

CITATION: *Police v Luke Nicol* [2007] NTMC 008

PARTIES: PETER NUNN

v

LUKE RAYMOND NICOL

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Summary Jurisdiction - Alice Springs

FILE NO(s): 20624346

DELIVERED ON: 19 February 2007

DELIVERED AT: Alice Springs

HEARING DATE(s): 8 and 9 February 2007

JUDGMENT OF: M Little SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Prosecution: P Nunn
Defendant: T Stevens

Solicitors:

Prosecution: Police Prosecutions
Defendant: NTLAC

Judgment category classification: B
Judgment ID number: [2007] NTMC 008
Number of paragraphs: 52

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

No. 20624346

BETWEEN:

PETER NUNN
Prosecution

AND:

LUKE RAYMOND NICOL
Defendant

REASONS FOR JUDGMENT

(Delivered 19 February 2007)

Ms M LITTLE SM:

1. The defendant is charged that on 3 September 2006 he unlawfully assaulted George Close at Alice Springs. It is alleged that there were two circumstances of aggravation namely that George Close suffered bodily harm and that George Close was unable to effectively defend himself due to situation. This was a charge pursuant to s.188 (2) of the Criminal Code. The defendant pleaded not guilty and a hearing was conducted on 8 and 9 February 2007 and I reserved my decision. This is now my decision in the matter. I remind myself that prosecution bears the onus of proving each and every element of the offence and that should any matters be raised on the material by way of authorisation, justification or excuse, it is for prosecution to negative those issues. If they do not do so, the defendant is entitled to be found not guilty.
2. I have taken into account all the material in the case and now summarise the evidence and material tendered. The complainant George Close was the first witness. He gave evidence that early in the morning on 3 September 2006 he had been at Bo's and then he went to Melanka's. He was refused entry into the Melanka's nightclub and he went and sat on the wall near the phone boxes. He

drew a plan which became exhibit P1. He had 10 – 12 beers that night and he agreed he had been refused entry due to being intoxicated. He felt good and was enjoying himself. His friend Clinton Nibbs came along and they were playing around on the footpath. A security officer came over and told them to stop it or they would be removed. He identified the defendant as the security officer. His evidence was that the man tried to move us on and we said we were waiting for a taxi. The man grabbed Clinton and tried to put him down. Clinton said “we are doing nothing”. The man got hold of the witness and put him on the ground using a type of rugby tackle. He was put onto the road. The witness said he was doing nothing, just waiting for a taxi. “I don’t remember what happened next. I woke up in the hospital. I had been grabbed, thrown on the ground and knocked unconscious”. The tackle was from the front around the chest area, he was tackled and put to the ground. He drew an x mark on exhibit P1 to indicate where he had landed on the road. He did not recall anything else until he woke up in hospital.

3. As a consequence, he received a lump on the back of the head approximately two inches around, a graze on the head, five stitches to his top lip and a swollen left cheek. He felt light headed and needed strong pain killers. For two weeks he was in pain and the pain meant he could not attend work. He could not chew solid food for a week and a half and the stitches were in place for a week. He stayed in hospital until 8am the next morning. He did not give anyone permission to assault him. He did not know the defendant before and didn’t recall seeing the defendant earlier in the evening. He had attended at Melanka’s prior to going to Bo’s and had been refused entry.
4. In cross-examination he agreed that he had had some beers after playing football. He had been at the Memo Club and then left there to go towards Melanka’s. After being refused entry at Melanka’s he went to Bo’s and had a few drinks. It was put to him that he had been ejected from Melanka’s on the first occasion and he said he had been told to go by a security officer. It was suggested he was annoyed at Melanka’s for being ejected. He replied he did not worry about it when he was refused entry. He denied he had been annoyed at Melanka’s. He had been waiting for friends to arrive and his friend Clinton had arrived with his wife. They had stayed by the phone box wall area. It was put to him that he and Clint were really

hyped up and he denied that. He said that they were rousing around, just mucking around. He agreed they had been head butting a sign but he said they were not angry. He agreed that he had not put into his statement that he had been head butting the sign. He said that the police had spoken to him the next morning and he was still groggy after what had happened. He agreed that the security officer had asked him and Clint to stop mucking around which had included head butting the sign, but he said “we were not hurting anyone”. He agreed they were asked to leave, and he said they had told the officer they were waiting for a taxi.

5. It was put to him that he told the security officer to ‘fuck off’ and said that they could do what they like as it was not his property. He replied “maybe that was said”. It was put to him that Clinton had gone close to the security officer and he denied that. It was put to him that the security officer said for them to leave on three separate occasions and his reply was that he did not recall that, “maybe but I didn’t hear that”. It was put to him that the security officer tried to push Clinton away and he replied that he was behind Clinton. It was put that he punched the security officer in the mouth area and he said “I don’t think I did”. It was put that he and the security officer had a bit of a struggle before he hit the ground. He agreed there was a struggle before he hit the ground. He only recalled the struggle and then hitting the ground, he could not remember from the time he hit the ground.
6. The next witness was Chanelle Mosley the wife of George Close. On 3 September 2006 at approximately 2am she had been at Melanka’s and she walked up to where the taxis were lined up. She and a friend named Clint had come out of the Melanka’s bar and walked up to the brick wall and phone box area. They were all in the street area. Her husband George Close was there with Clinton Nibbs. They were there approximately half an hour before the incident happened. Her husband and Clint were on the footpath wrestling around and telling each other about what had happened at the football game. She was 2 – 3 metres away. George and Clint were head butting a sign and a security officer came over. She identified the defendant as the security officer. The security officer said stop it or I will remove you, and that was not said nicely. The security officer was jerking Clint around and George was behind Clint trying to hold him up. The security officer was

jerking Clint around by the collar area with Clint trying to restrain himself. George was trying to help Clint from behind. She saw the security officer get George from behind and threw him to the ground. Clint was fighting with the other security officer trying to defend himself. She saw the security officer hit George to the ground. The security officer grabbed George from behind in a rugby style tackle around the rib area or perhaps a bit below.

7. George had not done anything to the security officer and he hit the ground. He fell right back hitting the back of his head. While he was on the ground the security officer elbowed him and punched him several times to the face. George was on the road. She drew a plan which became exhibit P2. She put a mark number 1 where the incident had occurred between Clint and the security officer and number 2 where George ended up on the road. George had not moved after he hit the ground but did appear conscious. George was hit repeatedly to the face. The security officer had his elbow on George's chest and was sitting on top of him. He was bending down hitting George. He had one knee on top of him and was facing George. He had a knee in the chest or stomach area. The security officer elbowed George and she thought it was the right elbow that was used. He was elbowed in the face and then George was unconscious. George was hit to the face, lip and cheek area to the right side of his face. They looked like hard hits and George was punched several times. She had no idea which fist was used but only one fist was being used. He was punched several times to the face, eye and mouth area. The punches were very hard and George was not doing anything. She realised George was unconscious and she tried to lift him up. She was angry and was panicking.
8. The security officer got up and ran to Melanka's. He did not offer any assistance to George. George received five stitches to his upper lip and she saw bleeding from his face. There was a lot of blood and George was unconscious. Police attended 5 -10 minutes later. George was not conscious before the police arrived. Before the incident George was happy, he was intoxicated but not severely intoxicated. There were street lights on and the phone boxes were lit up as well. When George was on the road she was not far away – approximately one metre away and she had a good view.

9. She was then cross-examined. She agreed that she and George had talked about the incident. She agreed that in her statutory declaration she said the boys had been doing silly stuff including pretending to wrestle. She agreed she had not mentioned there had been head butting. She had 4 glasses of bourbon and coke at the Memo Club and 2 at Melanka's and said she was not intoxicated. Only George had been refused entry into Melanka's. Clint and George were both drunker than she was. She agreed they were hyped up. She agreed she was not right beside them when they were mucking around. She saw the security officer come up to them but she was not close enough to hear the start of the conversation. It was put to her that she did not see the entire incident and she denied that. She said that George did not punch the security officer. She saw the security officer at the hospital with blood on his face but she had not seen blood on him when he fled the scene.
10. It was put to her there was an altercation between George and the security officer and she said she did not recall that at all. The incident had started on the side of the road and George had ended up in the middle of the road. She did not recall a struggle on the road. It was put to her the security officer only used his elbow and she denied that. She was asked if she had seen any blood on the security officer at the time of the incident and she said that she had not taken any notice of the security officer and was worried about her husband.
11. The next witness was Donna Lemon who is a training officer at Central Land Council. On 3 September 2006 she left Melanka's at approximately 2.15am. She got in a taxi and as she proceeded towards KFC she saw people gathered in front of the phone boxes by the billboard area. She heard a familiar voice, that of a former neighbour who she later identified as Clint Nibbs. The taxi driver had stopped for a pedestrian who was crossing and she heard what she considered to be a disagreement between husband and wife. She was sitting in the front passenger seat of the taxi. She heard words such as "what have we done wrong", "what's happening". She saw punches being thrown and 3 or 4 people were there. She recognised Clint Nibbs and Chanelle Mosley. She also saw a person she knew through rugby as Chanelle Mosley's partner whom she knew as George. She saw a security officer wearing a light blue shirt and had a radio on. She identified him

as the defendant. The security officer was quite agitated and she heard Clint Nibbs' voice saying "what have we done wrong". Clint was talking to the security officer who she identified as the defendant.

12. She saw punches thrown but she didn't see Clint hit anyone. She saw George swing and she saw the security officer hit George once to the face. Clint was trying to defuse the situation and Chanelle was hysterical. She saw the security officer grab George around the waist, pick him up rugby style and body slam him to the road. She identified the defendant as the security officer who did this. He had approached George front on, picked him up and dropped him to the ground. George's body was lifeless and he was not going to do anything. She was 5 metres away and the lighting was not very good. She said there were street lights on and the taxi had a light on. She saw the security officer pick up George and carry him and he was stumbling as he was walking. George was then on the ground with his head facing east and his legs west. His body was between the CAAMA shop and Melanka's. He was just off the edge of the gutter area and Chanelle was standing near the pole. Clint was saying for Chanelle to stand back and Chanelle was about a metre away.
13. George appeared intoxicated. In particular she noticed he was quite lethargic and she thought he was intoxicated. The tackle to George was around his waist area and when George was on the ground he had his arms on the side. The security officer put his left leg on George's right arm and his right leg on George's chest or waist area. The security officer elbowed George in the upper throat using his right elbow moving forward. George's left arm was freed but he did not swing his left arm at all. The security officer hit George in the throat and at that stage she got out of the car and she was swearing. She said it did not look right. The blows did not appear to be soft and there were several blows with the elbow. George was lifeless and he was not reacting. The blows were being delivered from an area between the elbow and wrist area and there were 5 or 6 blows which landed in the upper chest and throat area. She had not seen any other blows. She saw another man with a radio on and that person took the security officer off of George. The first security officer had a blood nose and she had said to him you deserved that and that she was going to write to the paper about what she had seen. She did not

see George move at all when he was on the road. Chanelle was trying to wake George up. The cab driver did a u-turn and she saw the ambulance arrive. She did not see the security officer again. The police took 7 – 8 minutes to arrive.

14. She was then cross-examined. She had seen George head butt the sign and had heard something like a bang. She agreed that she could sense some aggression and that George was hyped up. Clint was acting like mediator. She saw George take swings but she did not know if any had connected. He was lethargic as he was throwing the punches. There was a scuffle to the road and once George hit the ground there was a thud and he was lifeless. His arms were on the ground and he had not moved. She denied there was a struggle on the road. When she saw the security officer walk pass the taxi she saw the blood to his nose.
15. The next witness was Katie Holley. She is a receptionist at Melanka's. On 3 September 2006 she was about to go home from Melanka's early in the morning. She drove towards Gap Road and she saw an incident near the phone boxes. She saw Luke grab a guy by the shoulder and the guy punched Luke to the chest. She did not know who this person was. He was of Aboriginal appearance wearing a red shirt and he used a left fist. Luke let go and looked shocked when this happened. The guy ran out and Luke went to grab him but he missed and the guy was running from Luke. They both ended up on the street and then the taxi blocked her view. Luke had just got hold of the man but her view was blocked by that stage. When she had been near the front gate area she heard something said about the signs and then she saw the man with the red shirt on facing the signs. She would have been approximately 7 metres away from that and did not pay much attention. After Luke walked away from behind the taxi she saw he was bleeding from the nose and mouth and he had blood on his arms as well. The police arrived as Luke was walking to the front of Melanka's – this was soon after he had been on the road.
16. In cross-examination she said she saw a fight between a security officer and the man in the red shirt beginning. She saw that person punch the security officer. She did not see a white man around but there was another security officer around dealing with other people. She agreed that in her statement made to police she had not said she had seen a man in the red shirt run any where. In her statement she

had said that the man was moving away from Luke. The man had his hand on the other guy's shoulder and then turned. The two had moved from the side walk to the road area. The man was trying to get away.

17. Then next witness was Richard Castine, a concreter. On 3 September 2006 he was walking between Bo's and Melanka's. He was on the side of the road where the telephone boxes were and he saw an incident. There was a bloke on the road and a bloke ran out and punched him two times to the head. He had not seen how the man came to be on the road and people were standing around. The man was 3 or 4 metres onto the road and his feet were facing towards the footpath where the witness was. The man was not moving at all. The other man ran, knelt down on the man's chest or stomach area with his knee and punched the man. He identified the defendant as the man who had knelt on the man on the road. The man was in a squatting position and using his right fist to punch the man to the face or head area. He saw two blows and he described them as solid blows. The person on the road was not doing anything. He heard the sound of the punches landing and he heard girls screaming. There were 4 or 5 people standing around. The man who was hitting the man on the ground then got up and walked to the footpath. That man was bleeding to the nose and mouth area although he said there was not a great deal of blood. The man on the road did not move at all and he did not see any injuries to the man on the road. He was approximately 7 metres away and he saw the man's back as he was hitting the other man. The police arrived soon after and he went to the front of Melanka's to talk to the manager. He then made a statement to the police.
18. In cross-examination he agreed that there were people around these two people. He had not seen how the man had got to the road. It was put to him that he could not be sure that it was fist being used and he said that he was reasonably sure it was a fist.
19. Samuel Tasker from Chubb Security was then called. On 3 September 2006 he was working for Dasco security and he was at Melanka's controlling the gate area. At about 2.20am there was an incident near the phone boxes. Melanka's property was potentially being damaged as a man was banging his head on a sign. The manager had told him to deal with the incident. It was a tourist information sign

for Melanka's. He saw a person banging his head on the sign, leaning over the brick wall to the sign behind the brick wall. The person was male in his late 20's or early 30's and he could not really describe that person. Luke (the defendant) asked the gentleman to move on. They were at the gate by the front beer garden when they first saw this occurring and that was 10 – 11 metres away. They walked over to where the people were and asked the people three times to move away from the sign, saying that they were damaging property. One of the men became threatening and stepped towards Luke. Luke moved his arms out straight and then a second guy then verbally abused Luke. The second guy struck Luke and Luke was severely bleeding. Two males stepped aside and Luke was hit to the face. He was not sure which hand was used but it brought Luke to his knees. The witness got the other male back and then did not have a 100% view of the situation. He was dealing with one male who was wearing a t-shirt. He was looking over his right shoulder and could see a struggle going on with the other security officer. Luke was on his knees and the guy got a hold of Luke. Adam grabbed the guy. Luke ended up on top of the man on the road in the gutter area. Luke was on top of the bloke and the man's head was towards the 24 hour store and his feet were towards Melanka's and he was on his back. Luke was on his knees on top of the guy and the man was struggling. There were arm movements by both Luke and the man on the road. They were struggling together. Luke got off of him and he went back to the gate. The bloke's misses picked him up from the top of his body and then she let go of him. She was calling Luke racist remarks. The police arrived and the witness went to the gateway area of Melanka's.

20. In cross-examination he said the two men were quite heavily intoxicated. He noticed that from the man's facial expressions and the way he was moving. They had come to the gate earlier and had been refused entry. The witness knew that they were intoxicated. The witness was keeping the other man back and he had concerns for his own safety. They were quite large blokes who were quite aggressive. They were strong blokes who were intoxicated. He was also concerned for Luke's safety as Luke was bleeding from his lip. He only saw snippets whilst Luke and the man were in the gutter area. There were arms going everywhere between the two of them. A forearm was used by Luke not his fists. Luke was using his outside forearm and then Luke got up and walked away. From the

remarks people were making they wanted to hurt him. The witness said for Luke to go to the hospital. He had blood on his face and shirt and looked dazed.

21. A statutory declaration of Michael Eilersen was then tendered. That was dated 3 September 2006 and became exhibit P3. He was a Danish backpacker who left Australia soon after making the statement. He had been walking back to his hotel approximately 2am on 3 September 2006. The following is an extract from the statutory declaration, paragraphs 4 and 7 inclusive.

- “ 4. I was walking along the footpath on the same side of Melanka’s towards Toddy’s. I could see that there was some sort of trouble happening about 5 metres in front of me, about 20 metres from the entrance of Melanka’s. The first thing I noticed was a male aboriginal in a red shirt, I would describe him as being a dark skinned person, he took a swing at a male person wearing a jacket, I assumed he was a bouncer from Melanka’s. I did not see the punch connect. I am unsure of exactly how things happened next. These people were on the road.
5. The bouncer some how threw the Aboriginal onto the ground, landing on his back, they both appeared to be still fighting. The bouncer sat on the Aboriginal’s stomach, with his knees on either side of him. I saw him hit the Aboriginal in the face with his fists at least a couple of times whilst they were still struggling. By then the Aboriginal went limp and didn’t move and the bouncer hit him again with his fists in the face at least five times.
6. The bouncer got up and left, he made no attempt to give any help or assist the guy in anyway, nor did he say anything. I stayed where I was as family were around him, an Aboriginal woman I presume his wife was hysterical. The police came and I spoke to them. An ambulance came and treated him and then took the guy away, I never saw him move after the bouncer hit him, he just stayed limp.

7. I would describe the bouncer as being Caucasian, tall at least 180cms, solid heavy build, blond, shortish hair. He was a bigger build and taller than the Aboriginal. ”

22. The next witness was Aboriginal Community Police Officer (ACPO) David Hanley who arrived on 3 September 2006 to see a man on the ground near the corner with KFC. He saw an Aboriginal man who was on the ground and he later learnt that the man was George Close. The man was unconscious and not responding to verbal commands. He also appeared intoxicated and had a superficial wound to his mouth. He had not seen any other injuries at that time. The man was drifting in and out of consciousness and a call was made to communications to arrange for an ambulance. Back up had been called for and arrived soon afterwards. He did not see any of the incident leading to the man being on the road.
23. The next witness was Sergeant Phillip Brooke-Anderson. On 3 September 2006 he was on night shift and at 2.20am he was called to Melanka's. There was a large disturbance with a group of people in the middle of the road. There was a lot of yelling and people around. He saw two ACPOs with an Aboriginal man on the road. When he arrived an ACPO was looking at the man's head and the Aboriginal man appeared to be drifting into unconsciousness. The ambulance arrived and they were assisting to get the crowd away so the ambulance could treat the man on the road. The man's wife was almost hysterical. He later spoke to Luke Nicol. That person was identified as the defendant in Court. That was the close of the prosecution case and I found there was a case to answer.
24. The defendant then gave evidence. He is now residing at Cairns and has been a security guard for 5 – 6 years. On 3 September 2006 he was working at Melanka's and he and a co-worker at the front of Melanka's heard some banging. His co-worker was Sam Tasker and the manager asked them to go and sort it out. They wanted the people to move on for their own safety and to protect Melanka's property. The people were heading butting the sign which had a perspex cover and metal backing. A man he now knows to be George Close was with a white man. He described the man he now knows as George Close as an ATSIC man. The ATSIC man was wearing a red shirt with blue jeans and black shoes. He went up

to them and they were already in an agitated state. He asked them politely three times to move on and they were extremely abusive. He said to them to move away from Melanka's property and to stop vandalising the property. They answered that it was their country and it was not his jurisdiction. The man who he now knows as Mr Nibbs became abusive. That man got right into his face and stood right up next to him. The man he now knows as George Close was behind the man with the white shirt on and there were no females present. He slid his arms under the other man and moved him away from the sign. The man was heavily intoxicated and then the other bloke hit him over his friend's shoulder. This put his tooth through his lip and he dropped. He had been trying to bulldoze the bloke back and then he was hit to the face area. The next thing he remembers is going to the hospital. He was losing blood and there was a gap in time. As it transpired the tooth was put threw his upper lip area and was told he had concussion. He was off work for a week.

25. Some photographs were taken of the defendant and they were exhibited as D4. The photographs show an injury to the top left upper lip area of the defendant. There is a cut to the outside lip area which has medical glue to close the wound. There is blood on the inside area of the defendant's mouth. An Alice Springs Hospital Emergency Department report was tendered and became exhibit D5. That statement asserted that the injuries received by the defendant could be described as bodily harm. As a result of the incident he received a headache and his lip was sore. He had not met George Close or Mr Nibbs before. He was concerned for his safety during this incident as the men were agitated and they had a heavy smell of alcohol on them. He was also concerned for the safety of others. The men had been head butting signs and playing silly buggers. He did not recall seeing George Close's wife at any time. He accepts that he hit George Close whilst George Close was on the ground but had no recollection of it. He had no awareness of George Close being unconscious and was blank after he had been hit by George Close. He had been trying to lay assault charges against George Close but the police had been away. He had no prior charges of assault in Australia or New Zealand and had held a security license from 2000. He worked another month at Melanka's and then worked for Chubb. The charge before the Court was laid approximately a

month and a half after the incident. He was then suspended by the Northern Territory licensing authority pending finalisation of the charge.

26. When faced with aggressive people the procedures set down specify that a security officer should try to talk people down first. He gave three warnings at this incident. They are taught to use a forearm rather than a fist in any such incident as there is less danger when a forearm is used.
27. He was then cross-examined. He said he was not sure if any damage had been caused to the sign at Melanka's. The man with the red shirt on had been head butting the sign but he spoke to both of the men. The man with the white shirt on had become aggressive and that man had walked between the man with the red shirt on and himself. The man in the white shirt was then right in his face and both men were abusing him. They were saying things like it is our country and we can do what we like. He could not recall the exact words used and he had asked three times for them to move on. He gave them opportunity to move on but they refused to move on. He was punched once to the face by the ATSI male who was in the red shirt. The blow stunned him and he went to his knees. He had been trying to bulldoze the other bloke. The man with the red shirt on had been head banging on the sign. The man with the white shirt on had come in to his face so he had pushed him away. He was trying to defuse the situation. The man followed him as he stepped back.
28. He had been told by his co-worker what had occurred. He accepts the material before the Court that he struck the man while the man was on the ground. He said that he had been told that he had used the minimum amount of force needed to defend himself. He had a poor memory of the incident and was stunned by the blow. Before the blow he had a fairly accurate memory of the incident. It was put to him that the male was knocked unconscious on the road and that while he had been kneeling on top of him he had inflicted 3 or 4 blows. He said that was all speculation and he could not comment. There were different accounts given in Court and at the end of the day it was a matter of conjecture what had occurred. That was the close of the defence case. Submissions were made the following day. Counsel gave comprehensive submissions and this justified the decision to have all submissions made on the second day of the hearing.

29. The incident occurred on 3 September 2006 and the Criminal Code to be applied is as at that date – that is prior to the amendments in December 2006. Sections 29 and 31 of the Criminal Code Act were raised by the defendant. Section 29 has not been amended. Section 31 has been amended but does not apply to this case. Section 29 of the Criminal Code Act reads:

29. Defensive conduct justified

(1) Defensive conduct is justified and a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event.

(2) A person engages in defensive conduct only if –

(a) the person believes that the conduct is necessary –

(i) to defend himself or herself or another person;

(ii) to prevent or terminate the unlawful deprivation of his or her or another person's personal liberty;

(iii) to protect property in the person's possession or control from unlawful appropriation, destruction, damage or interference;

(iv) to prevent trespass to land or premises occupied by or in the control of the person;

(v) to remove a trespasser from land or premises occupied by or in the control of the person; or

(vi) to assist a person in possession or control of property to protect that property or to assist a person occupying or in control of land or premises to prevent trespass to or remove a trespasser from that land or premises; and

(b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.

(3) A person does not engage in defensive conduct if the conduct involves the use of force intended to cause death or serious harm –

(a) to protect property; or

(b) to prevent trespass or remove a trespasser.

(4) For the purposes of subsections (2) and (3), a person trespasses if he or she enters or remains on land or premises –

(a) with intent to commit an offence; or

(b) in circumstances where the entry on to or remaining on the land or premises constitutes an offence.

(5) A person does not engage in defensive conduct if –

(a) he or she is responding to the lawful conduct of another person; and

(b) he or she knows that the other person's conduct is lawful.

(6) Nothing in subsection (5) is to be taken to prevent a person from engaging in defensive conduct in circumstances where the other person's conduct is lawful merely because he or she would be excused from criminal responsibility for that conduct.

(7) Sections 31 and 32 do not apply in relation to defensive conduct.

30. As at 3 September 2006 s.31 of the Criminal Code Act read:

31. Unwilled act etc. and accident

(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.

(2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.

(3) This section does not apply to a crime defined by section 154 or 155.

31. I will now assess the witnesses in the matter. There was some element of taking sides by some of the witnesses in this matter. The evidence of the witness Chanelle Mosley and Samuel Tasker was affected somewhat by their allegiance to the complainant and the defendant respectively. Nevertheless, I do not find that their evidence should be rejected in its entirety. The complainant George Close was a quiet and thoughtful witness who did not embellish or exaggerate his evidence. He did not become angry or agitated when certain matters were put to him in evidence – in particular that he had assaulted the defendant. He could not take the matter very far as he became unconscious during the incident and I accept this evidence. I am satisfied that the material he put to the Court was to the best of his ability. He did not categorically deny that he assaulted the defendant and agreed that he was affected by alcohol on the night in question.
32. The witness Chanelle Mosley has agreed that she discussed the incident with her husband George Close. The frankness in which she made this concession was refreshingly honest and I do not believe that it could be said to be extraordinary in the circumstances. It could hardly be believable that a wife would not discuss such an incident with her husband unless, for example, they were estranged. That is not the case here. That does not of itself cast doubt on her account. Her husband did not recall much of the incident. I accept that he has little recollection of the incident and he can not have influenced her to any great extent based upon

his limited recollection. Her evidence is that she was quite close to the incident yet she did not see any blows delivered by her husband towards the defendant. She did give evidence that her husband was head butting the sign and to that extent she was not seeking to suggest her husband was well behaved all night. A significant amount of her evidence is consistent with witnesses who are not as directly involved in the case. She had had some alcohol to drink but I find that she was not particularly affected by alcohol and that she was able to give an account of what she observed. She was somewhat away from the start of the incident. She became hysterical as her husband lay on the road unconscious. This would also have had an impact on her recollection. I found her a thoughtful witness.

33. The witness Katie Holley's evidence was vague and of limited value. She gave evidence that she had seen the defendant punched to the stomach area by someone. This evidence is not supported by any other witnesses. She knew the defendant and it is certainly open for me to find that her vagueness was seeking to minimise the defendant's role in the entire incident. Very little of her account is corroborated by any other witnesses and I find that her evidence does not take the matter very far at all.
34. The witness Sam Tasker had given a statement to the police only the day before the hearing. It is certainly possible that his recollection of events was affected by the fact that he had not made a statement immediately after the incident and was recalling the incident without the benefit of contemporaneous notes. He did not see the entire incident. He gave evidence that he was looking over his right shoulder from time to time to see what was happening between the defendant and the other male whilst he was dealing with the other male. This meant he had limited opportunity to make observations that could encompass the entire incident. He had spoken to the defendant about the incident. His account was very favourable to the defendant, notwithstanding his evidence that he was occupied with the other male and had to turn his head to see the defendant. This does not reflect well upon the witness.
35. The witness Donna Lemon was forthright and open about her evidence. I am satisfied that she observed the incident closely. When she realised she had some

knowledge of the people involved, and as the taxi had slowed to allow a pedestrian to go past, she took the opportunity to make close observations of what was occurring. The taxi then stopped and she was observing what was occurring. The severity of the incident caused her to get out of the taxi. She was an impressive witness whose evidence can be relied upon. I do not regard her knowledge of who the complainant was as affecting the reliability of her evidence.

36. The witness Richard Castine saw only the end part of the incident. His evidence was clear and unequivocal. His evidence can be relied upon as to the severity of the blows. He can be described as an independent witness. His evidence acts as a marker to work backwards as to what occurred.
37. The defendant also gave evidence. I acknowledge that it is almost always a stressful situation when a defendant gives evidence in response to charges laid as against them. Taking that into account, the defendant did not appear to be overwhelmed by the occasion and gave his evidence in a forthright manner. His evidence is that he does not recall the incident from the point in time after he was punched to the face. He has been provided with some information with respect to the incident after discussing the matter with security officer Samuel Tasker. He also heard the evidence given in Court. He gave evidence that he accepted that he assaulted the complainant whilst the complainant was on the ground. That reflects favourably upon the defendant. The subsequent evidence given, that he had been told he “had used the minimum amount of force to defend himself” was a blatantly self serving statement of “opinion” evidence which does not reflect well upon his credit. That is a matter for the tribunal of fact to decide and it was somewhat perplexing that the defendant would make such a self serving statement. He described the evidence before the Court as “all speculation” when discussing precisely what had occurred when he had been kneeling on top of George Close, which does move somewhat away from his acceptance of the material before the Court that he had struck George Close while on the ground. These matters adversely impacted upon his credit.
38. I make the following findings. The findings made are based upon a consideration of the evidence and the credibility of the witnesses. I find that the following

matters are proven beyond reasonable doubt. The complainant George Close was intoxicated on the morning in question. He was declined entry to Melanka's on two occasions and subsequent to the second refusal he was outside the premises. These refusals of entry demonstrate his level of intoxication. His wife Chanelle Mosley and friend Clinton Nibbs came out of the Melanka's bar area and they all gathered near the phone box area on Gap Road (an extension of Todd Mall) down from the Melanka's entrance. The phone boxes are on the footpath area and behind the phone boxes is a brick wall which people can sit upon. Behind the brick wall is a sign which advertises tourist information. The sign is Melanka's property. The footpath area is a public place. I do not have evidence as to the owner of the brick wall. The complainant George Close and his friend Clinton Nibbs were rousing around as they were waiting for a taxi to arrive. The complainant's wife was standing in the vicinity. Both the complainant and Clinton Nibbs were intoxicated and the complainant's wife was far less intoxicated. The complainant commenced head butting the Melanka's sign. There is no evidence upon which I find there was any damage caused to the sign by these actions but I am satisfied beyond reasonable doubt that there was a potential for damage to occur.

39. The defendant and his co-worker Samuel Tasker were employed as security officers working at Melanka's that night. Melanka's is a nightclub and the entrance is from Gap Road. Their employers' representative sent them to the area of the sign to stop the head butting and to move the people on. The defendant did not know any of these people. I accept they had jurisdiction to request that the head butting of the sign cease. I accept that they may have had jurisdiction to request that the persons not lean over the wall area, the question of who owned the wall not being the subject of evidence. I also accept they had jurisdiction to request the persons not to be in the area of the sign, and that their bodies not enter the premises where the Melanka's sign was (by leaning over the wall). I do not accept that they had jurisdiction to direct the complainant and his friend to move on. The footpath area is a public area and I do not accept that a security officer can request someone to move on from a public place such as this. This public area includes public telephones and I am satisfied that this area was not within the jurisdiction of a security officer at Melanka's. I do accept if there was an ongoing

breach of the peace, such as an assault, that a security officer could request a person cease such activities and could intervene. This is especially if the breach of the peace had spilled out from the venue where the security officer was working from. The complainant had stopped head butting the sign prior to this incident. There was no ongoing incident with respect to Melanka's property as the defendant was requesting the complainant and his friend move on. The request to move on was being made to both the complainant and his friend. The complainant's friend escalated the situation by standing near by the defendant. The defendant began moving the complainant's friend by pushing him backwards. While this may have been annoying, I do not find there was any danger to the defendant at this stage. I do not accept that the defendant had authority to push the complainant's friend in this manner. The complainant was standing behind his friend and was trying to ensure that his friend did not fall over.

40. By this stage there was verbal abuse by both the complainant and his friend directed towards the defendant. Both persons were becoming increasingly aggressive towards the defendant. The balance of the evidence before me is that there were punches and swings thrown by the complainant towards the defendant and I am satisfied on the evidence before me that one blow by the complainant did land on the defendant. There are two possible explanations for the witness Chanelle Mosley's failure to give evidence about these matters – either she did not see or she is covering up for her husband. This latter scenario is not consistent with the tenor of the balance of her evidence. She did not see the whole of the beginning of the incident and in particular did not hear all of the words being said between the parties. She was somewhat away from the incident and different witnesses saw the incident from different angles. Punches were being thrown by the complainant and one landed on the mouth area of the defendant. The injuries which the defendant sustained are set out in exhibits D4 and D5. These injuries were sustained as a consequence of this one blow by the complainant. I find that the complainant did not strike the defendant on any other occasion. As a consequence of this blow the defendant ceased attempting to push to complainant's friend away and he then focused his attention on the complainant. I am not satisfied on the evidence before me that the defendant fell to his knees as a consequence of this blow. The evidence of the defendant mirrored the evidence of

Samuel Tasker to such an extent on this point and given the evidence that he had spoken to Samuel Tasker about the events of the night, and his evidence that the blow itself was responsible for his loss of memory, I am not satisfied he fell to his knees. Apart from Samuel Tasker, no other witnesses gave evidence of this. Numerous witnesses saw the defendant move towards the complainant and pick him up in a rugby style tackle. Samuel Tasker was occupied with the complainant's friend and deposed that he was not looking at the defendant all the time. I am not satisfied the defendant had to get up from being on his knees before his next movements.

41. Very soon after the blow to the defendant's face, the defendant moved towards the complainant. The defendant picked up the complainant around the waist area, moved him a short distance and then pushed him in a rugby style fashion towards the ground. As the complainant was being moved in the rugby style tackle he was struggling with the defendant. This involved movement of his arms. At no stage during this process did the complainant gain the upper hand or, to put it another way, at no stage during this process did the defendant lose control of the situation. The complainant had been on the footpath prior to this tackle. He landed on the roadway lying with his feet facing towards the phone box side of Gap Road and his head facing towards the 24 hour store, lying on his back. The lump at the back of the complainant's head was caused as a consequence of being pushed onto the roadway by the defendant. The defendant then knelt on the complainant and held one of his arms down. From the time the complainant was on the ground he posed no risk whatsoever to the safety or welfare of the defendant and did not do anything which required the defendant to defend himself. No other person was in danger. The defendant had the complainant restrained and no further force was required. The defendant used his forearm to strike the complainant to the mouth and neck area. The defendant then proceeded to use his right fist to punch the complainant to the face and head area. The complainant was repeatedly struck whilst the defendant was kneeling on his stomach and chest area.
42. The defendant then stood up and left the area. Both the defendant and the complainant were bleeding from the mouth and nose area. The defendant made no

attempt to render any assistance to the complainant. He walked towards the Melanka's front desk area and then went to the hospital. Police arrived and tried to revive the complainant. The complainant was unconscious on the road and was taken to the Alice Springs Hospital by ambulance. The evidence before me is somewhat at variance to the precise moment that the complainant became unconscious. It is certainly possible that he became unconscious from the moment that his head hit the pavement area but I find, based on all the evidence before me, that it is not proven beyond reasonable doubt that he became unconscious at that point. I find that he lapsed into unconsciousness upon the first blow being inflicted by the defendant as the complainant was being held to the ground. As previously found the complainant was posing no danger to the defendant from the moment he hit the ground. The blow which caused the complainant to become unconscious was struck while there was no actual danger to the defendant, or to anyone else.

43. Section 187 of the Criminal Code defines assault to mean the direct or indirect application of force to a person without his consent (the rest of the definition is not relevant in this matter). I find that there was a direct application of force by the defendant to the complainant without his consent from the time that he was grabbed by the defendant in the rugby style tackle and thrown to the ground. A further direct application of force occurred with the defendant kneeling on the complainant and continued with a blow by the forearm area and then punches to the head. All of these actions were without the consent of the complainant. I find that the complainant was assaulted by the defendant's application of force through these actions. The question remains whether these assaults are unlawful assaults.
44. The defendant has raised two separate matters for consideration with respect to this question. The first relates to whether s.31 excuses the defendant from criminal responsibility for the assaults and secondly whether s.29 justifies the conduct. No other matters are raised on the evidence which go to whether the assaults were unlawful.
45. The s.31 point was not the primary matter relied upon by defence in its submissions but must be addressed. The defendant says that he does not recall any of the actions which I have found constituted assaults. He says that he was

concussed and was not able to recall the incident as a consequence of the actions of the complainant. I find this evidence difficult to accept. I do not have any medical evidence to substantiate the diagnosis which the defendant has reported to the Court. I do not have any medical material which would go to the question of whether concussion would lead to the type of loss of memory that the defendant has given evidence about. I have no medical evidence upon which I could consider the actions of the defendant were unwilled. The blow he received was to the jaw area and not to the upper head area. He immediately moved towards the person who had delivered the blow and undertook a series of actions which had the affect of rendering the person unconscious. He used techniques learnt as a security officer. He then got up and returned to the front entrance of Melanka's where he had been working prior to the blow to his mouth. I find that prosecution has negated s.31 in all of the circumstances of the case.

46. The next issue relates to s.29 of the Code. Section 31 of the Code does not apply with respect to defensive conduct (see section 29 subsection 7). Defensive conduct is raised on the evidence before the Court. It is for prosecutions to negative defensive conduct. If they do not do so, the defendant is entitled to be found not guilty. There are two aspects of defensive conduct to be considered. Firstly, the defendant must have a belief that the conduct was necessary to defend himself. Secondly, the conduct must be a reasonable response in the circumstances as the person reasonably perceived them. There is no direct evidence in this matter as to the defendant's perceptions or understanding of the situation. His evidence is that he cannot recall anything after he was struck to the mouth area. That evidence is accepted when considering this issue. Accordingly, consideration must be given to the whole of the surrounding circumstances when looking at these questions.
47. The surrounding circumstances which are relevant to this issue are as follows:
The complainant was intoxicated and had used force as against the defendant. The force had resulted in a blow to the defendant's mouth with had been reasonably forceful. The complainant had a friend near by who had been aggressive towards the defendant. The defendant's co-worker Samuel Tasker then took charge of the complainant's friend. Another bouncer named Adam arrived at some stage but it is

not possible to be clear as to precisely when Adam arrived. There is no evidence to suggest that the defendant had any idea that Adam had arrived. The complainant had been head butting a sign prior to him punching the defendant to the mouth. This is sufficient evidence of the potential for further incidents. The actions which I have found to be assaults can be separated into three separate categories. First there is the rugby style tackle and the push to the road. Secondly there is the kneeling on the complainant by the defendant. Thirdly there are the blows by the forearm and the punches to the complainant. I find that prosecution have negated defensive conduct with respect to the third category of assaults. I find they have not negated defensive conduct with respect to the first and second categories of assaults. The actions by the defendant in restraining the complainant in a rugby hold and then pushing him to the ground were necessary to defend himself and the conduct was a reasonable response in the circumstances as the defendant reasonable perceived them. I accept that the action of placing the complainant on the ground resulted in him receiving a lump to his head. Nevertheless I am satisfied that it was not so forceful as to result in him becoming unconscious at that stage.

48. The actions of holding the complainant to the ground were also a reasonable response in the circumstances as the defendant reasonably perceived them and I accept that the defendant had a belief that the conduct was necessary to defend himself. He had just been hit to his mouth by the complainant and he was dealing with an intoxicated, abusive and aggressive male. Once he had the defendant restrained on the ground there was no further threat to him and I am satisfied that no other person was in danger. The blows to the neck, face and head area of the complainant was not a reasonable response in the circumstances as the defendant reasonable perceived them. There is no evidence before me to suggest that there was any imminent danger to the defendant when he had the complainant on the ground.
49. I find that prosecution have negated s.29 with respect to the third category of blows. In particular I find that the defendant unlawfully assaulted the complainant by way of using his forearm to strike the complainant to the mouth and neck area and then using his right fist to punch the complainant to the face and head area.

The complainant was struck repeatedly to the face and head area and I find that there was not less than two blows to the face area. It is certainly open on the evidence to find there were further blows but given the varying accounts I do not find there were any further blows. The strike by the forearm to the mouth and head area led to the complainant becoming unconscious. The other blows occurred while he was unconscious. I find the charge of unlawful assault proven beyond reasonable doubt.

50. The next issues to be resolved relate to the circumstances of aggravation. The complainant became unconscious as a result of the assault and suffered injuries to his upper lip. The injury to the back of his head was sustained as a result of hitting the pavement and I have found that that aspect of the case was not an unlawful assault. I find that the complainant did suffer bodily harm by way of the injury to his upper lip and the fact that he was unconscious for approximately ten minutes. He then suffered some ongoing pain and inconvenience during the subsequent weeks. I find that there was an interference with the complainant's health and that the circumstance of aggravation that the complainant suffered bodily harm is made out.
51. The second circumstance of aggravation alleged is that the complainant was unable to effectively defend himself due to situation. That situation is that the complainant was unconscious and being held to the road at the time the blows were being inflicted. I find that circumstance of aggravation is also made out.
52. A verdict of guilty to aggravated assault is recorded.

Dated this 19th day of February 2007.

Melanie Little
STIPENDIARY MAGISTRATE