

CITATION: *Burgoyne v Bairstow* [2006] NTMC 097

PARTIES: ROBERT ROLAND BURGOYNE

v

CHAD BENJAMIN BAIRSTOW

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Summary Jurisdiction - Alice Springs

FILE NO(s): 20611548

DELIVERED ON: 14 December 2006

DELIVERED AT: Alice Springs

HEARING DATE(s): 13 - 14 November 2006

JUDGMENT OF: M Little SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Prosecutions: R Noble
Defendant: J McBride

Solicitors:

Prosecutions: ODPP
Defendant: J McBride

Judgment category classification:

Judgment ID number: [2006] NTMC 097

Number of paragraphs: 85

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

No. 20611548

BETWEEN:

ROBERT ROLAND BURGOYNE
Complainant

AND:

CHAD BAIRSTOW
Defendant

REASONS FOR JUDGMENT

(Delivered 14 December 2006)

Ms M LITTLE SM:

1. The defendant was charged with two offences dated 26 April 2006, namely count one aggravated assault pursuant to s.188 (2) of the Criminal Code and count two assault Police pursuant to s.189A of the Criminal Code. Both offences relate to the same complainant, Garry Smith. The complainant was and is a Police officer. He was not on duty at the time of the alleged offences. On 13 November 2006 the matter came before me for hearing and count two was withdrawn. I advised the parties that I knew of the complainant through his work as a Senior Sargent of Police and especially as a consequence of the after hours call duties of a Magistrate. No issue was taken by any party. The hearing then proceeded on Count 1. The defendant entered a plea of not guilty to the substantive offence and both circumstances of aggravation namely bodily harm and unable to effectively defend himself due to situation. The hearing then commenced. After the two day hearing I reserved my decision and this is now my decision.
2. Prosecution bears the onus of proving each and every element of the offence beyond reasonable doubt and if they do not do so the defendant is entitled to be

found not guilty. All evidence has been taken into account in consideration of the matter.

3. The prosecution proceeded by way of oral and documentary evidence. The documentary evidence in this matter is of significance and I propose summarising the documentary evidence prior to summarising the oral evidence. The summary will include my interpretation of the exhibits.
4. Exhibit P1 is a set of ten photographs taken on 26 April 2006, the day of the incident.

Photograph one shows a bandage to the right ear of the complainant and an abrasion approximately three centimetres in length above the left eye of the complainant.

Photograph two shows the back of the complainant's head with a horizontal injury to the back of his head which is approximately five centimetres in length. This injury is closer to the top of the head than to the top of the ears. An injury to the right ear can be seen. The injury to the ear shows that the ear has been torn approximately half way down on the outside edge of the ear.

Photograph three is a closer view of the injury to the back of the complainant's head and shows a red arc like mark which is approximately five centimetres across with an abrasion in the centre of the mark approximately three centimetres across. There is dried blood in the area in the middle of the injury.

Photograph four is a closer rear shot of the injury to the right ear. It shows there is a significant tearing of the centre middle area of the ear.

Photograph five is a photograph of broken dentures with a plate and the four front teeth have been severed from the denture. This belongs to the complainant.

Photograph six shows the eastern side of the Melanka Party Bar with barrel style tables.

Photograph seven shows the southern side of the Melanka Party Bar with barrel style tables and chairs.

Photograph eight is a photograph of the entrance that leads towards the toilets.

Photograph nine shows the entrance to the male toilets at Melanka's.

Photograph ten shows the inside of part of the male toilet at Melanka and shows the urinal and the hand basin area. It is a step up urinal. The cubicles are to the right of the photo, adjacent to the urinal.

5. Exhibit P2 is the video surveillance from Melanka's. The camera was at a position in the corridor leading into the toilet area and is the area shown (from a reverse angle) in photograph nine. I will now summarise the times and relevant matters on the surveillance video. There is no dispute as to the identity of the persons named in this summary. The relevant period of time is between 1.12am and 1.18am on 26 April 2006.

1.12.21: The complainant walks into the men's toilet. The complainant is walking in an upright way and does not appear to be staggering or physically affected by the consumption of alcohol. He walks straight to the toilet and appears orientated.

1.12.52: The witness Eckert walks into the male toilet.

1.13.06: The defendant walks into the male toilet. He is wearing a green t-shirt with 00 symbols on the back of his t-shirt, shorts and thongs. He walks across the screen, then to the side of the corridor into the toilet. He also appears orientated.

1.13.38: The defendant's brother Daniel Hayes (also known as Stanford) walks into the male toilet. Before going into the toilet he looks in all directions while standing in the corridor at a doorway opposite the toilet (including looking back down the corridor entrance to the toilet). He then walks into the toilet. He is holding a glass as he walks into the toilet. The time set out is when he walks into the toilet.

He had arrived at the corridor area shortly after the defendant walked into the toilet but as set out did not go in at the same time.

1.13.50: The defendant walks out of the male toilet, walking very fast. He can only be seen clearly when the surveillance is slowed to a frame by frame speed – and for that reason I can be sure he is walking fast. At normal speed, it is very hard to see him. The defendant is smiling.

1.13.51/2: The defendant's brother walks out of the male toilet – no glass is visible in his hand. He is also walking fast.

1.14.00: Manager Andrew Case and security officer Robert Frampton walk into the male toilet.

1.14.21: Witness Eckert walks out of the male toilet.

1.16.43: Security officer Mendez walks into the toilet.

1.18.01: Security officers Mendez and Frampton, manager Case and the complainant walk out of the male toilet. The complainant's body is slumped and walking in a laboured fashion. This is quite different than when walked into the toilet. Blood loss from the right ear down the side of the complainant's face and neck area is visible.

6. From the evidence in P2 the following times can be calculated. Between the complainant and the witness Eckert entering the toilets is a period of 31 seconds. Between the witness Eckert entering the toilet and the defendant entering the toilet is 14 seconds. Between the complainant and the defendant entering the toilet is 45 seconds. Between the defendant entering the toilet and his brother entering the toilet 32 seconds. Between the defendant's brother entering the toilet and the defendant leaving the toilet is 12 seconds and between the defendant leaving the toilet and the defendant's brother leaving the toilet 1 – 1 ½ seconds. That ends the summary of the video surveillance exhibit.
7. I will now summarise the oral evidence.

8. First witness was the complainant Garry Smith. On 25 April 2006 he went with his partner Bianca Rushton to ANZAC Day celebrations including arriving at the Firkin and Hound at 2pm to watch some football. He had some beers and that was the first drink he had had on that day. He had approximately 6 pints of xxxx at the Firkin and Hound and had lunch there as well. They went to the Outback Bar and Grill and he had one pint of xxxx. They went to Bo's for dinner and the couple had a bottle of red wine as well as dinner. The complainant is a Police officer based at the Alice Springs Police Station. Some off duty Police arrived at Bo's and in particular Vanessa Barton, David Wrigglesworth, Courtney McCartney, a Police officer from Western Australia who is now based in Kintore and Leith Phillips arrived. At Bo's he had a conversation with a man named Tim Duncliff. He was speaking to him about motorbikes and he considered the chat to be a friendly one. The complainant was wearing a t-shirt which had a Harley Davidson logo on it in black, white and orange. The logo was in the Thai language. He had green knee length shorts and sandals on. At the time he was speaking to Tim Duncliff the complainant described himself as jovial, happy not intoxicated to any extent. He was drinking bourbons and cokes at Bo's and some time after midnight they left Bo's.

9. They went to Melankas as the girls in his group wanted to go dancing. They walked to Melankas and got a table. He was speaking to the Western Australian Police officer and the girls went to dance. He described himself as well aware of his faculties and in a good mood. He went to the men's toilet and noticed there were cubicles to the left and he went to the urinal. He was the only person in the urinal at the time and had no idea whether there was anyone in the cubicle. He was using the urinal and felt a smack to the back of his head. He was on his haunches and trying to get up and was being punched and kicked. He thought to himself that this was not really good and was covering up trying to protect himself. The initial blow to his head felt like a punch and felt hard. He had no idea how many people were around him and no idea how many blows he received. He was covering his head and was receiving punches and kicks to his arms and head area. He then has a blank period and his next recollection is being at the hospital getting his ear stitched. He received injuries as a result of the incident as follows: three stitches to his right ear, two bottom teeth loose, cut to the head,

abrasions to the face, bruises to arm, tenderness and soreness generally. His denture plate to the top of his mouth was broken as a consequence of the incident.

10. He was shown a group of photos and identified himself in the photographs 1 – 5 with the injuries to his eye, head and his dental plate, photos 6 – 10 were identified as areas in the Melankas Party Bar and toilet area. These photos became exhibit P1. He did not know of the defendant at all, and he did not see a man in a green shirt that night. He had no arguments with anyone that night, and he did not have any altercations at any of the venues that night.
11. In cross-examination he agreed he had been at the dawn service and then he had gone to the RSL. He did not consume any alcohol at the RSL and he did not consume any alcohol at the Red Ochre where he and friends had breakfast. They went for a ride on a motorbike and then went home for a sleep. He caught a taxi to the Firkin and Hound. He agreed it could have been as early as 1.30pm that they arrived at the Firkin and Hound. As soon as he had arrived he had a beer and was drinking midstrength xxxx gold. He was of the view that his partner Bianca had consumed more of the red wine at Bo's than he had. After the wine he had approximately five bourbons and cokes. He agreed he had been a bit of a larrikin at Bo's including performing in front of the webcam. He denied he drank most of the red wine from the bottle. He agreed the alcohol was catching up with him but said that he knew what he was doing. He did not feel he was intoxicated, describing himself as happy and jovial and aware of what was happening. He agreed that in his initial statutory declaration he said that he was starting to feel the impact of the alcohol and starting to feel he was on the way to being intoxicated when he was at Bo's.
12. He did not want to go to Melankas after leaving Bo's but the girls had wanted to go dancing so he went with them. He said he had wanted to go home. He did not have any drinks at Melankas. He said that soon after he had arrived he went to the toilet area and he went on his own. He was still feeling happy at that stage. When he felt the smack to the head he had not seen anyone and was not conscious of anyone else in the area. He was hit from behind and he had no idea how many people were present. He was on his hands and knees and was trying to protect himself.

13. The photographs in P1 did not show the bruising to his face and forearms, he reported that they came up later. He thinks that he was zipping himself up at the time he received the smack to the head. He has a blank period after the initial part of the assault. The injuries included a cut to the eye area and his bottom teeth being loose. The denture plate for the upper teeth are generally hard to get out and he was of the view he must have been hit hard for it to snap and break the way the denture had broken.
14. He had never met the defendant and did not have any recollection of talking to him on that night. He did not recall the defendant being present when he was speaking to Mr Duncliff. He did not recall the defendant being in the toilet urinating at the same time as he was. He did not recall that he may have splashed urine when he was at the urinal. He did not recall the defendant saying “are you alright or what”. He denied that it was possible he had urinated upon the defendant, saying that he was at the urinal by himself. It was put to him that he was so intoxicated that, in the course of urinating and being unsteady on his feet, he had urinated in the direction of the defendant and this had caused offence to the defendant. He denied that. It was put to him that he splashed urine on the defendant’s leg and foot and he denied that. It was put to him that the defendant had said “are you right or what” and then pushed him away. He said “that did not happen”. It was put to him that the defendant was at the urinal to the left of him. He said “No, I was there on my own”. He did not recall anyone else in the toilet at the time. He said that “no-one spoke to me while I was at the urinal”. He denied that it was possible that the defendant came in and was urinating beside him. Once again it was put to him that he was unsteady, unbalanced and he splashed the person next to him and he denied that.
15. In re-examination he said he was a 181cm tall and between 127 – 130kg in weight. He is a regular social drinker. He was asked if he recalled being pushed and as a consequence him falling over and injuring himself. He said “No, it was the smack to the head that dropped me”.
16. The next witness was Bianca Rushton. She and the complainant went to the dawn service on ANZAC Day 2006 and then went to the Red Ochre Grill for breakfast. They went for a motorbike ride and then went home. Approximately 1.30pm they

went to the Firkin and Hound. She was drinking vodka and Garry Smith was drinking beer. They were the first drinks of the day. They were with friends and left around 7pm. She felt fine when she left there and believed Garry Smith was fine as well. They got to Bo's for dinner after stopping at the Outback Bar and Grill. They had one drink at the Outback Bar and Grill and arrived at Bo's around 7.30pm. They sat down and ordered dinner. They ordered a bottle of wine which they both drank. They had dinner and then made contact with her mother on the mobile phone and on the webcam at Bo's. She did not have anything else to drink and Garry had rums or bourbons to drink. She saw Garry speaking with Tim Duncliff at one stage and they seemed in a good mood. She saw a man in a green shirt and he kept looking over to where Garry was. The man was near by and, when she and Garry moved, he wasn't far away. She said that struck her as odd. This was at Bo's and she did not see the man with the green shirt at Melankas.

17. Around 12.30 – 1am they left Bo's and she was reasonably intoxicated although aware of what was going on. She believed Garry was in the same condition and they walked to Melankas. Some of the group went with them including Vanessa and John from the Western Australian Police, Courtney and David Wrigglesworth. They went and sat down at a table near the entrance area and she went dancing. Garry was sitting at the table with the Western Australian Police man. Approximately 20 minutes later she realised Garry was not there and Vanessa told her something. She then saw Garry and he was unsteady on his feet, bleeding and in a mess. She tried to talk to him but he was making no sense. She took him to the Hospital but Garry seemed to have no idea where they were going or what they were doing. Vanessa and John went part of the way with her and then she continued onto the Hospital.
18. She was then cross-examined. She was drinking vodka and red bull when she was at Firkin and Hound. Garry had been drinking pints of beer. They kept drinking all afternoon and left at approximately 7pm. She agreed in her statutory declaration that she said they left at approximately 8.30pm. She believed they got to Bo's at around 9pm and she drank approximately 2 ½ glasses of wine. Garry had the rest of the wine. Then Garry changed drinks to bourbon or rum and he kept drinking that. She agreed Garry had more to drink than her. She agreed Garry

was well on the way to being drunk. She agreed both she and Garry were intoxicated. It was put to her that they were both heavily intoxicated and she said “I would say we were both intoxicated”.

19. The next witness was Andrew Case who is the Operations Manager at Melankas. He was on duty on ANZAC Day 2006. He had been speaking with a man with a green t-shirt on and another person at the bar area for some time. The smaller of the two men had been put on water and there was a discussion about motorbikes. An off duty Police officer named Rowan had something at the front gate and he had pointed towards the direction of the men he had been speaking to. He could not positively identify who the person was that Rowan was pointing to. When he finished talking to Rowan he was walking through the bar area and realised that Garry was not sitting in the same spot. There was no sign of the people who he had been speaking to and he went to the toilet area with the security officer Robert Hampton. They went past the eight ball tables shown on exhibit P1 in photo 6. He explained that photo 8 shows from the servery to the emergency exit to get to the toilet area. Photo 9 shows the corridor towards the door to the male toilets. Photo 10 is the urinal part of the male toilets.
20. As he was heading towards the toilets he passed a couple of people who he has seen since on the surveillance footage (P2). They appear to be the same people he had been talking to earlier and they were walking out of the toilet area. They were heading towards the exit of the venue in the opposite direction to him and he went to the male toilet area. He then continued to recount the events as he recalled them. He opened the door and saw Garry Smith getting up off the floor. He had been beaten up. He had false teeth on the floor, a cut ear and a round dent on his head and had lost a fair bit of blood. The blood was on his ear and shoulder area and he believed some may have been coming from his mouth. He was grabbing onto the sink trying to pull himself up. There was another person there was well who he described as having a t-shirt on and being tall and thin. He said to Garry Smith are you ok and Garry Smith said nothing. The witness could not get a word out of Garry Smith and he said he spent between 2 – 10 minutes in there with him before they left the toilet area. Garry Smith was washing himself down and there was a fair bit of blood. They took him to the kitchen area to wash him down and

apply some first aid. Some other people came to the assistance of Garry Smith including someone who he believed was a Police officer and someone who may have been the girlfriend of Garry Smith. He was urging them to go to the hospital and he described Garry Smith as groggy. He went back into the pub area and called the Police. Before Police forensics had arrived he had told his staff to clean up the toilet.

21. The Police wanted to obtain copies of the surveillance video and he arranged for that to happen. He was with the Police when they first saw the video and he re-stated that he believed the people he had been speaking to earlier in the evening (one with the green top and one other with the black top) appeared to be the same people he had seen in the video footage. There are only three people that are authorised and able to access and down load the surveillance video. The witness was one of those people. The others are a man named Lynch and a person who does the servicing of the equipment. The witness is authorised to use the equipment and he was the one who set the dates and times when he began his shift. He uses a check sheet to operate the system and accesses the surveillance video on a regular basis. Only himself, Darren Lynch and the man who installed the system knows the combination to access the hard drive. Part of the footage of that night was shown on that eventually became P2.
22. In cross-examination he said that the two people he had been talking at the bar left the toilet area and as he was going into the toilet area. The surveillance video is motion sensitive and activates when there is movement in the corridor area and then stops. He spent sometime with Garry Smith in the toilet then in the kitchen. Garry Smith was not talking and the witness helped clean him up. At that stage a female arrived who he presumed was Garry Smith's girlfriend. The woman was asking Garry Smith who did this and he was saying words to the effect of "I don't know", "no-one" or "it doesn't matter". The witness then said that Garry Smith was semi-conscious although he did not believe he needed an ambulance. He had not smelt alcohol on him.
23. The next witness was Robert Frampton, he worked as security at Melankas and he was working on ANZAC Day 2006. He was called on duty at about 9pm and started at 9.15. There was between 160 – 170 people there. He saw Andrew Case,

the bar manager, talking to two guys at the bar. One had a green shirt on with 00 on the back of the shirt. The other had a black shirt on. As he was on duty he was watching people. One of these two persons was drinking water, the other was drinking from a spirits glass. He was asked to check the toilet area early in the morning and as he got to the door way the two males that he had seen speaking with Andrew Case, and who he had been keeping an eye on, came out of the door at a hurried pace and they appeared to be trying to get out quickly. He described their pace as between walking to running. When he got to the toilet he saw Garry with a cut to the back of his head and to his ear. He saw two teeth from a plate on the ground and he gave them to Garry. Garry then pulled out a plate. Garry was taken to the kitchen area and he washed his face down. The supervisor of security Teo came into the toilet area and no patrons were able to come into the toilet at that stage.

24. He was then cross-examined. He said that the toilets were not closed straight away. A number of minutes had passed prior to the toilets being closed down. He agreed he did not know who was going in and out of the toilets at that stage. When he saw the two guys coming out of the toilet area they were coming towards the pool table area and he denied they were at the bar area when he first saw them. This was at 1.15am in the morning when he had seen them. He saw them coming through the door and Case and he stepped aside to let them pass. The males were proceeding through the doorway and they were in a hurry.
25. The next witness was John Eckert. He is a chef and on ANZAC Day at around 11pm he went to Bo's. He saw a big, bald fellow with a Harley Davidson shirt and shorts on. The man was described as being big all over. He did not see any trouble at Bo's. Then he went to Melankas and had something to drink. He then went to the male toilets. He described himself as being half way intoxicated. The big "dude" that he had seen at Bo's was using the urinal. The man was standing sideways to the witness when the witness walked in. The man had his hand on the wall with his arm out at shoulder height whilst he was using the urinal. There was no one else that the witness was aware of in the toilet. He went into a cubicle in the toilet and closed the door. When he was first in the toilet he heard something like a scuffle going on and something was said. He was not sure what was said but

it was something like the way the man was in position while he was urinating. He heard people going for it, like someone was getting hit. He heard no other words and no other sounds except for bodies hitting other bodies and bodies moving around. He had no idea how many people were in the toilet and did not hear the sound of doors. It did not go on for very long. Two security officers were in the toilet when he came out of the cubicle and they were talking to the man. It was the same man he had seen using the urinal when he had walked in. He then left.

26. He was then cross-examined. He was not sure about how long he was in cubicle but did not think it was a period of minutes. The noise he heard which he described as bodies on bodies was for between 20 – 30 seconds. He was only able to hear things, he did not see anything to explain how the man ended up in the hands of security. He did hear a sound something like a plastic cup hitting the ground and movement of feet. He could hear a scuffle and someone getting hit or slapped. He described the sound as quieter than a clap. He did not hear a door entry or exit. What he had seen when he was leaving assisted his memory of what he had thought had happened. He then said “I knew something was going on” when he was inside the cubicle.
27. The next witness was Constable Rowan Wake, an off duty Police officer who went to Bo’s on ANZAC Day 2006. He went with David Wrigglesworth another Police officer. About 9.30pm he arrived at Bo’s and saw Garry Smith, Megan Mackay and Vanessa Barton. There were others with them who he did not recognise. Garry Smith was talking to Timothy Duncliff and the witness was paying attention to Smith and Duncliff. He described the conversation as uncomfortable but not heated. Two other persons were near by and he did know who they were. One was stocky with short hair wearing a green t-shirt with 00 on the back and shorts. The second one was much stockier and had a beard. These two persons moved from the far end of the bar to be standing within two to three metres of Smith and Duncliff. They were not involved in the conversation and were not acknowledged by Smith or Duncliff. He then went to Melankas and Garry Smith was also at Melankas. When he got to Melanka’s he spoke to Teo Mendez and he saw people arriving including Tim Duncliff talking to other people. The man in the green shirt with 00 and another man in a black shirt arrived and entered Melankas.

Garry Smith and his group came in a short time later. He did not notice any physical interaction between Garry Smith and the man with the green t-shirt on. He was aware of the man with the green t-shirt on and had felt some tension in the air at Bo's. At Melankas there was some tension he was aware of and before leaving he spoke to security. He did not speak to Garry Smith that night about the tension that he had noticed or any of his observations. He was feeling fairly sober that night.

28. In cross-examination he agreed he had been making observations that night. He agreed he was not concerned enough to speak to Garry Smith.
29. The next witness was probationary Constable David Wrigglesworth also an off duty Police officer who was at Bo's on ANZAC Day 2006. He was with other off duty Police and he saw Garry Smith at Bo's and he bought him a drink. He thought that Garry Smith had been drinking bourbon. He saw Garry Smith talking to Tim Duncliff and he watched them closely. Another person was also watching – a man with a green shirt with white trim and 00 on the back. This person stood behind Garry Smith while Garry Smith was talking Tim Duncliff. Garry Smith had his back to the man and did not acknowledge the man in the green shirt. This man was not involved in the conversation and did not bring himself to the attention of Garry Smith. After the witness left Bo's they went to Melankas and he saw Garry Smith at Melankas. The man in the green t-shirt was also at Melankas at the bar area. When he left Melankas Garry Smith was still there. The man with the green t-shirt on and a man in a black shirt looked like they were “staring down” Garry Smith.
30. In cross-examination he agreed he was not on duty but he had made a lot of observations. He agreed he was watching them closely. He was 2 – 3 metres away when he saw the man in the green shirt standing behind Garry Smith. He thought that seemed weird. The man was not engaging, was behind Garry Smith and that was not an area for service of alcohol. The man had a drink and it seemed weird. Garry Smith had his back to the man. He agreed he was affected by alcohol but was of the view he could think clearly. He was still being served drinks. He would not have driven given the amount he had drunk. When the witness left Bo's Garry Smith had seemed ok. He did not have any other interactions with Garry Smith

after he had bought him a drink at Bo's. At Melankas he had not seen Garry Smith staggering and he was steady on his feet.

31. The next witness was Constable Vanessa Barton, also off duty on ANZAC Day 2006. She arrived at Bo's around 10pm, with other off duty Police. She saw Bianca and Garry Smith there. She saw Garry Smith talking to a man named Duncliff. Officers Wake and Wrigglesworth were in the same area. She described Garry Smith as intoxicated. They went into Melankas and may have had a drink there. She was approached by the security officer Teo who told her something and she went to the kitchen area, at the back of Melankas. She saw Garry Smith slumped over a sink with running water. He had blood on him. She asked what happened and he said he didn't know and had no idea. She went towards the Hospital with Garry Smith and Bianca and then went back to Melankas. She had been aware that Garry Smith had got up to go to the toilet but had no idea of the time between that happening and her speaking to the security officer.
32. In cross-examination she said that she believed both Bianca and Garry Smith were intoxicated. She thinks there had been one round at Melankas and she thought Garry Smith had a beer at Melankas. She said Garry Smith was merry.
33. The next witness called was Detective Senior Constable Leith Phillips from the Drug Intelligence Unit based in Alice Springs. He was at the Firkin and Hound on ANZAC Day 2006. Garry Smith and Bianca were there when he had arrived. He stayed to around 11 – 11.30pm and then he went up the Mall towards Bo's. Garry Smith had left the Firkin and Hound earlier and when he was at Bo's he saw Garry Smith inside. The witness talked to Tim Duncliff. He saw and recognised Chad Bairstow, the defendant, wearing a shirt with 00 on the back and shorts. He believed the shirt was green. On the following day he was called on duty to start an investigation with respect to the assault on Garry Smith and at that stage he started making notes. Chad Bairstow was inside Bo's moving around the area. The witness returned home about 12.15 and was sober. He believed Garry Smith had had a fair amount to drink but he was not talking to him. He was called back on duty at 3am. He went to the Alice Springs Hospital and spoke to Garry Smith. He saw injuries to his face and head area and broken dentures. At 8.30am he saw the surveillance video with Darren Lynch and Officer Carbone. He observed on the

surveillance video Mr Bairstow going into the toilet area and a second person entering as well. He had also seen Garry Smith entering the toilet area and at that point the evidence as to his observations of the video surveillance was ended. It was not contested that Chad Bairstow was one of the persons who was on the footage. A search warrant was obtained for 2/95 Dixon Road and items seized included a green t-shirt with 00 on the back.

34. He was then cross-examined. He may have said hello to Garry Smith that night but was not talking to him. He did speak to Mr Duncliff. He made observations that Garry Smith had a fair amount to drink but not enough to have been refused entry. He believed Garry Smith was in control of himself.
35. The next witness was Dositeo Mendez, also know as Teo, who is a crowd controller at Melankas. On ANZAC Day 2006 he started at 8.30pm and called Robbie Frampton in at 9.15pm. Andrew Case was the bar manager. He saw Andrew Case speaking to two men who were entering Melankas. One male was wearing a green polo shirt with 00 on the back, dark cargo pants and thongs. He was of a large muscular build and with short hair and clean shaven. The other male was of similar built, 5 feet 5 inches, clean shaven with a black top and cargo shorts. Some off duty Police officers came in and he recognised Garry Smith and Rowan. Rowan spoke to him later in the night just before Rowan left. A minute or two after Rowan had left he was on duty at the exit gate and he saw two males run rather quickly towards to him. He made sure they had no alcohol on them and he opened the gate and they left. As they left they smiled and ran down Todd Street. The witness then called on the radio to see if anything weird had happened. This was at 1.15am. He went to the male toilets and saw Garry Smith leaning over a basin with a lot of blood around his head and face area. There was blood on the floor and broken glass. Robbie Frampton, Andrew Case and the witness were in the toilet area with Garry Smith at that time. The witness, the manager and some Police officers later viewed some video footage and he saw the man with the green shirt with the 00 who he had seen before. He was able to recognise him and identify the defendant in Court.
36. In cross-examination he said he had no idea who the person with the black top on was. He knew Garry Smith and he was on duty when Garry Smith arrived. He

arrived at the toilet after Andrew Case and security officer Frampton. Garry Smith was leaning over a basin his hands on the sink. He noticed glass on the floor near where the urinal was and he also noticed sunglasses on the floor. He did not know where the broken glass had come from.

37. The next witness was Shane Bloomfield who was a security officer at Bo's on ANZAC Day 2006. Some off duty Police arrived and he knew one as Garry. He agreed Garry was large, big and bald. He knew Chad Bairstow and he identified the defendant. He also knew Daniel Stanford as a brother of Chad Bairstow. Early in the evening Daniel and Chad were at Bo's and he spoke to them. Chad was wearing shorts, thongs and a t-shirt. He also knew Tim Duncliff and Tim had also been at Bo's that night. Tim Duncliff had been talking a few people. The witness said G'day to Chad and at one stage spoke to Daniel and cut him off the bar. Daniel came outside to get some fresh air and then Chad came out and asked what was happening to Daniel. The witness explained that he had been cut off at the bar. Chad said that he would look after Daniel. The witness let Daniel back in at some stage but only to drink water and on the understanding that Chad would be looking after him. He saw Tim Duncliff talking to Garry Smith but did not see where Chad Bairstow and Daniel Stanford were at that stage. Bo's shut fairly early that evening, approximately 12 o'clock.
38. In cross-examination he said he did not know Garry Smith very well. He described him as fairly pissed and fairly happy on the night in question.
39. Leith Phillips was then re-called for cross-examination by consent. About 3am he was called back on duty and at 8am he went to Melankas and viewed surveillance footage. After viewing the footage he wanted to follow up with Chad Bairstow and his brother Daniel. He did not know Daniel Stanford at that stage. He understood that a charge of assault was laid against Daniel Stanford and that the assault was on Garry Smith. He thought that this person pleaded guilty to that offence. He understood that the assault that Mr Stanford pleaded guilty to was the same assault as being discussed in the Court.
40. The next witness called was Constable Ryan Watkinson. In April 2006 he worked for the Alice Springs Police Station Substance Abuse Task Force. On 26 April

2006 at 8am he went with officers to 2/95 Dixon Road. He got to the unit and there was no-one home. A blue 4wd Nissan drove past, driving slower than normal traffic. Five minutes later the vehicle returned and parked out the front of 2/95 Dixon Road. The car had originally driven past with three people in it and returned with only the female driver. The female driver was the mother of Chad Bairstow. A search of the premises was undertaken and clothing was put into a bag including a green t-shirt. They then went to Orange Creek Station, 90km south of Alice Springs to Chad Bairstow's stepfather's property to ascertain Chad Bairstow's whereabouts. There was no cross-examination.

41. The next witness was Detective Senior Constable Beau McNeill based in Darwin. He was involved in the investigation and became aware that Chad Bairstow and Daniel Hayes had handed themselves in. He was involved in the search of the property at 2/95 Dixon Road and inspected the video footage. He provided a disk which could be used to play exhibit P2 and that was joined as part of exhibit P2.
42. In cross-examination he said that by the time he had arrived from Darwin he was aware of the persons of interest in this case. Sometime after he arrived in Alice Springs those persons handed themselves in. He said that another search had occurred prior to him arriving.
43. There was a submission that there was no case to answer and I found a case to answer.
44. The defendant Chad Bairstow then gave evidence. He said that on ANZAC Day 2006 he went to Bo's and got there between 8 – 830pm. He went with his brother Daniel Stanford also known as Daniel Hayes. He had eaten before arriving there and had a light beer before he arrived. At Bo's he had two beers. He left about 11.30pm. He was mixing a bit and spent some time on his own. He was listening to music and was talking to a few people. His brother was drinking a lot and described his brother as intoxicated. He was keeping an eye on him and Shane Bloomfield had said that his brother had had enough to drink. The defendant said he would watch his brother and this was around 10.30 or 10.45. He noticed the complainant around the place but he did not speak to him at Bo's. He had no interaction with him. He went to Melankas with his brother and a few others. He

got served at Melankas and had a rum and soda water. His brother had one drink at Melankas, then was on water. He was speaking to the bar manage Mr Case for nearly an hour. They stayed at Melankas for a while and planned to leave around 1am.

45. The defendant needed to go to the toilet. He saw the big fellow with the bald head leaning up against the wall to his right at the urinal. The man's arm was out against the wall and the defendant stood to the left of him. He began to take a leak and the man stepped back off the ledge and as he did he sprayed urine onto the defendant's leg. The defendant had thongs and shorts on. The defendant said "Are you right" and pushed the man away. The defendant used his right arm, with a move backwards, to push the man away. He thinks the man stumbled backwards. The witness was still urinating and then turned back and saw his brother standing over the man, punching him. He grabbed his brother and said "what are you doing?" and then panicked. He said "we have got to go" and "what have you done?" and grabbed his brother. The witness walked out in front of his brother through the bar area to the front doors. He was hurry a little as he did not know who the man was and panicked. He was a big bloke with tattoos and he did not know who he was, "I wanted to get out of there".
46. The next day he heard the Police were looking for him – his parents had called to tell him this. He came back in and handed himself in. He heard his brother had been locked up, so he handed himself in to Mark Coffey and then was taken to the Police station. He was not intoxicated on the night but his brother was drunk. He went into the toilet by himself and he had no idea his brother was close by, thinking that his brother was at the bar. He only pushed the man because he was urinating on his leg. He did not know if it was intentional or not that the man urinated on his leg but the man was pretty intoxicated and wobbling around. He ran out saying to his brother "lets go". He was concerned for the man lying on the ground unconscious but did not want to wait for others. He believed he may have been attacked by four or five others. He had nothing in his hands when he went into the toilet.
47. In cross-examination he said he did not know if the man was intentionally urinating on him or not. He was disgusted and it made no difference to him if it

was intentional or not. He was then asked “Why do you think it may have been intentional?” and he said he did not know. He had no idea either way and agreed perhaps it was more of a chance that it was an accident, as the man was quite drunk and intoxicated. He agreed he did not hand himself in until 8.15pm on 26 April 2006. He said he had not been told until later in the day that the Police were looking for him. He had left his green t-shirt with the 00 after he had changed and showered and gone to his girlfriends place. He said his mother did not ring to say there had been a search on at his property around 9am on 26 April 2006. He denied he was in the motor vehicle when it passed the unit when the Police first arrived. He denied that by the time he had surrendered to the Police he knew the Police had his shirt. He said he did not know who the big, bald fellow was. The man was at Bo’s and his t-shirt stood out. He was asked “What do you think the man was?” and he said he didn’t know who he was. He was asked “Did you think he was a bikie?” and he answered “I don’t judge people”. He denied he knew Tim Duncliff. He was asked if Tim Duncliff was a bikie and he said he did not know. He said hello to Tim Duncliff and his brother spoke to him quite a bit about bikes.

48. He said he was behind the bar area throughout the night and it was possible that he was behind the complainant. He said he did not walk past him and stare at him. He said no-one had mentioned there was off duty Police officers around. He had not seen the big fellow waving at the cameras. He was looking after his brother who was quite under the influence. His brother had been on the water for about an hour at Bo’s. Then they had one alcoholic drink each at Melankas. His brother was out of town and works remotely and he could not call him as a witness. He was not sure if his brother had interacted with the bald fellow on the night.
49. He had got to Melankas before the others and was in the bar, talking to the man at the bar. He was probably talking to this man for an hour and he had agreed his other friends had not turned up at Melankas. He was going home. About 5 – 10 minutes after he had finished talking to the manager he went to the toilet. He had one drink while talking to the manager. His brother went to have one and they said he was on water. It was obvious his brother was pretty drunk. His brother did not want to go home. The witness said he was going to the toilet and then going home. His brother was finishing his water and he thought he would meet him at

the bar area where he had left him. He agreed it was not a large urinal and there was room for two people only. The man leaning on the wall did not acknowledge him. The man had his right arm up and the defendant went to the man's left side. He had seen the man at Melankas that night. He had no idea how long the man had been at the urinal and had not seen anyone else in the toilet. The man was leaning against the wall when he came in. He said "are you all right there mate?" And "that's disgusting". The man said nothing. The witness continued, "he was still spraying on my leg. I pushed him away. I pushed him and went back to pissing". The witness said he did not notice much and agreed the man was a big fellow. He pushed him away and was still having a leak. He said that the man was that drunk he didn't think he would attack. It was put to him he knew the man was drunk before he went into the toilet and he denied that.

50. He had seen his brother hitting him but had not seen his brother come into the toilet. He had his back to the door and thought his brother was at the bar. His brother did not say anything and he did not know what had happened to the man. He did not know if the man had ended up on the floor as a result of what had happened to him or how he ended up on the floor. It was put to him he would have noticed movement in the urinal and he denied that. It was put to him he had just had an altercation and said he did not notice if anyone else was there. He was asked what caused his brother to attack the man and he said "I have no idea". He agreed that his brother had no reason for such an attack. He had not seen his brother hit the man on the head with a cup. It was put to him he punched the man to the head and he denied that. He said he was just urinating next to him and he did nothing else to the man other than what had been said in evidence. He had said "what did you do that for?" and nothing was said.
51. They left the toilet area and he had panicked. He said to his brother "lets get out of here". He thought the big bloke might have friends. He recognised him as the same guy who had been at Bo's. It was put to him that his brother came in while he (the defendant) was punching and kicking the man and he denied that. It was put to him that his brother had joined him after he had started the assault and he denied that. It was put to him that he had decided to attack the man and he denied that. It was put to him that he was inside the toilet and he hit the man to the back

of the head and he denied that. It was put that at that stage his brother joined in and he denied that. He agreed that he and his brother had left in a hurry. He said that his brother had done wrong and he didn't know what would happen. When asked if he had concerns for the man left in the toilet he said he did feel uncomfortable for the way he was but he wasn't going to wait around to see if the same thing was going to happen to them. It was put to him why not go to the manager who you had been speaking to and he said the place had a bad reputation. They had run off and he agreed he had not told anyone that his brother may need protecting.

52. That was the close of the defence case. Submissions were then made.
53. A number of discrete issues need to be addressed prior to findings on the elements of the offence being made. I will deal with them in turn.
54. **Whether the Defendant was taking a particular interest in the Complainant on the night in question.**

It is the prosecution case that the defendant was paying particular attention to the complainant throughout the night. This is disputed by the defence. There is no evidence from the complainant that this was occurring – he was not aware of the defendant at any stage during the night. A number of witnesses gave evidence that a man with a green shirt with a 00 logo on the back was paying attention to the complainant. There is no dispute that the person in this t-shirt is the defendant. The complainant's partner Bianca Rushton gave evidence that the man with the green t-shirt with white numbers on the back was near by when the complainant was speaking to Tim Duncliff. I interpose at this stage to say that there was never any evidence to establish who Tim Duncliff was or whether there was any particular link between him and the defendant or indeed any other person in the case. It is a matter which is left entirely up in the air and from the point of view of the Court nothing turns on who Mr Duncliff is. Ms Rushton saw that the man in the green t-shirt kept looking over to the complainant and that he was near by when Mr Duncliff and the complainant were talking. When she and Garry moved the man in the green shirt was not far away. She said it struck her as odd but she took the matter no further. She had noticed this at Bo's.

55. The manager of Melanka's Andrew Case had been speaking with the person in the green t-shirt at the bar area. An off duty Police officer named Rowan said something to him and pointed towards the direction of the man in the green t-shirt and the other person who had been with him. The manager could not be satisfied that the off duty Police officer was definitely pointing to the man in the green t-shirt. When he finished talking to Rowan, he went back inside and the complainant was no longer seated. He then went to the toilet area with Robert Frampton and saw people coming out of the toilet area, one in a green shirt and one in a black shirt, which appeared to be the same people he had been talking to at the bar. They were moving away from the toilet area.
56. The security officer Robert Frampton noticed the bar manager Andrew Case talking to two males, one in a green t-shirt with the 00 on the back and the other male in a black shirt. He was asked to check the toilet areas and as he got to the doorway he saw the same two men coming out from the doorway in a hurried pace.
57. Constable Rowan Wake was off duty that night and was at Melanka's. He knew the complainant and Timothy Duncliff. While at Bo's he noticed a conversation between the complainant and Mr Duncliff and whilst it was not heated he thought the conversation seemed somewhat uncomfortable. There were two other persons nearby and he did not know them. One was stocky with short hair with a green t-shirt with a 00 on the back. The second one was much stockier with a black shirt – the rest of the description of the second person does not lead to any identification in this case. These two men moved from the far end of the bar standing within two – three metres of the complainant and Mr Duncliff. They were not in the conversation and were not acknowledged. At Melanka's the witness saw Tim Duncliff out the front and then he noticed two other people arriving – the man with the green t-shirt with the 00 and another man who was smaller than the man with the green t-shirt on, with short hair and a black shirt on. The complainant and his party arrived at Melanka's a short time later. The witness spoke to security and left. He did not notice any particular incidents between the man in the green t-shirt and the complainant at Melanka's although did he depose that

there was some tension. In cross-examination he agreed that he was not so concerned as to raise it with the complainant.

58. Probationary Constable David Wrigglesworth gave evidence that at Bo's he saw the complainant speaking to Tim Duncliff and the witness watched them closely. Another person was watching the complainant and Tim Duncliff talking – a male with a green t-shirt with 00 on the back. This person stood behind the complainant while the complainant was speaking to Mr Duncliff. This man was not involved in the conversation. The complainant has his back to the man. When they were at Melanka's he noticed the man with the 00 shirt on and he was there with a man with a black shirt on. He formed the view that the men were “staring down” the complainant.
59. In cross-examination he said that it seemed weird to him that the man would be standing behind the complainant at Bo's. He said the man was not engaging in any way and there was no alcohol being served at that location. The man had a drink and he thought it seemed weird. The complainant had his back to the man.
60. Detective Senior Constable Leith Phillips was talking to Tim Duncliff at Bo's at one stage. He saw other people he recognised and identified the defendant by name as wearing the 00 t-shirt. He knew the defendant and also identified him from the surveillance footage, going into the toilet area after the complainant went into the toilet.
61. It strikes me there is nothing unusual about off duty Police paying attention in the manner deposed. They were careful and cautious in their evidence. Careful not to be jumping to conclusions and cautious not to overstate their evidence. No-one who knew the complainant felt so concerned on the night that they advised the complainant and this includes both trained Police officers and the complainant's girlfriend. Defence disputes that the defendant was paying any particular attention to the complainant. The evidence before me refutes that denial. I find that at Bo's and Melanka's the defendant was paying particular attention to the complainant. I also find that this attention was of a negative nature. At no stage was the complainant aware of this and there was no direct interaction between them prior to them entering the toilet.

62. **Effect of the Defendant's brother's guilty plea.**

I have evidence before me that the defendant's brother Daniel Hayes also known as Daniel Stanford has pleaded guilty to an assault upon the complainant as a consequence of this same incident. Daniel Stanford is the man in P2 seen to be looking around before he goes into the toilet, is in the toilet for 12 seconds and then leaves just after the defendant. In the circumstances of this case, the fact that the defendant's brother has pleaded guilty cannot lead me to a finding that the defendant or another person or persons could not have assaulted the complainant. The complainant does not know many people or who was assaulting him. Further it does not mean that I must conclude that the defendant's brother did assault the complainant. I accept that the defendant's brother did plead guilty to an assault upon the complainant on this night.

63. **Complainant's state of intoxication.**

It was evident from the material before me that the complainant had consumed a large amount of alcohol, albeit over approximately 11 ½ hours and he had 2 meals in that time. The complainant had a mixture of alcohol including beer, spirits and wine. He consumed some food at various stages during the outing and was variously described by witnesses as merry, pissed and intoxicated. The complainant himself acknowledged he was affected by alcohol though his evidence was that he was still aware of his faculties. He agreed that he was starting to feel the impact of the alcohol but he disputed he was intoxicated. He said he was happy and jovial and was aware of what was happening. He was able to give a detailed account of the events prior to the assault. He recalls who he was with and what he had been doing. He was able to recall entering Melanka's and who he attended Melanka's with. He was not refused entry into Melanka's due to intoxication. He recalled going to the toilet and going to the urinal area. He recalls using the urinal and then the assault commencing. His memory of the night up to the point of the assault and immediately prior to the assault is not consistent with someone heavily intoxicated.

64. The video surveillance footage shows the complainant in the passageway and entering into the toilet area at 1.12.21. It shows the complainant walking upright

and he is not staggering or wobbling as he was walking. This is only one of the indicia of a person who may be affected by alcohol but it is apparent from that footage that the alcohol he has consumed during the day and evening has not lead to an apparent and obvious effect on his ability to walk. This material persuades me that, whilst the complainant was affected by alcohol, he was not heavily or grossly affected by alcohol. His account of events prior to the assault including immediately prior to the assault and during the assault can be relied upon.

65. **Flight of the defendant.**

The video surveillance evidence and evidence from security officers Frampton and Mendez, and to lesser extent the manager Andrew Case, is relied upon by the prosecution as evidence of flight. It was submitted by prosecutions that this flight demonstrated a consciousness of guilt. I find the defendant left the toilet quickly, almost at a run. It was put by defence that the defendant was wanting to leave the premises abruptly because he did not know who the complainant may know and he believed his brother (and he) may well be in danger as a consequence of the assault upon the complainant by his brother. The defendant is not denying that he left the toilet area quickly but submitting the reasons why he left quickly were linked to fear of retaliation. This account is not corroborated by the video surveillance evidence in P2. The defendant is smiling when he is leaving the toilet. There is no evidence of concern for their welfare demonstrated by his demeanour. The defendant comes out of the toilet before his brother and is not looking behind him to ensure his brother is coming out of the toilet. The defendant's demeanour is not consistent with his stated fear.

66. The evidence of security officer Mendez is that the two men smiled and ran off through the exit. I find that the two men he refers to are the defendant and his brother. Once again there is no evidence of concern for their welfare demonstrated by the defendant's demeanour. The evidence demonstrates flight and the defendant's account for that flight is not consistent with other evidence before me. The defendant's flight is evidence of a consciousness of guilt.

67. **The witness Eckert.**

This witness was in a toilet cubicle in the Melanka's toilets at the time that the complainant was assaulted. The cubicles are adjacent to the urinal. He had seen the complainant at Bo's and described him as big, bald, wearing a Harley Davidson shirt with shorts and big all over. He did not see any trouble at Bo's. The witness then went to Melanka's. He gave evidence that he was half way intoxicated, having drunk alcohol at both Bo's and Melanka's. He went to the male toilets. The video surveillance evidence in P2 is that he went into the toilet 31 seconds after the complainant went in, entering at 1.12.52. He was in the toilet a total of 1 minute and 29 seconds. Upon entering the toilet he noticed the "big dude" he had seen at Bo's was using the urinal. The man was standing sideway to the witness as the witness walked into the toilet. There is no dispute this was the complainant. The complainant had one arm out at shoulder height, with this hand on the wall. The witness was not aware of anyone else in the toilet area and went into the cubicle and closed the door. When he was first in the toilet cubicle he heard something like a scuffle going on. He heard something and he was not sure what it was but it was something like the way the "dude" was in position while urinating. He heard people going for it and someone getting hit. He heard no other words and no other sounds except the sound of bodies hitting other bodies. There were bodies moving around and he had no idea how many people were there. When he came out of the toilet the two security officers were there talking to the man. The man they were talking to was the same man he had seen using the urinal when he had entered the toilet. P2 reveals he left 21 seconds after Mr Case and Mr Frampton entered.

68. In cross-examination he estimated that the time he heard the sound of bodies hitting bodies as being maybe 20- 30 seconds. He cannot say who had said what and he had no idea if anyone else had come into the toilet. He had assumed that the man had been urinating. He did hear a sound like plastic cup hitting the ground and movement of the feet, shuffling and someone getting hit or slapped. The sound was quieter than a clap. Then it was quiet. He did not hear a door entry or exit sound. He agreed that what he saw upon exiting the cubicle had assisted his memory on what he thought had been happening. His evidence was then that he "knew something was going on" when he was inside the cubicle.

69. This witness is an independent witness. I am satisfied that his recollection of events is not affected by the alcohol he had consumed. He gave evidence in a thoughtful manner and his evidence is not inconsistent with any evidence in P2. Further his evidence of the physical sounds, such as movement of feet, shuffling and a person getting hit are all consistent with the complaint made by the complainant and to a large extent the defendant's account. The sound "like a plastic cup hitting the floor" could be the false teeth hitting the floor, though I cannot be satisfied of that. His evidence including his estimations of time can be relied upon.
70. The video surveillance evidence is that the defendant walked into the toilet 14 seconds after the witness Eckert had approached the door. Given that the witness Eckert had to walk into the toilet and then into the cubicle and close the door another approximately 2 – 3 seconds can be safely accounted for. Accordingly there is approximately 12 seconds between the witness Eckert closing the cubicle door and the defendant walking into the toilet. His evidence is that when he was first inside the cubicle he heard a scuffle. This evidence was not contested. As previously set out there was 32 seconds between the defendant walking into the toilet and the defendant's brother walking into the toilet. There was 12 seconds between the defendant's brother walking in and the defendant leaving. His brother left 1 – 1 ½ seconds later. As to the question of time, the evidence of the witness Eckert is not consistent with the version of events as deposed by the defendant. On his evidence, I find that the sound of bodies hitting bodies commenced soon after the witness Eckert entered the cubicle and carried on for 20 – 30 seconds. This must have included time prior to the defendant's brother entering the toilet, he being in the toilet a total of 13 ½ seconds.
71. The evidence of the witness Eckert as to what was said is not inconsistent with the defendant's account as to what he said though it cannot be said to be exactly the same. The words that the defendant said he used and in particular "are you alright mate" can hardly be said to be indicative of being about how someone was positioned when urinating. The witness does not hear anything said as between the defendant and his brother, such as "what have you done", "what are you doing", "lets go" or "we have to go". This will be ventilated in the next topic.

72. **Did the Complainant urinate on the Defendant.**

The witness Eckert's account does not go to the question of whether the complainant was urinating on the leg of the defendant. His evidence is that he heard a comment about the way the complainant was positioned. The evidence of the witness Eckert does not lead me to find that the complainant was urinating on the defendant. There is no evidence that there was urine on the floor around the urinal.

73. The complainant has denied he urinated onto the defendant's leg, and denies that anyone was next to him at the urinal at any stage prior to him being hit to the back of the head. He said that was the first blow he received. He denied he was pushed away. I am satisfied that the complainant was able to recall events immediately prior to the assault and he was not so heavily intoxicated to affect his memory of what occurred immediately prior to the assault. He can be seen walking into the toilet in P2 without any sign of wobbling or staggering. There is no evidence that the complainant was so intoxicated he would have been likely to have behaved in the way as alleged.
74. The defendant's evidence is that he did not specifically refer to that but rather said "are you right mate", or words to that effect. He referred to this statement in his evidence a number of times. On one occasion he deposed that he said "that's disgusting". The witness Eckert refers to a comment about the way the complainant was in position while urinating. This does not lead me to have a reasonable doubt that the complainant may have been urinating on the defendant. I reject the defendant's evidence as lacking creditability. He did not impress me as a witness. In saying this I acknowledge it is always stressful for a defendant to give evidence. Nevertheless his account lacked the type of detail to be expected of an incident such as this. The defendant is said to be urinating and standing very close to another large man at the urinal. It is a small urinal space. He says that he pushes the man away, but does not notice whether the man ends up on the ground as a consequence of this action. Once again, I stress this is a small area.
75. The Defendant says he does not notice another person coming into the toilet (his brother) nor notice that his brother is assaulting the complainant – until he

finishes urinating and turns around. Such an account of events in such a small space lacks any creditability. The complainant is a big man. His presence whether standing or on the ground can hardly have been missed by another person at the urinal. Further, if the complainant had been pushed as the defendant deposed, it is not believable that the defendant would simply have looked back at the wall and taken no notice whether such a big man was going to retaliate, especially as the defendant was said to be in the vulnerable position of continuing to urinate at a urinal. I reject the defendant's version of events and find that the complainant did not urinate on the defendant's leg.

76. **Injuries sustained by the Complainant.**

The injuries sustained by the complainant are consistent with his version of events. I find he sustained those injuries when in the toilet. The injuries sustained by the complainant are not inconsistent with the defendant's version of events. The injuries sustained do not lead to any findings one way or the other as to the way the injuries were inflicted or who inflicted them.

77. **What was the first blow suffered by the Complainant.**

This issue has already been canvassed to some extent when dealing with earlier questions. I am satisfied the complainant's version of events can be relied upon to answer this issue. I have found the complainant's level of intoxication was not so high as to find his recollection and memory would have been affected. He gave clear and consistent evidence on this question and impressed me as a witness when recounting the events of the night. He did not at any stage seek to implicate, by direct evidence or by inference, the defendant. That in itself was impressive.

78. The witness Eckert's account is not consistent with a version whereby an arm was moved out sideways to push someone away and no other physical interaction occurring in the 32 second period between the defendant entering the toilet and his brother entering the toilet. He had heard the sound of someone being hit when he was first in the toilet and this occurred for 20 – 30 seconds. His evidence can be relied upon.

79. I have previously set out matters with respect to the defendant's version of events and refer to the findings made above. In particular, I have found the scenario painted by the defendant as lacking creditability. In such a small space, the complainant being such a large man, the defendant being in a vulnerable position where retaliation was a possibility, I am unable to find that the defendant would have pushed the complainant away and not have maintained visual contact to ensure he was not the subject of retaliation. I reject the defendant's version of events that he made contact by way of pushing the complainant away with his arm. On his version this was the first physical contact made with the complainant, and it was not until his brother came into the toilet that there was further physical contact. I find that the complainant's version of events is proven beyond reasonable doubt and that the first blow connected to the back of his head and that he had his back to his assailant. This blow was so forceful that it caused him to fall onto his haunches. He then received blows to his head and body. There was then no time that he was not receiving blows until he lapsed into unconsciousness.
80. **Is it proven who inflicted the first blow (to the back of the head) and the subsequent blows?**

I have rejected the defendant's account but must not conclude that, because I have rejected that account, that prosecution has proven its case against the defendant beyond reasonable doubt. The prosecution case comprises oral and documentary evidence. The evidence of the complainant and the independent witness Eckert can be relied upon. As previously stated, the documentary evidence in this matter is significant. P1 shows the injuries sustained. P2 shows important evidence such as the state of the complainant as he walked in and as he walked out and the defendant's demeanour. The video surveillance in P2 also gives time lines which are firm markers which can be relied upon without equivocation. Those time lines put the defendant in the toilet area at the time the witness Eckert says that he heard the sound of bodies hitting bodies. The evidence of the witness Eckert and the time lines do not support a finding that this sound commenced at 1.13.38, that is the time the defendant's brother walked in. The defendant was paying particular attention to the complainant on the right in question and this attention was

negative. He entered the toilet shortly after the complainant. The defendant's flight from the scene is evidence of a consciousness of guilt.

81. There were only two people in the toilet when the defendant entered – the complainant who was using the urinal and the witness Eckert who was in a cubicle with the door closed. No-one else entered the toilet for 32 seconds and the next person who entered was the defendant's brother. There was no opportunity for any other person to cause a blow to the complainant's head at the time the witness Eckert was first in the cubicle, which I find was 1.12.54/55 am, until 1.13.38 when the defendant's brother walked into the toilet. This is a period of 43 seconds. Of that 43 second period, the defendant was in the toilet for 32 seconds before his brother arrived. He had opportunity to cause the blow to the head and the subsequent blows. The witness Eckert's account, which I have found can be relied upon, is inconsistent with a finding that there was such a long gap before the sound of "bodies hitting bodies" commenced. Further, it could not have occurred for 20 – 30 seconds if it only commenced when the defendant's brother first went into the toilet, he being there for 13 ½ seconds in total.
82. Based on all the evidence before me, oral and documentary, and based upon the findings made, I find that the defendant inflicted the first blow to the complainant and that this was a punch to the back of the head. I find that he continued to rein blows upon the complainant and that his brother then entered the toilet. I make no findings as to what occurred at that point, though I find that it is not proven that there was ever any stage when the complainant was being double banked. There is no evidence before me capable of making such a finding.
83. **Are the elements of the offence made out based upon the evidence and my findings?**

I find that the punch to the back of the head and the subsequent blows were assaults upon the complainant as defined by the Criminal Code. That is, there was a direct application of force to the complainant without his consent. Further I find these blows were unlawful assaults, there being no matters raised on the evidence which the prosecution has to negative as to the issues of authorisation,

justification or excuses. The blows were without authorisation, justification or excuse.

84. I find the circumstances of aggravation are also made out. Bodily harm has been proven and particularly as relates to the injury to the right ear. There has been interference to the complainant's health. I also find that the complainant was unable to effectively defend himself due to situation. There are a combination of factors which have led to that finding – he had his back to his assailant, he was facing a wall at the urinal and he was occupied undertaking the task of urinating. Further he was in a relatively small contained area. That circumstance of aggravation is also proven.
85. I record a verdict of guilty to charge one and the circumstances of aggravation.

Dated this 14th day of December 2006.

Melanie Little
STIPENDIARY MAGISTRATE