

CITATION: *Moore v Bonsell* [2006] NTMC 082

PARTIES: DAVID STEVEN MOORE

v

PETER WALTER BONSELL

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20612143

DELIVERED ON: 10 November 2006

DELIVERED AT: Darwin

HEARING DATE(s): 2 and 3 October 2006

JUDGMENT OF: Sue Oliver SM

CATCHWORDS:

CRIMINAL RESPONSIBILITY – SUMMARY OFFENCES ACT s47 –
UNREASONABLE DISRUPTION OF PRIVACY
Pregelj v Manison (1987) 51 NTR 1

PARTICULARS OF CHARGE
R v S [2000] 1 Qd R 445

REPRESENTATION:

Counsel:

Complainant: Mr Smith
Defendant: Mr Bryant

Solicitors:

Complainant: ODPP
Defendant: NTLAC

Judgment category classification: B
Judgment ID number: [2006] NTMC 082
Number of paragraphs: 48

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

No.

BETWEEN:

DAVID STEVEN MOORE
Complainant

AND:

PETER WALTER BONSELL
Defendant

REASONS FOR DECISION

(Delivered 10 November 2006)

Ms SUE OLIVER SM:

1. Peter Walter Bonsell appeared before me charged with two counts of assault contrary to section 188(2) of the *Criminal Code*, 8 counts of offences contrary to section 47(e), and 7 counts contrary to section 47(f) of the *Summary Offences Act*. At the outset charges 1 and 2, that is the assault charges, were withdrawn as was count 12, a charge of unreasonably causing substantial annoyance contrary to section 47(e) of the *Summary Offences Act*. Not guilty pleas were entered to all other charges. Charge 3 is a charge of unreasonably causing substantial annoyance to another person alleged to be the building of a wall of soil on the boundary of the Defendant's property resulting in substantial flooding to the victim's yard. The remaining charges were alternative counts of unreasonably causing substantial annoyance (section 47(e)) or of unreasonable disrupting the privacy (section 47(f)) of another person contrary to the *Summary Offences Act* relating to dates particularised in the complaints as 13th, 14th, 17th, 19th, 21st and 26th of November and between 23rd and 24th of December 2005. At

the end of the Prosecution case I heard no case submissions in relation to a number of the charges and the defence requested that the Prosecution elect from the alternative charges those on which it proposed to proceed. The Prosecution elected to proceed on counts 5 and 6, standing aside charges 4 and 7 which were alternatives. There was no evidence led by the Prosecution on charges 14, 15, or 16. I ruled that there was sufficient evidence on count 3 for that to proceed. In summary, the only charges for the defendant to answer at the conclusion of the Prosecution evidence were charges 3, 5, 6 and 13.

2. Charge 3 is that between the 1st of November 2005 and the 30th of November 2005 the defendant unreasonably caused substantial annoyance to another person namely Gorgia-Lee Skinner and Shane Bates contrary to section 47(e) of the *Summary Offences Act*. Charge 5 is that on the 13th of November 2005 the defendant unreasonably disrupted the privacy of another person, namely Gorgia-Lee Skinner and Shane Bates contrary to section 47(f) of the *Summary Offences Act*. Charge 6 is that the defendant on the 14th of November 2005 unreasonably caused substantial annoyance to another person namely Gorgia-Lee Skinner and Shane Bates contrary to section 47(e) of the *Summary Offences Act*. The final charge 13 is that between the 23rd of December and 24th of December 2005 the defendant unreasonably disrupted the privacy of another person, namely Gorgia-Lee Skinner and Shane Bates contrary to section 47(f) of the *Summary Offences Act*.
3. Ms Skinner and Mr Bates were, at the time to which the charges relate, neighbours in an adjoining property to that of the defendant at Humpty Doo. The charges arise out of incidents alleged to have occurred on the defendant's property at Humpty Doo. The Prosecution called evidence from both Ms Skinner and Mr Bates and also from Evangelos Kammass and George Kammass, Mr George Kammass being another neighbour and Mr Evangelos Kammass, his brother, who on his evidence was a frequent visitor

to Mr George Kammas' property. Evidence was also given by two police constables, Constable Natalie Watts and Constable Kellyanne Paragreen.

4. The evidence of the Kammas brothers related to charge 13 concerning the events between the 23rd of December and the 24th of December. Mr Evangelos Kammas gave evidence of noise which he said started around midnight on the 23rd of December and went on for at least a couple of hours. He described it as a drumming noise, the sound of someone hitting something metal with a hammer. He said he was quite clear of the date because on the 24th of December the Kammas brothers had held a party. He described the noise as being constant for "a lengthy period" and then stopping for 5 to 10 minutes before starting up again. When asked what was a lengthy period he said this was at least an hour. Mr Kammas was cross examined as to whether the noise might have resulted from the wind banging loose items in a shed or in the shade house on the Kammas property but his view was there was not enough wind that night to cause the continuous noise that he heard. He said that he had walked out about ten metres from his house to gauge where the noise was coming from. He said the noise stopped about 3am or a bit after and acknowledged that in the statement he made to the police he had said that it was 4:30am.
5. Mr George Kammas had been out earlier in the evening and gave evidence that on returning home he heard loud banging which he described as being like a hammer hitting steel drum with metal. He described the banging as being constant with a bit of a break. He said that that night it went on pretty much all night. He gave evidence that he had heard similar noises on other occasions.
6. Constable Natalie Watts gave evidence that she attended at the residence of Ms Skinner and Mr Bates on the 23rd of December as a result of a noise complaint that had been received by police. She said that there was no noise when she arrived but it started shortly after while she was talking to Mr

Bates. On going to investigate she saw, in the adjoining property, a man standing behind a tree with a bucket and a stick. She said she called out to him but he did not respond instead going to the shed and then coming out without the bucket and going to the house on that property. She said she then went back to talk to Shane Bates and the noise started again. She again approached the boundary property and the person shone a torch on her and then walked off. She said that she gave a warning to the defendant that if she had to attend again she would issue a ticket. She said it was about 1am at this time. Constable Watt said the incident was very clear in her mind because it was one of the only jobs that she had attended where she saw a person hiding behind a tree and the person was ignoring her. When questioned about the length of the drumming that she heard she said it was for about 15 seconds and then the defendant was standing behind the tree for a few minutes. She said she assumed that the pipe that was being used to make the drumming sound was metal judging from the sound. In cross examination she was asked whether the defendant mentioned scaring away animals and whether she had asked him what sort of animals. She agreed she said "what animals" because she could not see any and he said "the little animals here". She said she looked around and couldn't see any animals. She said there was no other conversation because he walked away. Constable Watts identified the defendant as the person that she observed and spoke to that night.

7. Ms Skinner gave evidence of the events of the 13th and 14th of November and of those occurring between the 23rd and 24th of December. Ms Skinner gave evidence of a conversation which had occurred some months earlier with both the defendant and his wife at the stables on her and Mr Bates property, in relation to their son Jack riding his 80cc bike and the noise it was making. Ms Skinner was somewhat unclear about the dates of the earlier incidents save that she believed that it was around the 14th. Her evidence however was clear that there were two consecutive nights on which

particular noises occurred. On the first occasion, which she described as being pretty sure it was the 14th, she said the dogs were going off and that she could hear whistling noises. She described the next night as being worse. Someone banging something like a tin or drum, banging on a fence, the shed and whistling to the dogs. She described these events as being part of a series of similar events which would start as soon as she and Mr Bates went to bed between 10:30 and 11:30pm and turned the lights off. She described the noises as stopping for a bit and then starting again. The whistling noise that she described was said to be a strange whistle like object, something artificial. Her confusion as to the dates appeared to arise out of the time of the events, that is around midnight either from the 13th going into the 14th or from the 14th going into the 15th. Ms Skinner also gave evidence about events that occurred between the 23rd and the 24th of December. She said that they had family come up from Melbourne that day and on that evening of the 23rd of December the noise started at around 11pm and went on and on. It started once the lights were turned off and finished some time between 4 and 5am. She said that sometimes the noise went on for almost an hour at a time. She described this night, the night the police came, as being the worst night with the noise going on and on and being very loud. She said she just didn't think things like this were normal. She described the drumming heard as being constant and rhythmic, sometimes faster, sometimes slower, which she demonstrated by slapping the witness box. She said the police had been out to the property but that didn't seem to stop it. In cross examination she said that she couldn't believe that these things were going on and that if Shane (Mr Bates) wasn't home she wouldn't let the kids go outside. She was asked in cross examination whether there were problems with dogs and whether they would jump through the property to the Bonsells. She said she was not aware of that and that their dogs don't jump and couldn't get through. She said there was not a problem with roaming dogs except for one amusing incident she described of a puppy in a chip packet. In response to a suggestion that her

dogs were frequent visitors to the Bonsell property she said that she would be surprised because that had never been brought to her attention and she didn't see how they would get in.

8. Shane Bates evidence also concerned the three nights in question. He gave evidence that on the 13th of November Ms Skinner woke him up because she could hear dogs barking at a whistling sound. He described the time as being late, around midnight. He went outside and could see a figure in the adjoining property. He used one of his horses which was free in the paddock to disguise his approach to the fence line. He said that he observed Mr Bonsell walking up and down the fence hitting the fence with an object like a stick and whistling. He shone a torch on Mr Bonsell and asked him if he had lost anything to which he said he seemed to be a bit shocked and went back to the house. In cross examination he further described the incident and said that he had observed Mr Bonsell for maybe 10 to 15 minutes smashing or hitting trees to make a rustling noise, hissing at dogs and using a fox type whistle which he described as being a metallic disc that you suck or blow through. He also describing twanging and hitting the fence. His evidence was that his own dogs had been put inside when he came out. Mr Bates was quite clear that the first night was the 13th going into the 14th.
9. In relation to the allegations concerning the 14th of November 2005, Mr Bates gave evidence that following the noise on the previous night he obtained a camera in order to record what was occurring. On that night he described the banging noise starting again and that he got the camera and then it stopped. He described the sound as being an object being hit like a drum. When it started up again, he went outside and taped the defendant and told him he would take the tape to the police. The tape was tendered in evidence and was played as an audio recording only. The tape contains sounds of banging which in my view are consistent with the description given by all of the prosecution witnesses who heard the banging noise. I

would describe the noise on the tape as being a fast repetitive drumming sound. Reference to this tape is made further in these reasons.

10. With respect to the allegation concerning the 23rd and 24th of December, Mr Bates said family arrived from down south that day and that his nephew and his son rode the motor bike for about one hour finishing at about 6pm. Mr Bates said that Mrs Bonsell was riding her ride on mower during this time and he said that the boys could ride the bike while she was still riding her mower.
11. Mr Bates said the noise on this occasion started after 11pm when the lights went out and went on to about 4:30. Mr Bates called the police on three occasions and those calls are recorded on a police communications tape that was tendered in evidence together with a transcript of the call records chronology. Once again the same noise was described, that is a sound like a drum being hit although Mr Bates says to the operator he could have been hitting the shed as well. In addition to Mr Bates evidence, hand written notes made by Mr Bates, with one addition by Ms Skinner, was tendered through Mr Bates. The notes record calls to the police and the attendance of Constable Watts at the property. Various times were recorded on which the neighbour is said to be banging a drum, banging a drum and shed, hitting a drum and shed and calls to the police. The final note is at 4:05 – “police left no noise whilst here”.
12. Mr Bates was cross examined as to the tape that he had given evidence he made and it was put to him that there was no independent means of establishing when it was made as it didn't state the time or date. Mr Bates responded that if it had been during the day then you would see video footage but you only see lights occasionally on the tape. He said it was a borrowed machine and he didn't know how to put the date on it.
13. Exhibit P6, the event chronology from the police communications line, shows a call being received at 23:59:09 on the 23rd of December 2005. It

describes the caller, Shane Bates, as complaining of noise from 12 Forrest Drive Humpty Doo banging a drum or hitting the side of a shed and that this is being done approximately every half hour. The chronology runs through till 4:07:57 on the 24th of December 2005. The audio tapes from police communications also tendered as P6, record the voice of Mr Bates and police communications officers. Noise can be heard in the back ground of the tapes and a comment is made by the police communications operator that it sounds like clattering pots and pans. Mr Bates comments that he has six kids in the house and is not impressed and the operator says “you won’t get much sleep, will you”.

14. The final prosecution witness was Constable Paragreen. She gave evidence that in November she spoke to the defendant and told him about undue noise and the *Summary Offences Act* and that what he was doing was criminal. Constable Paragreen was also the person who subsequently was involved in taking an electronic record of interview with the defendant. The record of interview was tendered and marked P7. During the course of the interview Mr Bonsell says that the noise that he makes is to scare off dogs that come through to his property for chickens and his little Jack Russell and that he uses the noise to drive the dogs off. Mr Bonsell said that he complained once to police which was an incident described in prosecution evidence where the Bates-Skinner dog in their absence was the subject of an attack by a dog from another property.
15. In my view both Ms Skinner and Mr Bates were witnesses of truth. Ms Skinner in particular was very careful not to state matters where her recollection was not absolutely clear. Neither in my view attempted to embellish the account of events and were straight forward as to what occurred and the effect on them.
16. The defendant gave evidence himself. His evidence was that all the drumming noise could be attributed to him chasing dogs off his property. In

relation to the tape (P4), conversation with Mr Bates he believed this to be an occasion towards tea time when Mr Bates had a silver thing in his hand and that he was not banging a bucket but knocking cement off a shovel on a wheelbarrow. Mr Bonsell said he believed this to be the occasion on the tape played in court. In relation to the evidence which had been given as to whistling noises, he suggested that this was flying foxes which set off the Bates dogs and his own. He denied hitting trees or a fence. He said that he had lost three chickens to dogs over the year 2005 and that he assumed the cause of the loss was dogs because the chickens were ripped apart. He said that this was done during the day. He described a number of problems with dogs coming into his property although some of these incidences seemed to have been five years ago. He also described the dog from across Forrest Drive coming across the Bates property into his own. He described methods he used to shoo the dogs as being grabbing an old shovel and shooing them towards the fence. And he would engage in this many times when his dog barked. He said sometimes he had to chase them out of his shed and this sometimes occurred night after night. He also described difficulties with other animals such as snakes which got up into the rafters. He agreed that he was using a stick hitting a drum but said this was to get dogs out of his shed. In relation to the allegations on the 23rd and 24th of December he said if he was walking up and down the fence line with a drum then this was probably to chase dogs off again. He denied being motivated by revenge to make this noise and said that he was just protecting his property. He said he did it before the Bates moved in and that he would do it again. He said that in relation to his conversation with Constable Watts on that evening he said he was chasing dogs off and that Constable Watts had said “these dogs are under control”. He said he then had things to do and he went away. He denied doing any of these things to annoy.

17. In summary then the evidence of Mr Bonsell both in examination in chief and cross examination was that he did not deny that on occasions he banged

on a bucket with a stick making the drum like sound spoken of by the prosecution witnesses but that any noise was used always to drive dogs off his property. He did dispute the occasion on which Mr Bates taped him, asserting this was not during the night but at tea time and that he was not banging a stick on a bucket making a drumming noise but was dislodging cement from an old shovel on a wheelbarrow. He denied banging on trees with sticks and said that it was fruit bats making the whistling noise complained of.

18. It was submitted that the prosecution case that had proceeded on the evidence was so different from the particulars provided to the defendant that it had created unfairness to him. Section 22A(1) of the *Justices Act* requires that “Any information, complaint, summons, warrant or other document under this Act in which it is necessary to state the matter charged against any person shall be sufficient if it contains a statement of the specific offence with which the accused person is charged, together with such particulars as are necessary for giving reasonable information as to the nature of the charge.” Such information is required for two reasons. First to eliminate the risk of duplicity, so that the occasion on which the offence is said to have occurred may be differentiated by the jury [trier of fact] as a specific event distinguishable from other similar incidents suggested by the evidence. The second purpose is to give the accused person a sufficient indication of what is alleged against him on the occasion on which he is said to have committed the offence. *R v S* [2000] Qd R 445 & 452.
19. Charge 3 is a complaint that between the 1st of November and the 30th of November 2005 the defendant unreasonably caused substantial annoyance to another person namely Gorgia-Lee Skinner and Shane Bates contrary to s47(e) of the Summary Offences Act. The particulars provided on this charge concern an allegation that a large wall of soil was built by the defendant on his property which caused substantial flooding to the victims yard resulting in the need to make repairs to the victims septic system.

20. Some evidence was given of flooding on the property occupied by Ms Skinner and Mr Bates including photographic evidence of what appeared to be a build up of soil and other materials along a boundary area on the Defendants side of the fence and of Mr Bonsell building up this area. No evidence was given of damage to the septic system as was specified in the particulars of the charge. Whilst I found that there was sufficient evidence at the close of the prosecution case for there to be a case to answer I am not satisfied beyond a reasonable doubt that the offence has been proved. There may well be other explanations for the flooding on the Skinner/Bates property at that time other than it being caused by a wall of soil placed along the boundary line, for example a rain pattern that caused or contributed to flooding at that time. The evidence lead by the prosecution is insufficient for me to conclude otherwise and that charge is dismissed. The discrepancy in relation to particulars is therefore of no moment.
21. Charge 13 is that between the 23rd and 24th of December 2005 the defendant unreasonably disrupted the privacy of another person, namely Gorgia-Lee Skinner and Shane Bates. The particulars provided for this charge are that the defendant attended at the boundary of the victims property adjacent to their house and hit on a metal drum lid or similar whilst walking up and down and provoked the victims dogs by whistling and hitting the fence. As the evidence transpired the drumming noise attested to by the witnesses appears to have been caused by the defendant banging on a large bucket with a metal object or a stick. Evidence of banging on the shed was also given. It was not in fact contested by the defendant that he had used such implements to make a drumming noise on that occasion, only the purpose for his so doing. In my view the misidentification (if indeed 'metal drum lid or similar' is a misidentification) of the implement is not misleading as to the nature of the charge to be answered. The key issue in the particulars provided was the banging noise, not the method by which it was made. In addition, the night identified in this charge was the only

occasion on which the police attended and spoke directly to the defendant about the noise he was making. The dates themselves without further particulars was sufficient in my view for the defendant to know the occasion on which the offence was said to have occurred. The absence of evidence of any whistling or hitting the fence on this occasion did not prejudice the defendant. The substance of this allegation was of disruption of privacy by noise, metallic in sound.

22. The evidence of all witnesses to this incident was consistent. The Kammas brothers both gave evidence of drumming noise that had some metallic sound. Both described it as constant banging (Mr Evangelos Kammas saying for lengthy periods of about an hour) followed by a short stop or break. Both described it as going on until the early hours of the morning, variously somewhere between 3 and 4.30am. Constable Watts gave evidence that she saw the defendant with a bucket and stick and heard him banging on it. She only heard the banging for a short time but also gave evidence that the banging stopped after her initial approach and then started again when she returned to talk to Shane Bates. Ms Skinner's evidence was that the drumming noise on this occasion started around 11pm and finished around 4 or 5am on occasions going on for almost an hour. Mr Bates also described the noise of a person hitting a drum as starting around 11pm and going on until 4.30am. Police were called 3 times and the police communications records show this to be the case. The police communications audio tape tendered records sound in the background which the communications officer comments "sounds like clattering pots and pans" and that "you won't get much sleep will you".
23. The Defendant did not deny in his evidence that on the night in question he was walking up and down the fence line banging on a drum but said that he was chasing dogs off again. He said that he was protecting his property and that he did it before Mr Bates moved in and that he would do it again. He described the time employed on the exercise as about 5-10 minutes

depending on how dark it was. He said this sometimes occurred night after night. He denied in cross examination that there were no dogs and that he was motivated by revenge arising from the use of a motor bike by Mr Bates teenage son.

24. I am satisfied beyond a reasonable doubt that the defendant was on this occasion using a bucket and stick of some kind to create drumming noise that sounded metallic in nature. He does not of course deny this. I do not accept that the noise was only of short duration as described by the defendant. Although Constable Watts described only a short period during which she heard the noise but she was not present all evening and the drumming was interrupted by her own actions in approaching and questioning the defendant. The evidence of all of the other witnesses, Ms Skinner, Mr Bates and both the Messrs Kammas was that the sound went on for lengthy periods of up to an hour. That evidence is corroborated by the record of calls to Police.

25. The question is then whether that noise constituted an unreasonable disruption of the privacy of Mr Bates and Ms Skinner and whether the defendant intended that disruption. I was not referred to any authorities on what is required for the proof of disruption of privacy and my own researches failed to locate any relevant Australian authority, not perhaps surprising because legal privacy issues have tended to be a relatively recent concept in Australia and for the most part have concerned information privacy or have been referred to in the context of search and surveillance warrants. There is of course considerable jurisprudence from the United States of America on the subject of privacy because in that jurisdiction privacy is recognised both as attracting constitutional protection and at common law invasions of privacy are actionable by four discrete torts. What may be drawn from that jurisprudence which is of relevance to this matter is that the home is afforded the greatest level of privacy protection. In *Kyllo v United States* 533 US 27, 34 (2001) the US Supreme Court

described the home as the “prototypical...area of protected privacy. In *Payton v New York* 445 US 573, 589-90 (1980) the Supreme Court said “The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home – a zone that finds its roots in clear and specific constitutional terms.” The US Supreme Court is of course in those cases concerned with the right of a person to be free of governmental intrusion in the home. Nevertheless the cases are of interest in determining the question of what is intended as being encompassed by the reference to privacy in s47(f). I observe also that it is a commonplace in sentencing for crimes that involve invasion of a person’s home for the purpose of stealing or otherwise for a sentencing judge to express the view that the great majority of people attach importance to their privacy and the sense of security provided by their own homes.

26. In my view, placed in the context of the home, an unreasonable disruption of the privacy of another person may occur when a person is unable to enjoy the quiet sanctuary of their home or to go about a normal domestic routine free from disturbance. The evidence of Ms Skinner and Mr Bates was that because of the noise created by the defendant they were unable to sleep properly, or in Mr Bates case, at all, during the evening of 23/24 December. Clearly the quiet enjoyment of their home was disturbed and they were unable to get what most people consider to be important to well being – a good night’s sleep.
27. It was put to me that the mental element required for this offence is as in *Pregelj v Manison* (1987) 51 NTR 1, that is that I must be satisfied beyond a reasonable doubt that the defendant intended to disrupt their privacy and that the disruption was unreasonable. Although that decision deals with a different offence that is, offensive behaviour, under s47(c) of the *Summary Offences Act* in the absence of any other authority I accept that this is what must be proved. There is no doubt in my mind that disrupting Ms Skinner

and Mr Bates privacy, that is the quiet enjoyment of their home and their domestic routine is exactly what the defendant intended on this occasion. The drumming noise he made was both over protracted periods of time (around an hour at a time other than when police attended) and went on for many hours into the early hours of the morning. I do not accept his evidence that it was of short duration. That is contrary to all the other evidence including quite independent witnesses, the Kammass brothers. I do not accept his evidence that he was making the noise to scare off dogs. If that was indeed the purpose then it must have been a remarkably unsuccessful method, involving as I find it did, banging a drum for over an hour at a time, only to start up again 10 minutes later. The explanation is implausible.

28. Charges 5 and 6 concern events alleged to have occurred on the consecutive nights of 13 and 14 of November 2005. Charge 5 is that the defendant unreasonably disrupted the privacy of Gorgia-Lee Skinner and Shane Bates contrary to s47(f) of the Summary Offences Act whilst charge 6 alleges an offence of unreasonably causing substantial annoyance contrary to s47(e) of the Summary Offences Act.
29. The particulars provided of charge 5 were that the defendant unreasonably disrupted privacy by attending the victims' fence line, hissing and whistling at the victims dogs, using a stick to hit trees and the fence line the actions resulting in the dogs barking.
30. In my view all of these particulars were covered by the evidence. Ms Skinner's evidence was that she woke Mr Bates because she could hear whistling and the dogs "were going off". She was unclear on where that date was the 13th or 14th her confusion appearing to rise for a crossing of the midnight hour. It was clear that she was speaking however of events of 2 consecutive nights. Mr Bates was however clear that the date of the first of the two nights was the 13th going into the 14th. His evidence was that he

saw the defendant walking up and down the fence line hitting the fence with an object like a stick so that it made a twanging noise and whistling. In cross examination he said further that he watched the defendant for about 10 to 15 minutes smashing or hitting trees to make a rustling noise, hissing and making a fox type whistle which he described as being a metallic disc that air is sucked or blown through. His dogs had been put in the house when he went out to investigate.

31. In his evidence the defendant denied banging on trees with sticks or hitting the fence and suggested that it was fruit bats that 3 or 4 times a week made the whistling noise described by Ms Skinner and Mr Bates in their evidence.
32. I do not accept the defendant's evidence and prefer that of Mr Bates. Mr Bates positioned himself so that he could observe the defendant and eventually confronted him by shining a torch on him and asking if he had lost anything. It was not suggested to Mr Bates in cross examination that he had fabricated this observation and confrontation although he was questioned as to how long the noise went on for and the time during which he had the defendant under surveillance.
33. The evidence of Ms Skinner and Mr Bates was that on this occasion as on other occasions they had been woken up by the sounds shortly after turning their bedroom light off. Clearly their rest had been disrupted by the noise and in the case of Mr Bates by his getting up to investigate the source of the various noises.
34. I find that noises as described in the evidence were made on this occasion by the defendant and that they were sufficient to be an unreasonable disruption of privacy by disturbing the quiet enjoyment of Ms Skinner and Mr Bates home, in particular disrupting their rest and sleep. I am satisfied beyond a reasonable doubt that this was again precisely what the defendant intended to do. There is no logical explanation for the behaviour described, there being no dogs present on the scene once Mr Bates got up and his behaviour

continuing for at least 10-15 minutes whilst under observation, not stopping until confronted by Mr Bates.

35. Charge 6 is that on 14 November 2005 the defendant unreasonably caused substantial annoyance to another person namely, Gorgia-Lee Skinner and Shane Bates. The particulars provided of this charge were that the defendant used a hammer and drum to bang repetitiously resulting in substantial noise at night. The evidence of this incident came from Ms Skinner and Mr Bates and from the tape that Mr Bates recorded.
36. Ms Skinner's evidence was that on the second night that she was giving evidence about, the noise was worse. She described noises like someone banging like a tin or a drum, banging on the fence or shed and whistling the dogs.
37. Mr Bates evidence was that there was again banging noises outside which he described as an object hitting a drum and that he got a video camera that he had borrowed earlier that day went outside where he confronted the defendant at the fenceline and taped him. Although the camera was a video camera only an audio of the incident was tendered (Exhibit 4) and played.
38. Throughout the tape a sound is heard consistent with the description of the "drumming" noise given by all prosecution witnesses on the various nights on which they testified that they had heard it. The consistency is both in terms of the metallic nature of the sound and the frequency of the beats, that is, it is a fast repetitive sound. Both Mr Bates' voice and Mr Bonsell's voice were identifiable. Mr Bates is heard to say in what I would describe as an exasperated tone "We're all awake". The defendant responds "Oh good". An exchange takes place in which the defendant indicates to Mr Bates that he can call the police but that they will laugh at him and is then heard to say "its really great hearing a nice grinding noise isn't it". The tape concludes with Mr Bates saying "You're a tosser mate" followed by

words from the defendant “I’ll be back later”. The drumming is heard throughout the exchange.

39. The defendant was questioned about this incident in an interview with police that was electronically recorded and tendered as Exhibit P7. During the interview the tape to which I have just referred was played to the defendant and he is asked to explain what is going on. He responds that it sounds like one of us cleaning my shovel by banging on a wheelbarrow to get dried up concrete off the shovel and that Mr Bates had come up to the fence moaning at him. He said this was sometime during the holidays and during the day. When put to him that it was 1am he responds that it was at tea time. When asked why Mr Bates would say “we’re all awake” he suggests that they were having an afternoon nap. Later in the interview the defendant agrees that subsequent to this incident Constable Paragreen visited him on the 17th of November and said that she had seen a video tape and gave him warnings about the noise that was being made. He disputes with her that the noise is unreasonable and attributes it to scaring off dangerous dogs.
40. The defendant gave a similar account in his evidence that he believed the incident recorded on Exhibit P4 was an occasion towards tea time when Mr Bates had “a silver thing” in his hand.
41. The particulars provided of this charge did not match the evidence lead by the prosecution in that no evidence was lead that the implements used to make the drumming noise were a “hammer” and “drum” nor was the evidence clear as to the precise time that it occurred other than the evidence of Ms Skinner and Mr Bates that, as on other occasions, it started around 10 to 15 minutes after they had turned off their lights and that typically they went to bed between 10.30 and 11.30 pm. Only Constable Paragreen put a time of 1am on the tape played. It is not clear to me how she arrived at that time.

42. I do not think that any unfairness was occasioned to the defendant by the discrepancy in those particulars and the evidence lead. He been visited on the 17th of November by Constable Paragreen and given warnings in relation to noise issues. He had been interviewed by Police regarding the incident on the 14th of November and had the tape recorded by Mr Bates played to him in that interview. In my view the particulars provided were sufficient “reasonable information” as required by the *Justices Act* for the defendant to understand what was alleged against him on the occasion on which he is said to have committed the offence. I do not accept that the time is a material particular of this charge. The relevance of time to the charge is that it was late at night. I do not think that any unfairness arises to the defendant arising from accuracy of the time on the particulars and the evidence lead. The incident the subject of the tape (Exhibit P4) and of the evidence of Ms Skinner and Mr Bates is said by the defendant to have occurred around tea time. The dispute on the evidence is therefore whether it occurred during the day or night and the nature of the noise. No unfairness therefore arises from the evidence not showing that a drumming noise as alleged did not occur precisely at 11pm on 14 November provided I am satisfied that the offence alleged to have occurred did in fact occur at or around that time.
43. No question of duplicity for me as the trier of fact arises from the particulars, the evidence indicates a very clearly defined event that can be identified as separate from other incidents where similar noises were said to be made.
44. I do not accept the defendant’s evidence that the incident recorded on the tape occurred at tea time and involved banging a shovel on a wheelbarrow to dislodge concrete. The sounds recorded in my view are highly unlikely to have been caused by such an action both because of the frequency of the bangs and the drumming sound I heard. The words recorded on the tape said by the defendant are inconsistent with his account of the event and

consistent with the allegation that he was making a drumming sound with the intent of annoying or disturbing the Skinner/Bates household at night. It is notable that the tape concludes with him saying “I’ll be back later”. In my view such a statement is consistent with all the evidence that the defendant engaged in making repeated drumming noises during the night but inconsistent with his claim to be hitting a shovel on a wheelbarrow to dislodge cement. Why he should plan to return later to a fence line with an adjoining property to knock cement off a shovel was not suggested to me.

45. I am satisfied beyond a reasonable doubt that the offence alleged in Charge 6 is made out on the evidence. What is said by the defendant on the tape that is Exhibit 4 leaves me in no doubt that the noise was being made by him for the specific purpose of annoying the Skinner/Bates household. The action of making such noise so late at night was unreasonable. The evidence, including of their complaints to the police, shows that Ms Skinner and Mr Bates were substantially annoyed by it.
46. Mr Bryant put to me that notwithstanding the evidence of the defendant that the noise concerned in each of the charges was made only for the purpose of scaring off dogs, including if I did not accept the version of the defendant in relation to the events of the 14th of November, that I should nevertheless consider the question of provocation which he suggested was raised on the evidence and which had not been negated by the prosecution.
47. In my view there is nothing in the evidence that supports the defence of provocation being raised. It is fundamental to a defence of provocation that the defendant has lost the power of self control and acts before he has time to regain control (or in the words of the Code “before there was time for his passion to cool”.) No evidence supports a view that the defendant committed the acts complained of that form the basis of the offences at a time when he had lost control, rather the evidence supports a view of calculated acts to disturb and annoy.

48. I will hear counsel on sentencing submissions.

Dated this day of 2006.

Ms Sue Oliver
STIPENDIARY MAGISTRATE