

CITATION: *Police v HM* [2007] NTMC 060

PARTIES: ERICA SIMS

v

HM

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Justices Act

FILE NO(s): 20626048

DELIVERED ON: 27 August 2007

DELIVERED AT: Darwin

HEARING DATE(s): 18, 19, 28 June 2007; 2 August 2007

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

Evidence – Oath on Oath

R v Calides (1983) 34 SASR 355 at 358

REPRESENTATION:

Counsel:

Complainant: Ms Nobbs
Defendant: Mr P Elliot

Solicitors:

Complainant: ODPP
Defendant: Woodcocks

Judgment category classification: C
Judgment ID number: [2007] NTMC 060
Number of paragraphs: 25

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

No. 20626048

[2007] NTMC 060

BETWEEN:

ERICA SIMS
Informant

AND:

HM
Defendant

REASONS FOR DECISION

(Delivered 27 August 2007)

JENNY BLOKLAND CM:

Introduction

1. This matter was originally listed for oral committal however both parties indicated they consented to summary jurisdiction and wanted to have the matters determined in this court. The defendant entered pleas of not guilty to two counts of aggravated assault, the circumstances of aggravation on both counts were firstly that the complainant JC was a female and the defendant a male and that JC was indecently assaulted. The charges relate to incidents that occurred on 23 May 2006 at the defendant's home. It is not in dispute that the defendant is a bailiff and was involved in recovery action of an outstanding debt that JC's partner had with a transport company. It is alleged that on 13 May 2006 the defendant attended JC and her partner's residence to seize goods in relation to the debt. An arrangement was entered into by JC and her partner that they would pay \$50 each Tuesday towards reduction of the debt commencing Tuesday 16 May 2006 and that the money would be collected at JC's work place. On the following Tuesday (23 May

2006), the complainant attended the defendant's residence and it is alleged that after some discussions and viewing a photo album the defendant pulled the complainant's top up, licked her breast and placed his hand down her pants. The whole incident was denied on oath by the defendant and it is further argued on behalf of the defendant that even if I found the physical acts to have occurred, I could not be satisfied beyond reasonable doubt that the prosecution can prove the requisite mental element for indecent assault, that is, proof that the defendant *knew* the complainant was not consenting. As this is an offence of aggravated assault, it is unaffected by other recent amendments to the *Criminal Code* in relation to mental element and as such requires proof of *knowledge* of non-consent. Both counsel agreed that I should consider this even though the defendant denies that anything occurred at all. I think it is fair to say that there is some surrounding evidence which at first blush is supportive of the complainant's testimony, other evidence that tends to contradict her evidence and some evidence that on close examination is neutral. The defendant denied the assault both in a record of conversation with police and in the witness box.

Summary of Evidence of the Prosecution

Complainant's Evidence (JC)

2. The complainant gave evidence that at the relevant time (May 2006) she was living with her partner and son at Karama; that the defendant (in his capacity as a bailiff), visited them and she ended up making an arrangement to pay off her partner's debt at the rate of \$50 per week. The arrangement was that he would go to his work each Tuesday and she would give him \$50. She told the Court the defendant had told her he was a *very busy man* and she would have to be ready to pay him. The second Tuesday that she was to make a payment she contacted the defendant and they discussed meeting at Truck City for her to make the next payment. She said she usually finished work at 4.00pm and could drive to Truck City but during the discussion he

gave her his address and she attended his unit at Palmerston. After work on that day she attended to some personal matters, bought a drink at a service station and went to the defendant's address in Palmerston; she said there was no-one else there and it was quite dark. She said she wanted to give him \$100 and proceeded to give him \$100 but he had already written the receipt out for \$50 and she ended up with two receipts.

3. She said the defendant offered her a seat on his couch. She said he was rushing around a lot and was then sitting on the lounge because he was writing out the receipts; they were sitting and talking. She said they spoke about their work and had general conversation. She said he then began to show her photographs on the cabinet that he said was his ex-wife and daughter and he spoke about them. She said he gave her a photo album on the coffee table and it had photos of an Asian or Chinese woman in various states of being clothed and unclothed. She said the defendant told her he was having sex with the woman in the photo. She said he mentioned a lady she knew "Linda" and he also showed her a photo of Linda. After these discussions she said he sat very close to her on the couch; she said she didn't feel threatened because "he wouldn't dare;" he then rubbed her cheek saying she was gorgeous; she said she felt edgy but tried to stay calm; she said she owed him money and was thankful for being able to pay it off. She indicated it was her left cheek that he touched. She said he remarked that she was a "gorgeous girl with big tits" and she said "I have got big tits and I am a big girl". She said he moved his hand across her belly and grabbed the bottom of her shirt, pulled her shirt up, took her left breast and started to suck on it. She said she didn't know what to do. She tried to pull her shirt and bra down and was saying "don't". She said he put his right hand down into her chaps pants and got inside the top of her pants; she said something like "no, don't it's Tom's". She said once she got his hand out he was rubbing in between her legs. She got her shirt and bra on, stood up and he talked to her about some photos on his computer. She said she was shaking

all over trying to be calm and he showed her more photos of women on the computer. She said the defendant made a number of comments of an intimate nature in relation to the women in the photos.

4. The complainant said she thought about how to get out without it being a problem given she owed the defendant money. She said she sat down, picked up her drink and then got up and told him she had to go. She said he told her about another friend who was paid to have sex with his dog and talked to her about options available to escorts if they wanted to make money. During the time she was at his home he asked her what size she was and she said a size 14/16 and he gave her some floral underpants. He said they did not fit another friend so he was giving them to her. She told the Court the defendant also talked about prostitutes generally, that she should come back and have dinner with him and that as she left he was trying to kiss her. She said that as she left she said thankyou and “you’re sweet....I have to go” and referred to needing to make dinner for her family.
5. After she left the defendant’s unit she said she bought dinner and went home to her partner and son. She said she thinks she left the defendant’s place at around 7.00pm. She said she went home and scrubbed herself all over, scrubbing herself with a flannel. She said she took her bra off, threw it into the bin in the corner of the bathroom and then put it back on and pulled her shirt down; she was sitting inside watching TV and eating with the rest of the family. She said she didn’t tell her partner straight away, she cleaned up and spoke to her girlfriend “SB” in Adelaide. She said she thinks she *messaged* her mother. She said she spoke to SB because she couldn’t believe what had happened and she thinks she told her mother about what happened. She said she texted her and phoned her that night. She said she swore a lot because she was angry. She said she wrote down what happened but not word for word, put it on the bed on the pillow and said “Tom, you’ve got to read this”. She said TC read it and they were both screaming and he cuddled her and talked about what happened. She said her father and

partner went to the police the day after the incident but she didn't go because she thought the defendant was part of the police. She attended police a day later. She said she sent a text to the defendant's telephone number saying she did not like what he had done to her and he had no right to touch her in the way that he had. She thinks that would have been the following Tuesday. She said he left a message for her to make the repayments into an account number. She said she would have done that from the start if she had known she was able to. She said she did not give him permission to touch her in the way that he had.

6. In cross-examination JC said she thought she might be "putting the defendant out" by meeting him at Truck City and that was why she met him at his home. She was cross-examined on her movements between finishing work, being picked up by her partner to go home and arriving home at around 4.20 to 4.40, she reiterated that she had bought a drink on the way and she thought it was approximately 6.00pm when she arrived at the defendant's residence. She agreed she told the police that she had arrived at the defendant's at approximately 5.45pm. She said she thought she was at his house for an hour and a half or two hours but "it just felt a long time". She was asked whether she was at his house for about twenty minutes and she said she had no idea. She said it wasn't "pitch black" when she arrived but the house was dark inside. It was suggested to her that she was out of the defendant's house by 6.00pm but she said she thought it was 7.00pm. She agreed it would be dark if it was 7.00pm.
7. She disagreed that she called SB while she was in the flat; in particular it was suggested that she called SB at five to six; she said she didn't remember. She said she must have phoned SB if that is what the records indicated. She was reminded that she had said she rang her at 8 o'clock. She said she rang her from around the corner at Palmerston. She said again she thought she was in the flat between half past five and quarter to six and agreed that she told police that she got there at approximately quarter to six.

She repeated that the defendant seemed agitated and he wasn't sitting down, he was getting up and down. It was suggested that she couldn't have been looking at a photo of the defendant's ex-wife, she said she didn't know his ex-wife. She disagreed with the suggestion that the defendant did not refer to one of the people in the photograph as his "ex-wife". She agreed that she described the person as "beautiful" in the photo. She disagreed that she picked the photo album off of the table herself and started to look through it, she said she was handed the photo album; she disagreed there were four photos on top and she was handed a photo of a lady called Linda. She was asked why she went through the photos and she said that the defendant had said "have a look at this" and that she didn't want to cause any problems; she said they also discussed the fact that he liked photography. She said she was asked what problem she could foresee if she had told him she needed to go at 6 o'clock or 6.30 and she said she didn't want him to start on about the debt. She agreed that as she was looking through the photo album at the photos of women, the women in the photos were wearing less and less clothes. She said she didn't want to leave because she didn't want him saying things to her about the debt as he had been to their house prior to making the agreement of the \$50 a week repayment; she said she was frightened and didn't run away and that she was sorry for that. It was suggested to her that the defendant did not say he was having sex with "Linda" for 15 years while her husband was out; she said he did say that; she was asked if she had told police that and she said she thought she had but then perhaps it was not in her written statement. In terms of the defendant and her sitting on the couch she agreed she didn't communicate that she didn't want him sitting next to her. She said she didn't leave as he moved closer as she didn't want to cause an argument.

8. She was asked whether there was conversation that she had not told the Court about. She said that the defendant was talking to her about having sex with people and he was asking her about personal things. She told him that

she had a relationship with a woman. She disagreed that she brought up lots of things to do with sex but rather she was trying to answer him as calmly as she could; she disagreed she told him that she had a friend doing topless pole dancing but rather that the defendant asked her if she knew any girls to bring out to him. It was suggested she was flirting with the defendant and she disagreed. It was suggested she told the defendant she brought a girl home to have a threesome but she said it was the defendant who spoke to her about that subject and she said “Tom would not do that”. She said she spoke about these subjects as the defendant was asking her about it.

9. It was suggested to her that she was shown pornographic pictures on the computer and she agreed. It was suggested to her that she told the defendant that the woman she had a relationship with was 23 but she said she didn't discuss age. It was suggested to her that the defendant asked her if she wanted to see some photos of 23 year old girls. She disagreed. She said she stood by the computer because she didn't want to cause any *drama*. She said that she had told the defendant that she knew a topless waitress – “a toppie girl”. She disagreed that she told the defendant that she had an ex-boss who was Greek who touched her. She couldn't recall the defendant asked her whether her partner was upset about that incident. She agreed at some stage she told him that her partner was “from the old school”. She said she made that remark in relation to the defendant touching her. It was suggested to her the defendant did not touch her at all. She said that he touched her after she said “yes I'm a big girl with big tits”. She agreed the incident involving the alleged assault happened very quickly. She told the Court she said “don't” a number of times. She said the defendant was trying to keep her inside the front door and he offered further sexual contact. She denied various suggestions put to her contesting her recollections.
10. It was suggested to her that she rang her friend SB and made a complaint on 13 May 2006, ten days before the alleged offences occurred. She disagreed saying “that is impossible. I am not a physic”. She denied that she told SB

that the bailiff had touched her *over the top* of her clothes. She said she wouldn't be surprised if she spoke or SMS'd her friend SB some twenty times that night. She was questioned about whether she tried to stop her father and partner going to the police. She did not give a direct answer but eventually stated "I think I said, "what are the police going to do? He is the police system. He is the police" and I am sorry it's totally different and entirely separate and everything like that"; she said she broke another appointment to see the police. She said she did want the police to be involved once she felt comfortable that they could help her.

SB

11. SB gave evidence of being a long time friend of the complainant and says she is in regular contact with her, a couple of times a week. She said it was mainly by text. She said it would not be any more than a couple of times a week. She said she received a telephone call on 23 May but she didn't know what time it was; she thought it would have been after lunch. She said she didn't remember what was said. She said JC had said she had gone to pay some money to a person, she had been in Palmerston but she wasn't sure of the particulars. She said that the complainant told her she had been out to Palmerston and she assumed she had been to visit her parents. She said she didn't speak to her again. She said she received some text late on 23 May and the complainant had said something to the effect that she was upset about something that happened. She said they were not having telephone conversations at that time. The recorded text messages sent from the complainant to SB indicates the messages from 23 May 2006 6.30pm "no ones now" and at 6.36pm "no ones friend now, hate him" and at 6.42pm "one minute. How can I look at Tom". 24 May 2006 8.28pm "I could not go to work today I am feeling so messed up by what that dirty man did to me. I never gave him permission to touch any of my body I feel filthy". There is also various texts for 24 May and she sent a copy of the text that she sent to the defendant. SB said the complainant appeared pre-occupied as

if there was something on her mind. SB said the complainant only told her she had been to Palmerston. SB was asked about her statement made to police indicating a phone call from the complainant on 17 May. She said she could only assume the dates were transcribed incorrectly. She said she didn't deny telling the police she had received a phone call from the complainant on 17 May 2006 and that she told police that in that phone call the complainant told her that on 13 May 2006 she went to Palmerston to pay some money she owed. She agreed she told police that the man seemed happy at showing the complainant some pornography and that they sat on the couch and that he had gone down her top grabbed her breast and gone for her vagina; she agreed she told police the complainant said she just froze; she agreed that she had said that the text messages received from the complainant relate to the incident on 13 May; she agreed that she had noted a change in the complainant since 17 May 2006. She said the date must have been typed in error. SB agreed she told the Court she had no recollection of the what the complainant said to her in the telephone conversation other than she had been to Palmerston and that there was nothing further; she agreed that she had told the prosecutor that the complainant had said that she had been touched *over the top* of her clothing. SB said she was right about the dates being in error because she knows the reading on her phone was 23 May 2006. She agreed she was telling the truth when she told the prosecutors that JC told her she had been touched on the outside.

TC

12. The complainant's partner gave evidence about the original meeting with the defendant concerning the debt and the arrangement. He picked the complainant up from her work on the afternoon of 23 May 2006. They went home, she went to the toilet, got a drink and said she needed to pay the bill. He understood she then went to pay the debt. He said he then saw her a bit after 7 o'clock when she walked in the door. He said she was not herself,

was vague, she didn't look right and she was being blunt with her answers. He asked her if she was sure she was OK and she said "fine". He said he may have been asleep but he thought it was after midnight and the complainant said "here read this" and he read a piece of paper that the complainant had written on saying she had been sexually assaulted when she went to pay the bill. He then corrected that to say that she had been assaulted. She said she told him that she went to make an arrangement with the defendant to pay him at Truck City but he said he wasn't there and that he was at home. He said the complainant was crying and he said "are you OK?" and she said "no" she said "that dirty old man touched me" and "he lifted up my top, my bra put his mouth around my breast and tried to shove his hand down my pants". He told the Court she said "he got into my pants, got to the top of my fannie". That she stopped him and said "no, that's Toms". TC said he was very angry and thought "nobody touches my property". He said he was fuming. He said he rang her work to advise them that she couldn't go to work. The next day TC said he told the complainant she should let her mother know and then her mother pulled up and he told the complainant "you have got to tell her". He said the complainant went to tell her but nothing could come out. He went to the police station and saw someone at the front desk and was advised to come back the next morning which he did with the complainant and her mother. The next day an appointment was made for the complainant on 25 May. TC said he picked up her bra and folded it cup to cup and put it in a Coles bag. He said he did that the next day. He said he grabbed the G string pants and put them in as well, he also put the receipts in. He said he went to the police station four times over this incident.

13. TC said that the complainant left around 4.30, or 20 to 5. He said it may have been 4.45. He agreed his evidence was that he saw her again a bit after 7.00. He agreed he told police in his statement that she arrived home around 6.30. The diversion in times between what he said in the witness box and to

police was pointed out. He agreed he told police that it was approximately 6.30 when she arrived home. He agreed that the letter she wrote had been destroyed. He agreed that on the night in question he wanted to go to the police but she didn't want to.

Denise Susan Grover

14. Ms Grover is a forensic scientist who took samples from the complainant's bra and the underwear that was given to her by the defendant. Ms Grover said the bra was tested on the outside front and the inside bra cups. She took samples from the right and left cups that had a mixture of DNA from three people, some of the DNA components were identified as the complainants and one of the two as the defendant. She said the likelihood ratio is that the mixture is approximately 240,000 times more likely to be the result of biological matter from the complainant, the defendant and unknown person than that from the complainant and two unknown people selected at random from the population represented by the Northern Territory Caucasian database. She said the sample on the outside of the bra indicated a DNA profile from at least two people but there was not sufficient DNA to determine who's DNA was there. She also took a sample from the strap on the inner surface. She also tested for alpha-amylase, a component indicative of saliva. She tested for that on the inside of the cups. Both cups tested positive for amylase. Ms Grover explained that identity cannot be determined from saliva. In relation to the underpants, the testing indicated a mixture including the complainant, the defendant and TC. She said that was from the inside and outside of the underpants.
15. In cross-examination Ms Grover said the underwear and the bra were in separate bags as that was standard procedure to avoid cross-contamination. She agreed that if they weren't kept separate it ran the risk of DNA from one piece ending up on the other. Ms Grover answered questions in relation to shedding and its variability between people; she agreed she did not know the

rate of the defendant's shedding as it cannot readily be tested; she agreed that people who had higher rates of shedding have a higher incidence of secondary transfer. She said her system of testing is used throughout Australia. She agreed her statistical analysis meant the DNA found could be any of 80 people in Australia but she said it was more likely to come from the complainant, the defendant and the unknown person. She said that the 82 people are not all allegedly involved in the incident. Ms Grover was familiar with the issue and the literature on secondary transfer. She agreed it was a recognised phenomenon. She agreed that was why items are isolated from each other. She agreed that she didn't know what happened to the items she examined before she received them in bags. It was suggested to her that she would be "horrified" if she knew they had all been stored in the one bag. She said it is not an ideal situation. She said she did not agree that it compromised the results as she still has the negative controls. She agreed that she didn't have a clue as to which part of one item was touching another. She agreed that the test for saliva is not an individualised technique and the test could show the presence of saliva if it was on a face washer and then rubbed against the object. She agreed it was easy for people to transfer DNA between each other.

16. The prosecutor did attempt to play a pretext conversation but very little of the conversation could be heard in the Court making it dangerous to receive any of it at all. The tender of the recording was not pressed.

Record of Conversation

17. A transcript of a Record of Conversation and the attendant DVDs were tendered to the Court. The defendant told police some of the background material which largely is not in dispute and explained that for the second payment the complainant came to his place. He said it was about 5 o'clock in the afternoon. He said she stayed for about three quarters of an hour. He told police in relation to making that arrangement she had asked where the

best place to take the money was. There was a suggestion of a meeting at Truck City but at about ten to four he said the complainant rang and said she had to pick the kids up and he told her he was home and she could make the payment there. He said when she arrived she sat on the lounge, he wrote her a receipt and asked her if she wanted a cup of coffee. When she said "no" he said he got her a cold drink. He said he thought she picked up a photo album with girlfriends of his on it and he showed her photos of his wife and daughter. He said he asked her about how she had met her husband and she spoke about being married to a very violent person previously, they had a discussion about paying bills and he spoke of Greeks around town not paying bills. He said that when he needs to get money from call girls they tell him they have got clients in the Navy and they make some money. He said she spoke of a friend who liked lap dancing and he told her if she wanted to get in touch with her friend he might be able to arrange some work. He said she had a look at his photos on the computer and those lying on the table. He said they had a discussion about girls in the photos on his computer. He told police the complainant was not his type. He said he would not risk his job for that. He said he thought she left after about three quarters of an hour or maybe thirty five minutes. He said she couldn't have been there that long because he wrote in his diary 5.45 as he had to go somewhere. He said she told him that she was "bi" and she spoke of threesomes. He said he thought she wanted to go further with him but she wasn't his type. He said he did not lay a hand on her, he did not touch her. He said he had previously bought a packet of undies for his girlfriend who is a size eight and bought a whole rack of them and there was a size sixteen. He said he asked her if she would like a set of undies but he knew it would sound strange to her husband but he told her they were a brand new pair and they didn't fit his wife. He said she told him she was a big girl. He said he told her to take them with her and give them to someone else. He said the front door was open at all times. A number of issues were pursued with the defendant by police but he continued to deny the allegations. Police

interviewed the defendant a second time once the DNA results had been received on 14 October 2006. The defendant told police that the only DNA from him would be on the underwear that he gave the complainant and that apart from that he didn't touch her.

Evidence Called on Behalf of the Defendant

18. The defendant gave evidence generally consistent with his Record of Conversation. He confirmed that he had an appointment in his diary at 6 o'clock for David Mischour and that is how he knew the time. Although the prosecution does not concede when the entry in the diary was made, it is conceded the defendant's diary contains a note confirming the defendant's evidence on that point. The defendant said he was on time for his appointment. In evidence he said that the complainant was at his home for 25 or 20 minutes at the most. He said it was impossible that the complainant was at his house for more than an hour. The defendant said he served a document on someone in Moil at about ten to seven. There is more detail in the defendant's evidence but it is essentially consistent with his Record of Conversation.

19. In cross-examination he was asked about the initial bailiff procedures concerning recovery of the debt. He told the Court that most of the goods in the house belonged to the complainant and not to her husband who was the subject of the action. He said the complainant offered to pay. He said that when the complainant left his house the arrangement was that he would see her next week and he put his arm on her shoulder. He said she rang him in the morning or sent an SMS the next day. He said she said something like "oh what you did to me yesterday". He said he rang her back and she hung up on him. He said he didn't see her again and he said to her at the time to go to the Post Office as she worked around the corner at Parap and she could get a money order, keep the stub and that way he didn't have to write a receipt out. He was asked by the prosecutor whether he had considered what

had changed so that the arrangement was now that the complainant was paying by money order. He said he didn't know what she was getting at. He said the previous arrangement was that he was in the area and so it was convenient for him to collect the money. He said the complainant sent him an SMS the next day saying "I don't appreciate you grabbing my tits and sucking on my tits" and she hung up on him when he rang her back. From then on he received payment by money order. He said he didn't know why there was not the money order arrangement from the start. He said it is not his job to determine how people pay him. He said there was a suggestion for them to pay him and try to get them out of the debt rather than seize their goods. Their arrangement was that they were going to get in touch with him and for him to either pick up the payments or them to drop it off. He was asked in cross-examination about the underpants and he said he bought them originally for his girlfriend and his wife in Thailand and he bought a whole rack because they were 99 cents each. He said he thought the complainant would like one of the pairs. He said there was still one pair at his home. He said he had two surplus in that size but he gave one to the complainant. It was pointed out that he had not told the police about having a spare pair.

Consideration of the Issues and Evidence

20. These are very difficult cases. I tended to believe the complainant whose credibility was bolstered to a degree by the text messages and calls to SB on the night of the alleged incident. The complaint evidence from SB is not as clear cut as it initially appears. I agree with the prosecutor that there are *probably* mistakes in the dates of SB's statement, however it is not quite as simple as a simple typographical error. SM talks about receiving a call on 17 May reporting that the complainant told her the incident occurred on 13 May. Her statement then talks of text messages received on 23 May (the date of the occurrence of the incident) but that it relates to the incident of 13 May. If the date had simply been wrong, I would not have drawn too much

from it but there are errors on the dates all the way through that statement. It detracts from the ability to be able to utilise the evidence of SB as strong evidence of first complaint. There is evidence tending to contradict the complainant's version of the times but I agree with the prosecutor that people subject to traumatic events may have difficulties with time. She did write a letter also to her husband indicating she has been assaulted. She gave him an account later on in the evening. It is clear the complainant texted the defendant and SB on the evening of 24 May 2006 and that is generally consistent with her account. Ms Nobbs argues that the consistent evidence of the complainant that is consistent with her complaints to her husband and her friend when considered with the DNA in both bra cups leads to enough evidence to a finding of guilt. In relation to the argument that the Court cannot rule out contamination of the bra by the underpants, Ms Nobbs argued the control had less DNA than the sample alleged to be contaminated. She said if there was any value in the shedding argument the reverse would be accepted. She said saliva in the left and right cups is consistent with the complaint. She said the defendant's version has shifted in relation to the description of two pairs of pants and not one.

21. On behalf of the defendant it is submitted there are a number of issues that raise doubt. It is submitted the DNA evidence is wholly unreliable as the underwear and the receipt were together in the bag. It was further argued that statistically the DNA could be sourced from 80 people in Australia and it was submitted that it is not strong evidence. The defence argued that the DNA cannot be corroboration as all of the items have been contaminated and the defendant's DNA is on the receipt that was with the other items. Defence counsel argued there is no evidence that can lead to the conclusion that if there had been a transfer there would be a similar amount of DNA on the sample as the rest of the items. It is submitted there is no evidence of that. Further it is submitted that the Court cannot ignore any conclusion from the saliva as the complainant used a face washer to wash herself and

anybody could have used the face washer. There is no evidence about when the bra was put on or other sexual activity that may have lead to traces of saliva in the bra.

22. The errors in SB's evidence were emphasised by defence counsel including the issues of dates and the fact that the text messages cannot be produced but could have just been typed out on the computer. SB had said in evidence she hadn't looked at her statement but it was then established that she had gone through her statement. The inconsistency with the complainant's evidence was pointed out that in evidence SB said that the complainant complained about being touched *over* her clothes. It was submitted that the letter written to the complainant's partner was not before the Court and it is not clear whether it referred to sexual assault or assault. It is submitted the evidence of her behaviour is not capable of amounting to distress. It was pointed out that the complainant did not want to go to the police station. It is submitted that it is not credible on the part of the complainant that she had no opportunity to leave. It is also submitted that the intimate nature of the conversations and the contact between the complainant and the defendant mean that the Court would not be able to find beyond reasonable doubt that even if there was the sexual contact between the defendant and the complainant that it was done with the defendant's knowledge.
23. If this were a matter of simply finding on balance which case was the more credible I would most likely find for the complainant both on the issue of whether the offence occurred at all and on balance that the defendant had the requisite knowledge. The situation in a criminal case is very different however and the prosecution must prove its case beyond reasonable doubt. As is well known and is acknowledged in cases such as this one, it is very difficult when it is primarily an oath against oath situation. In my view this is primarily an oath against oath situation because the DNA evidence cannot be determinative in this matter because of the issue of contamination

between exhibits. I cannot exclude contamination beyond reasonable doubt. Ms Grover's evidence effectively supports such a conclusion. It is an error to direct myself in terms of the question of "who is to be believed?" It is not proper to ask myself, "why would the complainant make this up?" It is not proper for me to reason that the defendant has an obvious motive to lie because he is the accused. It is an error to attempt to simply try to choose "who's telling the truth". That is all the wrong approach. See *R v Calides* (1983) 34 SASR 355 at 358:

"Here are two opposing bodies of evidence; they can't both be true. I suppose we have to decide who's telling the truth". That, I repeat is a perfectly natural and almost inevitable approach to begin with, at least for the man in the street. That may be a perfectly practical start, but, unfortunately, in my opinion, it suffers badly from a lack of proper guidance from the principles relating to onus and standard of proof. It has been said again and again in this court, and in the cases to which I invited counsel's attention, which I do not propose to repeat, that where you have two opposing bodies of evidence on matters central to the case which will almost certainly lead, if properly considered and weighed, to a resolution of the case, it is wrong to treat them with the comment, "It is for you to decide where the truth lies".

The onus of proof and the standard of proof must be correctly applied. It is not just for the jury to decide where the truth lies if that means, and it could well mean to a jury, that is for them to say whether there is some material which could give them an inclination of opinion in favour of one side or the other. It would be even worse if the jury were left with the impression that it was their task to decide, and to find, whether there is some material for providing a basis for an inclination of opinion one way or the other."

24. Similarly, Tilmouth's *Trial Directions* cites such directions as "you have to decide which evidence you accept in this case" and "you are the people who make the decision whether he is guilty or innocent" are misdirections. In this situation even if I prefer the evidence of the complainant over the defendant, that is not enough for me to find these charges proven beyond reasonable doubt. I have to be clear on a reason or reasons to reject the defendant's testimony and if I disbelieve his testimony it cannot be for the

reason that I prefer the complainant. Although I find some areas of the defendant's credibility lacking, and it is questionable practice that a bailiff conduct transactions at home, that is not enough for me to reject his testimony. Although it all seems weird that he gave her a pair of pants and that they indulged in fairly intimate conversations, that is not enough to reject his testimony.

25. I cannot be satisfied beyond reasonable doubt and will dismiss the charges. I will forward reasons to both counsel today and make the orders on 28 August 2007.

Dated this 27th day of August 2007.

Jenny Blokland
CHIEF MAGISTRATE