reasonable is an objective one.

184. I generally do not take issue with propositions 1, 2, 3, 5, 6 and 7 as put forward by Nicholson J, but I find proposition 4 requires some closer analysis. On the facts before Nicholson J this proposition was obiter only. In support of this proposition he appears to be relying on a decision of Wickham J in *O'Brien v Reitze* [1972] WAR 152 @ 153 where his Honour said:

> The complainant must harbour a real suspicion (*Dunleavy v Dempsey* (1916) 18 WALR 90) but it is not essential that he should actually swear that he held such a suspicion; that he did hold such a suspicion may be inferred from a combination of the proved facts themselves and the way in which the complainant acted: *Le Poidevin v Hudson* [1935] SASR 223.

185. Accordingly, the case that Wickham J relies upon for that proposition is *Le Poidevin*. When that case is looked at, the facts were quite different to the situation in the instant case. There the police officer was investigating the theft of some almonds. The defendant showed him three heaps of almonds and gave him a story as to how she came by them. The officer left and

checked out her story. The information he received accounted for two of the heaps, but not the third one. The officer returned to the defendant and told her the information he had been told and told her “you have more almonds here than what the boys brought home in two sugar bags. I suspect that some of them are stolen. I am going to take the heap from near the stack of hay and make further enquiries”. He did so. He later returned and told her what his enquiries had revealed. He again told her “I suspect that you came by them unlawfully, and you will be charged with unlawful possession”. On appeal from the defendant’s conviction it was contended that it was essential for the officer at the trial to state that he suspected that the goods had been stolen or unlawfully obtained. Richards J found in the circumstances of that case that it was not. At page 232 Richards J took the opportunity to correct a misapprehension as to what he said in *Henderson v Surfield and Carter*, [1927] SASR 31 @34, where he noted:

> It seems to have been supposed that I held that the existence of suspicion could be inferred simply from the conduct of the arresting constable; and the way in which it was put certainly might lead to that supposition. Obviously, something more is necessary.....In my opinion, the position is that, if the circumstances were such that a reasonable man would suspect, and the alleged suspecter acted as such a man would act if he suspected, that is sufficient.

186. Therefore, *Le Poidevin* is authority for the proposition that suspicion (in the instant case we are dealing with belief) cannot be inferred simply from the conduct of the arresting officer, something more is needed. According to Richards J that something more is that a reasonable man would suspect in the circumstances. I must say, with respect, that I find this reasoning somewhat circular and not altogether convincing. However, on the facts in *Le Poidevin* (given the clear evidence of what the officer told the defendant he suspected and why) there was, in my view, ample evidence before the court as to what the officer suspected and why he did so. I also would have had no difficulty in dismissing that ground of appeal as did Richards J. *Le Poidevin* was followed by Ross J in *Wallace v Hansberry* [1959] SASR 20 @ 25 where His Honour held that “it is sufficient if circumstances reasonably justify suspicion and a person acts as if he suspected”.

187. In the instant case the evidence from Hawkins is that:

> The defendant wanted to go to his car but wasn't allowed to, Hawkins positioned himself between the defendant and the BMW and put his right hand out to block him. The defendant tried to push past him but Hawkins told him to just turn around and go straight to the police van. The defendant tried to push past again stating "I want to get my shit out of the car".
>
> Hawkins put his left hand on the defendant's right arm just above the elbow to turn him around towards the police van. Ryan also assisted at this stage and gathered the defendant's other arm. The defendant was then turned around and was being lead back towards the police van at which stage he began to struggle and push back towards Hawkins to go the other way. The defendant said "let me go you can't hold me". Hawkins told him to keep going to the police vehicle but he kept struggling.
>
> When they got the defendant to the side of the police vehicle Hawkins asked him to put his hands up on the police van and asked him if he had any "sharps".

188. How does this evidence reasonably justify that a search of the defendant was necessary for the purpose of ascertaining whether there is concealed on his person, in his clothing or in that property, a weapon or other article capable of being used to inflict injury upon a person or to assist him to escape from custody? If the defendant was resisting and pushing back on police whilst he was being taken towards the back of the police van then that may have been an important piece of evidence.

189. As noted above:

> Hawkins said: The defendant was then turned around and was being lead back towards the police van at which stage he began to struggle and push back towards Hawkins to go the other way. The defendant said "let me go you can't hold me". Hawkins told him to keep going to the police vehicle but he kept struggling.
>
> O'Neill said in XXN: The defendant walked to the police van of his own free will. Willingly.
>
> Gray said: Hawkins intercepted the defendant and the defendant said "I want to get my shit". Hawkins again directed the defendant to the police van. Hawkins took hold of the defendants arm and directed him to the police van and she placed herself on the left arm of the defendant to help escort him.

> Trudgett said: he saw police escorting the defendant to the back of the police van. Police did not have hold of the defendant. The defendant had asked if he could get the rest of his identification and they said no you can't. When the defendant got to the back of the police van the defendant went to turn around and started to say something, he said "can't I just ..." and two police officers pushed the defendant into a third police officer who was up against the police van.

190. Accordingly, the only evidence to suggest that the defendant struggled with or resisted police in any way prior to being told he was going to be searched came from Hawkins. It is not the evidence of any of the other persons present who gave evidence before me. Gray did say in cross-examination that the defendant was with his tone and body language. Taking the evidence as a whole I am unable to find that the defendant did struggle, push back or resist the police as he went towards the rear of the police van. As noted earlier he did stop in order to say something to police but did not get the opportunity to do so. I therefore eliminate that as a fact that Hawkins could take into account in deciding whether to search the defendant or not.

191. As noted earlier there was no explanation put forward in the evidence as to why Hawkins had decided to search the defendant. It may be that he did this routinely for every person who he put into the back of his police van (if this was the case then this, in my view, is not permitted under s 144(1); as the officer must turn his mind to whether he has reasonable grounds to believe it is necessary to do so for either of the reason in ss (a) or (b) in each case). It could not be that he did so because the defendant was not being co-operative, as I am unable to find that he was not. It could not have been because the defendant was resisting, as I am unable to find that he was. It may be that he did so because he observed something on the defendant that caused him some apprehension (but he didn't suggest this, and there is no other evidence from which I can infer that this might have been the case). It may have been for some other reason, but I don't know, and the only person who could have told me was Hawkins, and he didn't do so.

192. There will be cases where the facts speak for themselves (such as in the *Le Poidevin case*), and requiring the officer to re-state the obvious in court is unnecessary.

193. In my view, where a police officer intends to search a person (other than in a situation to which *s 144(5) of the Police Administration Act* applies) then it would be advisable if he or she:

> 1. Informed the person to be searched that they are about to be searched (except in a case of emergency or where it is unsafe or impractical to do so);
>
> 2. Informed the person to be searched the reason the search is to be carried out in general terms (except in a case of emergency or where it is unsafe or impractical to do so);
>
> and if the search is in issue in any subsequent court proceedings:
>
> 3. Informed the court as to his belief (prior to effecting the search) as to why a search was necessary; and
>
> 4. Informed the court as to the facts or information that led him or her to form that belief (and hearsay evidence is permissible in this regard – *Manley v Tucs* (1985) 40 SASR 1 @12-3);
>
> as only then can the court decide whether the belief was on reasonable grounds or not.

194. It would be wrong, in my view, for a court to look at the surrounding facts in order to assess the reasonableness of an officer's belief, unless there was evidence that the particular officer was at the time aware of each of those facts. In the instant case there was evidence that when the defendant was talking to O'Neill he said "he had no medical conditions but he did have a problem that he doesn't like police and he likes to fight". Gray gave evidence of hearing similar words, but importantly, Hawkins did not. Hence, I am unable to be satisfied that Hawkins did hear these words or rely upon them at all. This evidence needs to be excluded when considering the reasonableness of any belief held by Hawkins.

195. In *Forrest v Normandale* (1973) 5 SASR 524 Mitchell and Wells JJ held that the court was not limited to considering the grounds specified in evidence

by the police constable, but was entitled to have regard to the whole of the surrounding facts and circumstances known to him, though not to facts or circumstances of which he was unaware.

196. Bray CJ (who dissented) held that where a witness purports to list in detail the grounds on which he suspected the court should regard the list as exhaustive. His Honour also went on to say at page 529:

> Though, as I said in *Stokes v Samuels* (1973) 5 SASR 18, if it were now an open question for me I might have stated otherwise, it is settled law in this state that it is not essential to the establishment of a prima facie case under the section that the alleged suspecter should depose to the fact that he suspected or to his grounds, provided that the court is satisfied that he behaved as if he suspected and that a reasonable person in his situation would have suspected (*Le Poidevin v Hudson; Wallace v Hansberry*).

197. I have great respect for the opinions of Bray CJ, and with respect share his reservations in this regard.

198. In the instant case all I know is that Hawkins asked the defendant if he had any “sharps”. I do not know that he believed that he might, but it is reasonable to infer that that was why the question was asked. There is, however, no evidence that would suggest that there was a basis for such a belief.

199. In my view, Hawkins is the only person who can tell me why he chose to seek to search the defendant as it was his state of mind and belief that was relevant. Accordingly, evidence from any other police officer which might go to the issue is irrelevant. If Hawkins had given evidence as to why he was wishing to search the defendant then stated the facts on which he based his reasoning, then evidence of other police officers could be used to confirm or otherwise the existence of those facts.

200. Even applying the *Le Poidevin* test, in my view, based on what Hawkins knew there was no reasonable grounds for believing that there was concealed on the defendant’s person, in his clothing or in that property, a weapon or other article capable of being used to inflict injury upon a person

or to assist him to escape from custody. In my view, the reason he was in police custody is an important factor.

201. Police officers are in a difficult position. They have to deal with all sorts of problems and problem people. When they take a person into custody they have a duty of care to that person, and to others who might come into contact with that person (including themselves). But every case must be assessed on it's own merits. The least amount of powers should be used in order to effect the legitimate purpose. Police are often in a no win situation. If they did not search a person because they seemed no risk and that person ended up inflicting self harm, then the officers might be criticised subsequently. However, as the legislation stands, police are not empowered to search every person taken into custody. The legislation simply does not permit this. Police are only empowered to search a person under *s 144(1)* where they have the requisite belief on reasonable grounds.

202. It is for the prosecution to prove beyond all reasonable doubt that Hawkins was acting in the execution of his duty. I am satisfied beyond all reasonable doubt that Hawkins intended to search the defendant. But I am not satisfied beyond all reasonable doubt that he considered it necessary to do so on reasonable grounds, on a consideration of the facts as known to Hawkins looked at objectively.

203. Accordingly, it follows in my view, that the prosecution have not established that the decision by Hawkins to search the defendant was lawful.

204. It follows, in my view, that absent this evidence it cannot be found that Hawkins was acting in the execution of his duty when he purported to inform the defendant that he was going to search him, and accordingly the defendant was entitled to use all reasonable force to resist (*Henderson v O'Connell* [1937] VLR 171 @ 177). Without a finding that Hawkins was acting in the execution of his duty it is not possible for the defendant to be found guilty of charge 2. Accordingly Charge 2 is dismissed and the defendant is discharged.

205. If I am wrong on this then I would not have found the aggravating circumstance (namely bodily harm) made out beyond all reasonable doubt.

206. The remaining charge is Charge 3 that of resisting a member of the police force in the execution of his duty. *S 158 of the Police Administration Act* states:

> A person shall not resist a member in the execution of his duty or aid or incite any other person to resist a member in the course of his duty.
>
> Penalty: $1,000 or imprisonment for 6 months or both.

207. The word resist means nothing more that “to oppose” or “strive against” or “put a stop to” (see: *R v Hansford* [1974] VR 251 @ 254).

208. The prosecution did not make an opening to the case and nor does it appear that the defence sought any particulars (if they have the court hasn’t been advised of it) from the prosecution. Accordingly, the charge does not particularise which particular police officer the defendant allegedly resisted. Further, it does not specify at which stage of the incident it allegedly occurred. I do not know therefore whether the prosecution is relying upon:

- The alleged resisting on the way to the back of the police van (which I have earlier found I am not satisfied occurred);
- The resisting which formed part of the assault (in which case the same problem would arise as to execution of duty);
- Resisting after the assault, by causing difficulties in being placed into the police van;
- Resisting by not getting out of the police van at the watch-house and having to be lifted out;
- Resisting by not walking into the breath analysis room and having to be carried.

209. In the case of *Daye v Pryce* [2000] NTSC 82 Riley J cited the following judgment of Walters J in *Hull v Nuske* (1974) 8 SASR 587 @593 with approval:

> "It seems to me that the offence of resisting a police officer in the execution of his duty is a "conduct offence" and that the actus reus can properly be made up of behaviour consisting of the one set of circumstances which form the central feature of the offence. The fact that the behaviour alleged to constitute a resistance of a police officer is aimed or directed at two police officers, lawfully engaged in the joint performance of the one and the same duty, does not in my opinion lead to the consequence that there are two independent actus rei which may be separately charged. In my view, it would be going too far to say that in relation to each officer, the external facts arising out of the one set of circumstances and involving a resistance of that police officer, in the execution of a duty being lawfully performed by him jointly with another police officer, can lead to the commission of two distinct offences. I think an unjust result would follow if an offender were to be convicted of two or more separate offences arising out of a continuous act or proceeding which gave rise to a resistance, at the same time, of more than one police officer in the execution of duty. It seems to me therefore, that in the circumstances of this case, the conviction for breach of section 6(2) of the Act is not bad for duplicity, simply because it is recorded in the language of the complaint. It follows that I do not think the complaint was defective; it disclosed only one offence."

210. On the facts of this case I find that there was no good reason why the defendant could not have gotten out of the police van and walked into the watch-house upon arrival there. There was no evidence before me from which I could find that the defendant's lack of response was other than feigned. He was deliberately not assisting, but was he resisting?

211. Resisting is not the same as hindering or obstructing (which is a separate offence under *s 159 of the Police Administration Act*). A hindering or obstruction occurs in all cases where the particular act complained of makes the carrying out of a constable's duty more difficult (see: "*Police Offences of Western Australia*" by P W Nichols @ 20/2). On the facts herein I would have had no difficulty in finding that the defendant's actions at the watch-house were hindering or obstructing. But I am not satisfied that they were resisting. He was not striving against, opposing or putting a stop to the police actions. He was passive in the extreme, and I am unable to find that this is "resisting".

212. In the scuffle that occurred at the scene he was clearly resisting police, but given that I am not satisfied that the intended search was in the execution of Hawkins' duty I am unable to find the defendant guilty of Charge 3 based on this aspect either. Accordingly, Charge 3 is dismissed.

213. In summary:

I find the defendant guilty of charges 1, 4 and 5.

I find the defendant not guilty of charges 2 and 3.

214. I will hear both counsel on the issue of sentence and any other orders sought.

Dated this 1st day of September 2006.

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DAYNOR TRIGG
STIPENDIARY MAGISTRATE