

CITATION: *Police v Bruce* [2007] NTMC 043

PARTIES: JASON ROTHE

v

DONNA BRUCE

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20630409

DELIVERED ON: 17 July 2007

DELIVERED AT: Darwin

HEARING DATE(s): 7 June 2007

JUDGMENT OF: M Little SM

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Complainant: Tom Berkley  
Defendant: Stuart O'Connell

*Solicitors:*

Complainant: DPP  
Defendant: NAAJA

Judgment category classification: C  
Judgment ID number: [2007] NTMC 043  
Number of paragraphs: 22

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

No. 20630409

[2007] NTMC 043

BETWEEN:

**POLICE**

Complainant

AND:

**DONNA BRUCE**

Defendant

REASONS FOR DECISION

(Delivered 17 July 2007)

Ms LITTLE SM:

1. The defendant is charged that on 30 July 2006 she unlawfully assaulted Janelle Winter at Darwin, pursuant to s 188(1) of the *Criminal Code*. The defendant pleaded not guilty and a hearing was conducted. Prosecution bears the onus of proof with respect to each and every one of the elements of the offence and if each element is not proven beyond reasonable doubt the defendant is entitled to be found not guilty. All the evidence is taken into account in this matter and I now summarise the evidence.
2. The first witness called was Janelle Winter. On 29 July 2006 she had gone to Tracy Village and then into Darwin with a friend Carmel Jenson and other friends. Approximately 1.30am she arrived at the Lost Arc. She had been drinking light beers and bourbon and cokes. When she got to the Lost Arc she was a bit affected by alcohol and described herself as happy. At the lost Arc she had two or three more bourbon and cokes. She ran into someone she knew by the name of Kate and spoke to that person. Her other friends had left. She and Carmel stayed for another drink and to listen to a song at

around 3-4am. They went to the dance floor. On the dance floor another person was dancing with Kate. That person fell into her and she said “excuse me” and she gestured for the person to go away. The witness demonstrated that she had her arms out and was moving her fingers in a motion to go away. The woman said to her to “get stuffed”. She heard her friend Kate say “come on Emily that’s Janelle a friend I used to work with” and started to move her away. Carmel was in front of her and she saw someone come past her on her right. At that stage they were standing by the round tables, approximately one foot from the dance floor. Carmel was an arms length away and next to the edge of the dance floor. The dance floor was to her left and she saw a female person stand to her right behind Carmel. She thought that person was staring at her and then she was next aware that she was falling into the table. There was a strike to her head and she had not seen it coming. The strike connected with the jaw joint on the left side of her face. She recalled two blows. They were close in time. She fell back and thought to herself “how did I get here”. She thought someone had helped her to stay up and that the table had stopped her fall. A bouncer took someone outside. She gave no-one any permission to do this to her. She had no interaction with the person standing in front of her at all. When she had first been at the club she had run into Kate who had told her that she had been at a 30<sup>th</sup> birthday party. Kate had indicated towards the person named Emily as the one having the 30<sup>th</sup> birthday party. She did not recall talking to Emily during the evening. On a sobriety scale of 1-10, 10 being the highest, she was 4 on the scale at the time of the incident. On 31 July 2007 she had gone to the Vanderlin Drive Surgery at Casuarina and she was suffering severe pain on the left hand side of her jaw. It took in excess of three weeks for the pain to subside and Panadol was recommended.

3. She was then cross-examined. She did not recall drinking any alcohol prior to going to Tracy Village. She arrived between 7.30 and 8.00pm at Tracy Village. When she was at Tracy Village she was drinking mid strength or

XXXX beer and she estimated she had had about 5 drinks. Then she had one or two bourbon and cokes at Tracy Village. At about 1.30am she was at the Lost Arc and she had had three bourbon and cokes there. The person who Kate had been dancing with fell back onto her shoulder area. The witness believed that the person fell onto her on two occasions. On the first occasion she tapped her and said "excuse me". On the second occasion she said for her to move away. She used a shooing motion when she was telling her to go away. She thinks the lady said "get stuffed". That did not make her angry. She agreed it was hard to hear because of the music around but said this lady was fairly close to her. She was not speaking to her in a loud manner but in the same level she was speaking in the Court room. She heard Kate say come on Emily and Kate pulled her away further into the dance floor. After they had moved she looked towards Carmel and saw someone standing behind Carmel. She felt like that person was staring at her. That person was about four metres away, off to Carmel's left but behind her. The area was not overly crowded but she was not able to say how many people were around. They were standing and Carmel was in front of her. She was not sure who else was around and there were coloured lights and the area was pretty dark. She turned her head to the right and was about to have a sip of her drink and a split second later it happened. It felt like it happened almost straight away. She recalled thinking "how did I get here"? She was not sure what had happened and she asked Carmel what had happened. She realised then that she had been hit. She did not fall on the ground and there was no scuffle with anyone. There was no argument or standoff with anyone except what she had said to Emily. She saw the bouncer take someone away. She was a bit cheesed off and angry when she realised what had happened. She then got asked to leave by the bouncer and he said for her to come out so they could speak to her. She questioned why she was asked to go out saying that she had been assaulted and she needed the police. Once again she was asked to come outside and she replied that she was "going anyway as that bitch had spilt her drink". She said there was nothing

between herself and the person who was four metres away. Carmel was about one metre away from her. In re-examination she said it was four or five seconds before she realised she had been hit.

4. Carmel Jenson was then called. On 29 July 2006 she had gone out with a group to Tracy Village. The group included her sister Debbie, Janelle Winter and her sister's friend. They had left there at about 1.00am and went into town to Lost Arc. They arrived at around 2.00am. At Tracy Village she had been drinking Carlton Light and had half a dozen. On the scale of 1-10 with 10 being the highest she was 2-3 on the scale of intoxication. At the Lost Arc she had had two or three XXXX beers. Janelle Winter was drinking spirits at the Lost Arc and she believed it was bourbon. She did not know how many drinks Janelle had. She was with Janelle the whole time at Lost Arc. They had got a drink and were standing near the stage on part of the dance floor. She then noticed someone who she thought she recognised and she went to say hello. That person then hit Janelle Winter and Janelle stumbled onto the table. Before this happened they had gone to the top of the bar and Janelle had been with Kate. The witness did not know Kate. They talked and had another drink. They went to a table and Kate was on the dance floor with another lady. Janelle said hello to Kate and the other lady bumped into Janelle. Janelle said excuse me and came back to the table by the witness. Janelle and she were talking and then she saw a person beside her who she named as Donna Bruce. She had met Donna Bruce through friends and she was trying to make eye contact with her to say hello. Janelle was about two metres away in front of her. Donna was to her right. The witness was aware of Donna and thought she recognised her and went to say hello. Donna walked forward and threw one fist, her right hand and hit Janelle. She was not sure if it was clenched or not. Janelle was hit to the left jaw area half way between her mouth and ear area. Janelle was not looking at the woman and there was no interaction between them when this happened. That was the first time she had seen Donna that

night. It was fairly dark in the Lost Arc and there were lights on. She thought it was Donna who was there and then identified the defendant as Donna Bruce. Janelle stumbled into a table and then the bouncer took Donna away through the side door. Janelle had stumbled onto the table and had then regained her balance. She did not fall onto the ground. There was no one else close around. She asked if Janelle was alright. Another bouncer said that they wanted to talk to Janelle outside. She and Janelle went outside. When the woman bumped into Janelle on the dance floor she saw no other interaction between them.

5. In cross-examination she said she had been friends with Janelle Winter for ten years. She had spoken to her about the night in question. A statement had been made a month later to police and she had been asked by Janelle Winter to make the statement. She had not been drinking during the day before she arrived at Tracy Village. She thinks that Janelle Winter was drinking XXXX or mid strength at Tracy Village. She may have been drinking bourbon as well. Janelle appeared ok when they were at the Lost Arc and did not appear intoxicated. Janelle was drinking bourbon at the Lost Arc and they had a couple of shouts. When they were near the dance floor she had her back to the DJ's box. She was facing Janelle and there was a table behind Janelle's back. Janelle had been talking to Kate on the dance floor and was near the side of a table. She saw a person bump into Janelle. She was not sure if it was the person's back or hip which connected. She thought the girl was wearing a white dress. Janelle said excuse me or words to that effect. She was not watching the whole time and did not see what words were exchanged. Janelle was not really annoyed but she came back over to the table. There were a few people dancing and carrying on. Within a five metre radius of her there were eight to ten people around her. A person had come up to her right side. She thought it was Donna Bruce but she was not sure. She was not able to say for sure who it was. She had not seen Janelle turn away but she was not looking at Janelle

at that time. The person threw her right arm and it connected with Janelle. She was not sure if it was a fist. She was pretty sure she saw contact but agreed it could have been a push. She saw a scuffle when the bouncer came over and Janelle was trying to regain her feet. It was chaotic when the bouncer was there, a lot going on. People came from either side of the table. She had not seen any interaction between Janelle and this lady. She first saw the lady then there was the blow. She saw the person and thought she recognised her and went to say hello and then there was the hit. There was approximately seven seconds involved. She agreed there was loud music and the lights were not bright. In re-examination she said if there had been any interaction it may have been in the toilet or around the bar area. She had not seen this person near Janelle before. Janelle was not involved in a scuffle. The bouncer was behind her and nearly ran to grab the woman Donna. She had seen this lady before quite a long time ago and on approximately half a dozen occasions she had met her before. There was a scuffle and someone was being restrained. Janelle was not involved in this. There was a scuffle between the bouncer and Ms Bruce. Janelle was trying to get up. She demonstrated the arm action of the woman as being the arm below shoulder height moving straight from the side of her leg. She saw a strike to the face although she was not sure if it was a clenched fist. She saw contact with Janelle and then Janelle stumble.

6. Katrina Lloyd was then called. She had been at a party at the Railway Club for three to four hours. She had been drinking bourbon and cola in a can and had had ten drinks. She left the club and got to the Lost Arc about 1.00am on 30 July 2006. She was not sure what she had to drink there. She was merry. When she got to the Lost Arc on the scale of 1-10 was 4 on the scale. She ran into Janelle Winter who she had previously worked with. She knows Emily Brown and she had been at Emily's party at the Railway Club. A group of them went from the party to the Lost Arc. She had been dancing with Emily on the dance floor at the Lost Arc and Emily stumbled

backwards into Janelle who was standing at the side of the dance floor. Janelle was with a friend. Janelle put her hands out to defend herself and her palms were out. She and Emily continued dancing and then there was a commotion near where Janelle was standing. It appeared that another girl was pulling Janelle's hair. She turned around and saw another female had hold of Janelle's hair. She had not seen that other person before. She saw a person come from the back of the Lost Arc towards the front running. She did not see this persons arms moving and there was a bit of a commotion. There were a lot of people crowded around Janelle and the other female. She saw security speak to Janelle but she did not see what had happened to the other girl. She has spoken to Emily about what has happened on this night. She arrived at the Lost Arc at 1.00am and this occurred approximately two hours after they had arrived.

7. In cross-examination she said there were a lot of people there and it was a busy night. She was on the dance floor and the DJ box was on her left. Emily was in front of her and Emily had lost her footing or had slipped. She saw Janelle put her hands up. There was a commotion a couple of minutes later. She had not spoken to Janelle after Emily stumbled. Janelle was upset when security was there. Janelle did not appear upset when Emily stumbled. She may have said to Emily she knew Janelle from work. She could not recall if she had grabbed Emily. She was still on the dance floor when the commotion started. She did not see any words between Emily and Janelle. She saw someone run in the bar area to her right and then straight ahead. This person came from the back of Janelle. It was a female but she could not describe the person. She did not know if Emily was wearing a white dress. The same person who was running behind Janelle was then seen holding her hair. She was pretty positive it was the same person. That person had dark hair and was a thin person. She was pretty confident it was the same person and she had never seen her before. There was no-one else involved in the commotion and there was a lot of people around. She did



not see any punches. She just saw hair and a hand. She thought they looked like they were wrestling and they were standing up. The person was pulling Janelle's hair and Janelle was facing her. She does not know Carmel.

Janelle was with a friend who was next to her on her right side. She did not know what happened between seeing the person running and seeing the person with Janelle's hair in her hand. They both moved towards the bar as they were wrestling with one another. The bouncers were around the girls. One bouncer was talking to Janelle and Janelle looked upset at that stage. She did not see any punches thrown and she was approximately 1.5 metres away from Janelle. She had a clear view of Janelle. In re-examination she described the wrestling as a grabbing motion. The time between when the person went past Janelle to when the bouncers arrived was approximately fifteen seconds. She had noticed the movement of the person moving and that was what had caught her eye.

8. The next witness was Gregory Bruce. Emily is his partner and he does not drink alcohol at all. They had gone to the Lost Arc between 1.00 and 1.30am on the morning in question. He had gone with Emily, Patrick, Donna and Maria. Emily, Donna and others were dancing. He identified Donna as the person before the Court. He saw a bouncer herding Donna's boyfriend Patrick out the exit door. He had seen a scuffle and he had not seen any punches thrown. Patrick and Donna left through the exit. He went to calm her down as she walked out. Patrick was behind her and they were hurrying him along. He saw Janelle arguing about why people were being kicked out. He did not know Janelle before. That night she had been at the corner of the bar standing there looking for trouble. He thought this based on the way she was standing at the bar. In cross-examination he said he was ten metres away and he saw a scuffle. There were two to five seconds of mayhem. He knew something was happening and the bouncers were there. He did not see how it started. Emily and Donna were dancing and they were going up and down dancing all night. When the scuffle occurred they were

on the dance floor. He had not seen Donna with any problems that night. She was in a jovial mood from the party. He thought that Patrick was involved the way the bouncers were taking him away. Emily had a black top on. He saw one bouncer and a whole lot of people. You could not pick out what had happened. It lasted a minute.

9. The next witness was Emily Browne. She had her 30<sup>th</sup> birthday party at the Railway Club Parap from about 6.00pm and then they went to the Lost Arc. She was drinking scotch and dry that night. She had maybe ten or more drinks that night. When asked on the scale of 1-10 how intoxicated she was when she was at the Lost Arc she described her level of intoxication as 6. She knew what she was doing even though she was intoxicated. She had kept celebrating and was drinking at the Lost Arc. A few people from the party had come to the Lost Arc - Donna, Patrick, Greg and Aunty Chrissy. She drank and danced at the Lost Arc. She had a black dress on with pink high heels. She had been dancing with Katrina Lloyd on the dance floor and had gone to the bar a few times. Once she had gone to the bar a big lady looked like she had been staring at her. It made her feel uncomfortable. Apparently she had stood on this person's foot and when she turned this lady was in her face with her hands out. There was a round table to her side. When she had made her statement to the police she was on morphine for an injury and now she is on a lower dose of morphine. She described herself as drunk, between 8½-9, although she was not falling over drunk. She did not know what the lady was saying to her. Donna came to her to see if she was alright. She did not see Donna do anything to this person. She remembered a scuffle which lasted about 50 seconds. After this short scuffle she saw them walking out the side door. She did not see how it started or anyone do anything in the scuffle. She did not know why she had turned but when she turned this person was in her face. At the bar this person had made her feel uncomfortable. She had her hands up and looked to be aggressive. Donna came around to see if she was OK. She might have turned around a bit. She

could not recall where Donna came from. Donna was on her left and the lady was in front of them. Fifty seconds to a minute later there was a scuffle. Something happened and then they were out. It was quicker than five seconds. People were below her and then the next minute they were out the door. It was quick.

10. The Record of Interview and transcript of the Record of Interview of 18 October 2006 became Exhibit P1. I will now summarise the Record of Interview.

The defendant was cautioned and then asked what happened in her words. She said it goes back months before to December. She was in the Lost Arc having a good time with friends and it was crowded. She accidentally bumped into this person and she said sorry and when she turned to her the person was shaping up and asking if she wanted to have a go. She was sort of standing trying to intimidate her. She said to her “whatever” and walked back to where her boyfriend was. The person who intimidated her was a big built woman. She described her as like a big butch woman. She was trying to have a good time and didn’t want any trouble. One night she was out with her brother Greg his wife and her boyfriend and the woman was there making passes at her friend. She ignored her and the person was giving her lip so they were laughing and just enjoying themselves and ignoring her. This woman makes her scared. Her brother’s girlfriend Emily had apparently stood on the woman’s foot and the woman was swearing abusive words at Emily. She was close by and walked over to where Emily was to ask if she was alright. This person turned to her and started flaring up again and started swearing at her and then went for her. They ended up in a scuffle and it happened quickly. Before she knew it the bouncers came over and were manhandling her. Her brother and boyfriend were at the back of them and were saying that it was OK. They were taken out the side doors of Discovery. The next day her brother told her he had gone out the front door where they had escorted the other person and that she had been going off her

head and arguing and swearing at the bouncers. Her brother told her there was nothing wrong with the woman and she had never physically hurt her in any way. Emily is her brother's fiancé and they were out for Emily's birthday. She does not know the other lady but on a previous occasion the other lady had been making lesbian passes at them on the dance floor. She does not know if the other lady knows her. The other lady stands out at a night club and she has picked on other friends of hers as well. She stands there is a really agro way and the defendant avoids her because she is big. The defendant says she does not go out to fight. The defendant recognised the lady from the incident in December but she does not think the lady recognised her. She had been out from 7.00pm at a birthday party and had been drinking scotch and coke. She did not count her drinks. She thought this lady was trying to crack onto them and she was intoxicated. When asked how the scuffle started she said it happened really fast. She walked up to Emily after she had seen the woman over the top of Emily and she just went up to Emily and asked her if she was OK. This woman then turned on her and started going off at her. This was like the first time that this had happened when she was standing up saying to her "do you want a go, do you want a go". She had walked away that time. Next time she did the same sort of thing and then it was a blur. Then there was a scuffle and there were people and bouncers. The lady was yelling at Emily because she said Emily had stood on her foot. She did not think she had the chance to turn away before there was a scuffle. When asked whether she threw any punches she said "all I remember is just you know them lot so I don't know". She woke up a bit sore the next day and said that she had been provoked. She was provoked by the way the woman was standing over her and trying to scare her. It was like it had just come to the crunch where she wanted to lash out at someone and she was it. The woman is built like a man and she would not want to fight her. The incident back in December is the incident where the woman had said to her do you want to have a go. On this occasion, after the defendant walked up to Emily, the woman had turned to her and had just

started swearing and carrying on. All she remembers is that they were just at each other. She felt a bit frightened when the lady was swearing. She thought that the lady was going to hit her and it even looked like she was going to hit Emily. The woman's hands were by her side and in a fist. She got the impression that the woman wanted to have a go at her. She was feeling very intimidated. She was swearing at the defendant. The defendant was a bit frightened and even though it looked like she was going to hit Emily the defendant thought that the woman might hit her. The defendant demonstrated that the defendant dropped her shoulder and looked like she was ready to hit her. The defendant said that she was not a violent person and did not like arguing with other people. It was a quick moment that just got out of hand and then she left straight away.

11. Eight Statutory Declarations were tendered and became Exhibit P2. These are all from security officers who were working at the Lost Arc on that occasion. None are able to recall any details with respect to this incident. None of the security officers have any notes with respect to the incident and all statements were taken in April 2007.
12. That was the end of the prosecution case I found there was a case to answer. The defendant then gave evidence. The defendant is 37 years of age and on 29 July 2006 was at her sister in laws birthday party at the Railway Institute from about 7.30pm. She had not been drinking earlier in the day. She was drinking scotch and coke at the Railway Institute and was there for five hours. She left at 1.00am having consumed seven or eight drinks. She had had a meal at the Institute. On a scale of 1-10 in terms of intoxication she was 4 on the scale. Between 1.00 and 3.00am she had four or five drinks of scotch in a mix glass. At approximately 3.00am she was happy. At that stage on a scale of 1-10 she was 5 or 6 on the scale of intoxication. She was having a good time and Emily and she were dancing. Someone had been laughing at them but she didn't take much notice and she didn't see anything. There was a scuffle and she left the dance floor. She

was standing with her brother and boyfriend. Emily was dancing with friends and a woman said you stood on my foot. This was said aggressively to Emily. The defendant was approximately 6½ metres away when this happened. She saw the back of Janelle and saw Emily facing towards her. Janelle was swearing at her that she had stood on her foot. She went to Emily to see if she was OK and Janelle turned to her. The three of them were in a triangle with the bar to the defendants left and Emily to her right. Janelle turned to her and was swearing and waving her hands around. The defendant was feeling intimidated. The defendant put her hands up and her hands were open. She was approximately one metre away. The defendant was in shock as the woman lashed out at her. The woman dropped her shoulder. People came over and they got pushed. The defendants boyfriend said lets go. The area was packed and there was a bouncer near the speaker. Everyone got pushed and the bouncer said to go out this way. They went out the back door a second or two after it took place. The defendant did not throw any punches or grab hair.

13. She was then cross-examined. She agreed that Emily was drunk and she was feeling protective towards her. She was slightly intoxicated. She first noticed the woman going off at Emily and had seen her by the dance floor. The woman had been making remarks before but the defendant did not take much notice. She was in a group away from the dance floor when Janelle was going off at Emily. Janelle had earlier been going off at Emily and her. The defendant went off the dance floor and Kate and Emily were dancing. She did not notice where Janelle was, then she noticed Emily near Janelle and Janelle was going off at her. She was swearing. There was no-one in the way in that area. It was not that crowded there. She didn't think that Emily heard her. Janelle was swearing and waving her arms around. The way she was standing was like she was having a go. She was waving her hand around (and demonstrated open handed) and it shocked the defendant. No punches were thrown. Patrick and Greg came over and Patrick was

grabbed by the bouncers. She was also grabbed by the bouncers and was taken to the side door. They held her by one arm. Patrick said not to manhandle her. On this night the woman was making passes at her friend but they were ignoring her. The woman said she wanted to go for the defendant and put her shoulder down and her arms were tight with clenched fists. She was asked whether the woman's hands were opened or closed and she said her hands were open. She was moving her hands around. The woman had made lesbian passes to her before. She looked aggressive towards Emily. She denied that she had got the woman to the left side of her head. She said that "we were too close for that". She also said anyone could have done that. She denied that she ran up to the woman and said that she walked up. She denied she pulled her hair and said she had not seen any punches thrown. She denied that she punched the woman to the side of the head. She denied that she had come from the right side of Carmel and had hit Janelle. She denied she had her hand to Janelle's hair. She said she could not be mistaken about this. She was not just being protective of Emily. She disagreed there was a punch, a pull of the hair or a push. That was the end of the defence case. Submissions were then made and the decision was reserved.

14. Prior to making findings of fact I will consider questions of credit. I found the complainant a credible witness. She did not seek to reconstruct any of the events of the night and frankly told the court that she had had no idea what had happened to her, that could have explained the blow she felt. She did not deny that she had discussed the matter with her friend Carmel Jenson who had been at the scene. She was not greatly affected by alcohol albeit she was intoxicated. Her account of what happened immediately prior to the blow is consistent with other accounts and demonstrated she was not greatly affected by alcohol. I found her to be an honest and credible witness. Carmel Jenson was also affected by alcohol albeit to a lesser extent than her friend Janelle Winter. She also confirmed they had discussed the matter.

That was a frank and refreshing reply. Too often the court hears that a person did not discuss an incident with, for example, their best friend or partner. Despite the fact that this seems an unlikely scenario, they continue on with this version of events. Ms Jensen frankly said she had discussed the incident with the complainant. The complainant herself said that she asked Ms Jensen what had happened – she had not realised how she had ended up falling into the table until she had been told by Ms Jensen. The fact that an account has been discussed does not of itself mean that the account can not be accepted. If evidence appears to be tailored around the evidence of the person who has been involved in the discussion then the court must be careful when considering the reliability of the evidence. I have considered the evidence of the complainant and Ms Jensen and can see no basis to find that they have put to the court a contrived version of events. I was impressed by Ms Jensen as a witness. I am satisfied that the account given by Carmel Jensen can be accepted. She was extremely careful in her evidence. I found her an honest and reliable witness.

15. The next witness was Katrina Lloyd. She was on the dance floor at the time of an incident. She was dancing with Emily Brown. She saw snatches of the incident and she has no evidence to offer the Court in respect as to how it was that Janelle (who she knew) and the other woman (who she did not know) came to be in contact. She was also affected by alcohol. I formed the view that her attention was primarily on dancing with Emily and that may have affected her reliability. She is not able to assist the Court as to precisely how the incident commenced. I accept that she may have seen parts of the incident and in particular prior to and after the incident. The witness Gregory Bruce attested that he does not consume alcohol and was sober that the time. He is not able to offer the Court any assistance in respect to how the incident occurred and saw only the end of the incident. His evidence does go to who was being escorted out of the premises.



16. The next witness Emily Brown was extremely affected by alcohol and her evidence is of limited value. She recalls the woman holding her hands towards her and being upset. She does not recall bumping into the woman which indicates her level of intoxication. She was focussed on dancing. She recalled Donna (the defendant) speaking to her just before what she described as a scuffle. Due to her level of intoxication and her focus on dancing her evidence is of limited value.
17. The facts in dispute are resolved as follows. I find that Janelle Winter was struck to the left side of her face in the jaw area while she was standing near the dance floor at the Lost Arc on 30 July 2007. This caused her to be forced backwards into a table. I accept the evidence of the complainant that she felt the contact though she did not know what had happened to her. She was facing away when this happened. Her account that she did not know what had happened to her is consistent with her facing away. The evidence of Carmel Jenson was impressive and I accept she saw a movement of an arm which resulted in contact with Ms Winter's face. The fact that Ms Winter was forced backwards into a table is consistent with her account of a blow to the face.
18. The identity of the person who came into contact with Janelle Winter is the next issue to be resolved. The evidence of Carmel Jenson is that she knew the defendant Donna Bruce and that she saw her move towards Janelle Winter move her arm outwards and strike a blow. She knew Ms Bruce from some years before the night in question. In cross-examination her evidence was not as definite as in Evidence in Chief. Then in re-examination she is again definite as to who came into contact with Ms Winter. In the record of interview, the defendant puts herself at the incident, though she denies striking Ms Winter. She agrees she was taken outside by the bouncers. Her record of interview was made on 18 October 2006. This was after Carmel Jenson had given her statement to police and after she had named the Ms Bruce as the assailant. Emily Brown also says that Donna was in the

vicinity. Being in the vicinity does not mean that the identity of the assailant is resolved. Ms Jenson was close to Ms Winter and Donna Bruce. Ms Jenson had her focus on Donna Bruce as she trying to attract her attention, to say hello. She was an impressive witness and was watching closely. She then watched as Ms Bruce's arm moved. I find there is no confusion or mistake as to who came into contact with Ms Winter. I accept that this contact occurred in a nightclub with less than perfect lighting and more than usual noise. Even taking these factors into account, the evidence of Carmel Jenson is accepted. I find it is proven beyond reasonable doubt that the defendant was the person who came into contact with Janelle Winter.

19. The next issue to be resolved is whether Janelle Winter did anything to instigate an attack upon herself. The defendant gives an elaborate account of events in her Record of Interview and also in her evidence. These accounts are not consistent accounts – most notably saying in her Record of Interview that the woman's hands were at her side with clenched fists and in her evidence that her hand and arm was waving about in an intimidating way. She alleges a series of incidents prior to this which were said to be directed at the defendant and the people she was with on the night. The accounts are not consistent; nor are they believable. I find that at no stage during the night, including immediately before the blow to the face, did Ms Winter direct any attention towards the defendant or anyone else that the defendant was with that night, save and except Emily. The interaction between Ms Winter and Emily was a result of Emily dancing into Ms Winter. This was instigated by Emily. Ms Winter, understandably, requested that Emily (who she did not know) not dance into her and for her to move away. The request was reasonable in the circumstances. That was the end of the interaction between the two of them. I find that the defendant became involved when she saw Ms Winter interacting with Emily, after Emily had stumbled into Ms Winter. There was no build up between Ms

Winter and the defendant (or any other people the defendant was with that night) prior to this incident.

20. I find that the defendant was seeking to implicate Ms Winter by her accounts. I reject the accounts given by the defendant as to how the incident commenced. I find Ms Winter had no warning of an impending blow and there was no interaction between the defendant and Ms Winter prior to the blow apart from a brief period when the defendant was looking at Ms Winter. Ms Jenson was trying to get the defendant's attention but the defendant was focussed on Ms Winter. It is likely the defendant did not see Ms Jenson. I find that the defendant struck a blow which connected with Ms Winters left jaw area. The defendant was using her hand. Ms Jenson could not be sure whether the defendant's hand had a clenched fist or not. While the blow was forceful, I do not find it proven beyond reasonable doubt that it was a punch. I find it was a forceful blow. Ms Winter was pushed over by the blow but regained her footing, with the assistance of persons unknown and the table prior to reaching the ground. The table behind her also interrupted her fall.
21. There was a direct application of force without the consent of Ms Winter. I find Ms Winter was assaulted by the defendant on 30/07/2006, by way of a single forceful blow to the left jaw area.
22. The next question is whether it was an unlawful assault. The defendant raises the possibility of defensive conduct and provocation on her Record of Interviews on 18 October 2006. In her evidence she raises the question of defensive conduct. She denies striking Ms Winter. It is not the case that she has said to the court, I did strike Ms Winter and this is why I struck her. Her accounts differ and neither account is impressive or credible. I have already rejected the accounts given by the defendant. Notwithstanding those findings I will consider the relevant sections in light of the accounts I have rejected. With respect to provocation, any provocation that was said to be

offered by Ms Winter on the night in question was not offered to the Defendant but rather to Emily. The excuse provision with respect to provocation applies to cases “if the act was committed because of provocation upon the person or the property of the person who gave him that provocation” and then the section sets out a series of provisos. Any direct provocation offered by Ms Winter to the defendant was so long before the night in question that the defendant could not be said to have acted on the sudden and before there was time for her passion to cool. I find that the provocation has been negated.

23. With respect to defensive conduct, I will consider the question of defensive conduct of another person first. There is no credible evidence before the court that Emily needed to be defended. She was dancing and bumped into Ms Winter. There was a brief time when there was some interaction between Ms Winter and Emily. Kate was close by and acted to move Emily away from Ms Winter. The Defendant went to Emily to see if she was alright. Emily said that the woman had her hands up and looked aggressive but Emily did not attest to any sense of danger to herself. Any interaction between Ms Winter and Emily was over by the time the defendant was near to Ms Winter. I find that the conduct of the defendant was not reasonable in the circumstances as she reasonably perceived them. The next issue is whether the actions of Ms Winter were such that the Defendant was justified in defending herself. The defendant went over to see Emily and had no reason to stay in the vicinity. She went towards Ms Winter. Ms Winter was not moving towards her or even aware of the defendant. Ms Winter was no threat to the defendant. I find that the conduct of the defendant was not reasonable in the circumstances as she reasonably perceived them. I find that defensive conduct is negated.
24. There being no other matters which go to whether the assault was unlawful raised on the evidence, I find the assault was an unlawful assault.

Dated this 17<sup>th</sup> day of July 2007.

---

**Melanie Little**  
STIPENDIARY MAGISTRATE