

CITATION: *Simms v Lewin* [2007] NTMC 064

PARTIES: ERICA ANN SIMMS

v

ANNA LOUISE LEWIN

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20627318

DELIVERED ON: 1 October 2007

DELIVERED AT: Darwin

HEARING DATE(s): 14 &15 August, 30 August 2007

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

Criminal Law – Particular Offences – “Street Offences”
Lawfulness of Arrest – Resisting Arrest – Assault
Criminal Code (NT) s 189A
Police Administration Act s 158
Summary Offences Act s 53(1)(a)(i), s 47

REPRESENTATION:

Counsel:

Informant: Mr Walsh
Defendant: Ms Bennett

Solicitors:

Informant: Office of the Director of Public Prosecutions
Defendant: Northern Territory Legal Aid Commission

Judgment category classification: B
Judgment ID number: [2007] NTMC 064
Number of paragraphs: 41

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

No. 20627318

[2007] NTMC 064

BETWEEN:

ERICA ANN SIMS
Informant

AND:

ANNA LOUISE LEWIN
Defendant

REASONS FOR DECISION

(Delivered 1 October 2007)

MS OLIVER SM:

1. The defendant, Anna Louise Lewin, is charged with seven offences. There are three counts of assaulting a police officer whilst in the execution of his duty, one count of resisting a member of the police force in the execution of his duty, one count of obscene language and one count of behaving in a disorderly manner in a public place. All of those charges are contained on a single information. There is a separate information laying a charge of aggravated assault with respect to the same police officer who is the subject of the assault charge on count three. The defendant pleaded not guilty to all charges and they were heard over three days, on 14 and 15 August 2007 and on 30 August 2007. Count three and count seven were clearly alternative charges on the evidence and at the conclusion of the evidence of Constable Maccioni, the Crown conceded that the evidence taken from him did not support an allegation of bodily harm as alleged in count seven and elected to proceed only on count three. I make a formal finding of not guilty on count seven.

2. The charges all relate to an incident which occurred on 29 October 2006 in the carpark area below the Darwin Entertainment Centre in Mitchell Street, Darwin.
3. The Crown called evidence from five police officers who attended the incident that night and of whom three are alleged to be the victims of assault by the defendant. The Crown also called persons who were present that evening and who are acquainted in various ways with the defendant; Jayde Kellie, Olivia Graham, Donna McDonald and Jahlee McDonald. The defendant, Ms Lewin, gave evidence on her own behalf.
4. The police officers who gave evidence were Constables Hayden, Maccioni, Thomas, Howe and Nancarrow. Constables Nancarrow, Thomas and Maccioni are said respectively to be the assault victims in counts one, two and three. Constables Hayden and Howe were on general duties together that evening, as were Constables Maccioni and Thomas. They were respectively called to attend in the vicinity of Discovery and the Lost Ark in Mitchell Street, at around about 4.00am, as each of those nightclubs were closing, due to the large number of persons who were intoxicated and on the street and to fights that were breaking out. Each gave an estimate of the number of persons who were around that area which varied from over 100 to 300, with the majority of officers estimating the crowd to be in the vicinity of 200.
5. Constables Maccioni and Thomas gave evidence that not long after they arrived in Mitchell Street, they were told by security that there was a fight in the underground carpark. Each gave evidence that they drove their vehicle down the driveway and that there was a group of females and males having an altercation at an area about half way across the carpark. Their evidence was that the main argument was between an Asian female and part Aboriginal female and that this was a physical altercation. Both Constable Maccioni and Constable Thomas identified the defendant and the two

McDonald girls as being present. Constable Maccioni said he knew Donna McDonald prior to this occasion. Some discussion with the various girls took place and then they were directed to leave. Constable Thomas gave evidence that following his direction to one of the part Aboriginal girls to leave, the three girls left in a slow manner, stopping and exchanging words with the Asian girls, but slowly and eventually left the carpark. The two Constables then went back up to Mitchell Street to attend to further incidents which were occurring there. They left their vehicle parked on the ramp.

6. Constable Hayden's evidence was that when he and Constable Howe arrived at around about 4.30am, they were told by security that there was a fight in the carpark. He went down there with Constable Howe and another member whose name he could not remember. There was a verbal argument involving yelling going on between a group of females. He gave an instruction to the group to leave because they were causing a disturbance. One of the females was said to become abusive and the other said "do you know who I am?". One of the McDonald sisters said something along the lines of "you khaki cunts, you've all got small dicks". She was again instructed to leave, but then came back, said to Constable Howe something along the lines of "you're a cunt" and Constable Howe then informed her she was under arrest and took her by the left arm. Constable Hayden then took her by the right arm and although she made some initial struggle, by the time they got to the van, she was compliant and she was placed in the van, which was parked at the end of the ramp, some 30 metres away from where the altercation had occurred. As Constable Hayden was about to close the door of the van, another McDonald girl was brought over and placed in the rear and he closed the door, after the two girls were put in.
7. Constable Howe's evidence was consistent with this account. His evidence was that as they arrived in the carpark, there was an altercation and the three part Aboriginal girls were yelling, calling the other girls names and waving

their arms around a bit. He described the language as not nice and loud. His evidence supports the evidence of Constable Hayden, in that it was Donna McDonald who used the term “khaki or khaki cunts” and “small cocks”. Neither of these Constables saw the defendant being arrested. When Constable Hayden next saw her, she was on her back with the person he described as “the Senior Constable” at her feet, crouched down and struggling with her. They were about three metres behind where the vehicle was parked on the ramp. Constable Howe’s evidence was that he became aware of the third girl, the defendant, struggling with Constables Thomas and Senior Constable Nancarrow. He described her as being quite aggressive, flailing, struggling and pulling her arms. She was being told by one of them not to resist. He described her being taken to the ground to be stabilised. Both of them described her kicking or lashing out with her legs, with Constable Howe describing her kicking out with her legs in a donkey style and although he did not see Constable Nancarrow struck, she was kicking in his direction. Both Constables gave evidence that they saw her strike Constable Maccioni (described as “the Senior Constable from Casuarina” by Constable Hayden), with Constable Howe’s evidence being that he saw her scratch Constable Maccioni on his left arm with her right arm. In cross-examination, Constable Howe said that he would describe the defendant’s behaviour when they were attending on the altercation and directing the girls to leave, as disorderly. Whether he would have arrested the defendant, he said was speculative.

8. Constable Maccioni’s evidence was that at around 5.00am, he heard yelling and screaming again, female voices coming from the carpark. He told Senior Constable Nancarrow and they went down and saw Constables Hayden and Howe and the girls that had been earlier directed to leave. He said he heard the defendant yelling and screaming and saying “you khaki cunts have all got small cocks” and that’s when Mark [Nancarrow] took her by the arm. Donna McDonald was already being walked to the police van.

Jahlee McDonald was using similar language and he, Constable Maccioni, then arrested her. When he got to the van, he saw Constable Nancarrow escorting her and she was telling him to “fuck off” and saying “you’ve all got small cocks, you’re all a bunch of cunts”. She was being told not to resist and she was swinging her body around. When she was on the ground, he saw her kicking at Nancarrow but did not see any of the kicks connect. She was swinging punches and his evidence was that she came over with her right hand and gouged his arm with her fingernails. He identified a photo of the injury to his arm, which had been tendered and marked as P2. The photo shows what appears to be a gouge going from the elbow down towards the wrist and there is evidence of bleeding, both on his shirt and on a dressing which is pulled back to show the injury. There is a slightly smaller and shorter line running parallel to the more significant one. He showed the scar of the wound (the more significant one) in court.

9. Constable Maccioni described all three of the girls as using language immediately prior to their arrest and in respect to the defendant, described her as being aggressive, swinging her arms around with lots of yelling and screaming and that she started to swear prior to being taken into custody.
10. Constable Nancarrow’s evidence was largely consistent with this account. The yelling and screaming was echoing from the carpark, even with the noise of the crowd, on Mitchell Street. He however described only two Aboriginal and two Asian girls, one of each fighting. He observed Constable Howe approach one of the Aboriginal females. He said that he gave a direction for them to move on and that he heard Constable Howe and Constable Maccioni also give the same directions. His evidence was that they failed to comply and continued fighting and using obscene language. He described the defendant as threatening other people, being disorderly, throwing her arms about, gesturing like ‘come on, I’ll fight you’. In response to Constable Howe’s direction to move on, the defendant said “fuck you, you khaki cunts, you have small pricks” and that it was at this

stage, he took hold of her and informed her she was under arrest for disorderly behaviour and obscene language. She was trying to break loose of his hold as he walked her towards the van and he told her to stop resisting. Close to the van she fell onto her bum and then her back and when he bent down to pick her up, she kicked him in the chest. She connected once and then tried to kick again, but he knocked her foot away. She was kicking and punching out at everyone. In a very frank admission, he said that the level of her resistance was such that at one stage, he considered elevating the degree of force he was using and punching her in the head to bring her under control. He conceded in cross-examination that it could have been Donna McDonald who made the comment about khaki cunts. However, he was adamant that the defendant was swearing at the Asian girls prior to her arrest and denied that he was approached by the defendant, asking for his help to remove Jayde and Jahlee from the carpark. Constable Nancarrow said that Constable Howe assisted him in his escort of the defendant, which was not the evidence of Constable Howe, whose evidence was that it was Constable Thomas who assisted Nancarrow.

11. Constable Thomas' evidence was consistent with Constable Howe's account, that he was the one who went over to assist Constable Nancarrow with his escort. His evidence was that when he went back down to the carpark the second time, it was the same ladies having an argument again. He went to assist Mark Nancarrow, because the one that he had was "still loud and abusive" and he made a judgement call that she would be the one who would cause the most trouble. He described her resistance about four to five metres out from the police vehicle, as arching her back, throwing her arms around and trying to break the hold they had on her. She was twice told to stop resisting. She was still shouting abuse, which was more directed at police officers than before and he said that he remembered the words "khaki cunts" and "small cocks" being used, although he couldn't remember the exact wording. He described feeling Nancarrow pulling her in one direction

to take her to the ground stabilise position and so he released his grip. Constable Nancarrow's evidence had been that when they needed to pass through the small area where the barrier was, that Constable Thomas had released his grip and that as a result of her pulling, the defendant had fallen to the ground. Constable Thomas saw Constable Nancarrow hit several times before he, Constable Thomas, got control of the defendant's feet. He said that he copped a blow to the right hand side of his neck, but was unsure whether this was with a knee or an elbow. He identified in a photograph that was also part of Exhibit 2, a photograph of himself showing a red mark, just above his ear. In cross-examination, he said he saw Constable Nancarrow kicked twice, but the kicks did not push him backwards. Again, there is some inconsistency between this evidence and that of Nancarrow, who said that he was pushed back by the single kick that connected with him.

12. The evidence of all Constables was consistent that the defendant was eventually brought under control by being rolled onto her stomach and her hands handcuffed and that she was then placed in the van.
13. Turning to the evidence of the young women called by the Crown to give evidence as to the events of that evening, it is readily apparent that there is considerable discrepancy in their respective accounts of the sequence of events in the carpark that evening.
14. Jayde Kellie, who is 17 years of age, gave evidence that she was at the Discovery Nighclub that evening with Jahlee McDonald. She was drinking alcohol at Discovery and had been drinking at her hotel before she arrived. She should not of course have been served alcohol in the nightclub and given the outcome of events concerning her that evening, I find that evidence a disturbing indictment on those responsible for the service of alcohol in that nightclub. I see no reason to doubt her evidence on this point.

15. When Discovery closed, she said she was out the front by herself and she came across Stephanie Lim, identified by a number of police witnesses as one of the Asian girls primarily involved in the carpark incident, drunk and lying down on the road. She said she picked her up and walked her to her car in the underground carpark, where Stephanie had an argument with her boyfriend and threw punches at him. She said she tried to break them apart and put Stephanie back onto the car, when two girls grabbed her, pulling her hair and punching her in the jaw. She said she then walked back up the ramp to find Olivia Graham and she found her across the road. She said she didn't know where Jahlee was prior to seeing her get arrested. She described seeing those arrests from across the road and said that Jahlee was getting in the paddy wagon, Donna was standing up and Anna was on the floor. She heard Anna asking police to stop hurting her. She said she was asking them if they knew who she was and why she was getting arrested. She said did not hear any yelling or screaming prior to the girls being arrested. She said also that she did not go to the carpark with Olivia Graham, nor did she see Ms Graham go into the carpark.
16. This evidence is greatly inconsistent with the evidence of Olivia Graham. Ms Graham said that she ran into Jayde up on the street and that Jayde was in company with Jahlee. She said Jayde was all beaten up and then all three of them went down to the carpark. There were some Asian girls there and a fight commenced with an Asian girl "Kathy" pulling Ms Graham's hair. Ms Graham said that when police and bouncers began to come down into the carpark, she got Jayde and took her back up to Mitchell Street. Ms Graham took this action because she is employed by police as a travel clerk and did not wish to be involved. She said she also saw, from the top of the ramp, the McDonald girls getting arrested, but could not see what happened before that. She gave the order of arrest as being Donna then Jahlee then Anna, which is consistent with the police evidence of the order of arrest.

17. Donna McDonald said she was on Mitchell Street and saw Jayde Kellie coming up from the car ramp and was told that Jahlee was down in the carpark. This evidence is consistent with the account of Ms Graham. Donna McDonald said she went down and there were comments going back and forth between Jahlee and Stephanie Lim. Anna had come down with her and at that point about four or five officers in uniform came down. She said they drove down in their paddy wagon which they parked where the ramp is about halfway up at most. She said they grabbed her sister (Jahlee) and chucked her in the paddy wagon. She said Constable Howe said to her “why don’t you go back to the scrub”, a comment which Constable Howe denied in his evidence. She said that she swore at Constable Howe using what were clearly obscene terms in response although the words described were neither those alleged in Count 5 nor those described by police witnesses. She then kept walking and heard running behind her and 2 police officers grabbed her by both arms and she was put into the wagon with her sister. Her evidence of the order of the arrest is inconsistent with that of the police officers and Ms Graham, Jahlee and the defendant. She could not see what was happening with Anna but could hear her asking why she was being arrested, to stop hurting her and “why are you doing this to me”. Ms McDonald said that Constable Maccioni was coming down from the ramp and said to the defendant, “you are nothing but a piece of black shit”, a comment which Constable Maccioni denied in his evidence. She saw Anna lying on her belly on the ground. Ms McDonald said that at no time was Anna, the defendant, abusive to police officers. She said that she was only in the car park on one occasion that evening.
18. Ms McDonald’s evidence that the police drove a paddy wagon down the ramp on the same occasion that 4-5 of them came down is completely at odds with the evidence of Constables Thomas and Maccioni that they drove their vehicle down on arrival, broke up the first fight, including telling the 2 McDonald girls and the Defendant to leave, then left it there to attend to

incidents up on Mitchell Street. That the van was already there when Constables Howe, Hayden and Nancarrow attended was confirmed in their evidence. Her description of seeing the paddy wagon driven down the ramp is in fact supports the evidence of the Thomas and Maccioni that the first fight they broke up involved the defendant and the McDonald girls. I reject her evidence that she was present on only the one occasion that evening. Her evidence of the order of arrest is also inconsistent with that of other witnesses, including Ms Graham, Jahlee and the Defendant, because it has her being arrested after Jahlee and continuing to walk away after Jahlee was arrested, only turning back when insulted by Constable Howe. I do not think this is credible and I reject her evidence as to the sequence and the precipitating events to her arrest.

19. Ms Jahlee McDonald, Ms Donna McDonald's younger sister, gave an account that she was told by someone, that Jayde was getting beat up in the carpark. She said she went down and asked the group of people, around six, whether they were the ones who had just beat up Jayde. She said she was arguing with another girl and that she went down on her own. Again, this account is inconsistent with that of Ms Graham whose evidence was that she went down to the carpark in company with Jayde and Jahlee. If Jahlee went down on her own on some occasion, then it was not on the same occasion described by Ms Graham. She said Donna and Anna came down later and this is consistent with their evidence. She gave the order of being placed in the wagon as Donna being placed in first and herself next, which is consistent with the evidence of the police officers and with that of Ms Graham. She agreed that she knew at some stage she was getting arrested or locked up. She said she did hear Anna ask why she was being arrested, she denied swearing at police herself but agreed that her sister Donna did. However she said that this was because of the police rough handling Anna. She agreed she could not see Anna the whole time, as she was being taken to the wagon. Again there are problems with this account. Anna was not

physically restrained by police until after Donna and Jahlee were arrested. Jahlee could not see what was happening to Anna while she was being arrested nor could Donna. Donna and the defendant both said that she [Donna] swore in response to what was said to her by Constable Howe but Jahlee gave no evidence of Howe saying this at all.

20. The defendant gave evidence herself. She is a 21 year old woman and a student. She was articulate in the giving of her evidence and clearly very distressed in describing the events of that evening.
21. She went out that evening with Ms Donna McDonald and two other friends to the Lost Ark Nightclub in Mitchell Street. They were drinking at home before going out. She described herself not as a regular drinker but a binge drinker and said that prior to this evening she had not been out for 8 months because she was focused on her studies. After she and Donna left the Lost Ark they came across Jayde Kellie, who said that she had been jumped on. She described Ms Kellie as being in some distress. She and Ms McDonald went down to the carpark, after being told Jahlee was down there. She said that she remembered seeing Olivia Graham leaving the carpark as they were going in and that Ms Graham specifically said to her that she was leaving because she worked for police.
22. She said of the incident there that she was trying to get Donna to leave and Donna was trying to get Jahlee to leave because a police officer said to move along. She denied abusing anyone and said that on the first occasion when a police officer came up and asked her to leave, she walked away with Donna and Jahlee, but then Jahlee walked back to Stephanie and then Donna walked back to Jahlee.
23. She denied swearing at Stephanie Lim and said that Stephanie had said that she and Jayde got jumped on. She said she spoke to a police officer who she described as being about her height with sandy brown hair and told him Jayde Kelly had been assaulted. She asked him if he was going to put it in

his notebook but he didn't. She told him they were arguing but not going to have a fight or swing punches because "we are all friends here"" and the girls who had assaulted Stephanie and Jayde had left. She said he then moved forward to control the situation and she saw Jahlee get taken away.

24. In cross-examination, in describing the argument between Jahlee and Stephanie and the other girls, she said that their voices were raised, but they weren't screaming at each other. She agreed however that both Jahlee and Stephanie were swearing at each other. She said she could not identify the officer that she was talking to. The account of what she was saying to the officer is inconsistent with her own version, a version that is consistent with the police evidence and that of Jahlee and Donna. If the girls were "all friends" and those who had beaten up Jayde and Stephanie had left then why would Stephanie and Jahlee be engaged in an argument in which they were yelling and swearing at each other?
25. She did not see Jahlee put in the paddy wagon because she was having a discussion with a police officer. She said the first time they were asked to leave, they walked to the ramp and she kept yelling "let's go", but Stephanie and Jahlee were still yelling at each other. At about one metre from the ramp she said one officer said "why don't you go back to the scrub" and that she said to Donna, "did you hear that?" to which Donna replied "he can get his penis and shove it up his arse and root himself". In cross examination she said Donna got arrested after she said this and taken away. Further on she said that the comment "go back to the scrub" was directed at Donna because Stephanie and Donna were still arguing.
26. There is no doubt in my mind on all the evidence I heard that the car where the argument occurred was approximately half way into the car park and that this was a distance of about 30 metres from the police vehicle on the ramp. It was not suggested otherwise. The defendant's account of what was said and the sequence of events is inconsistent. She said at one point that what

was said to Donna about going back to the scrub occurred close to the ramp after she and Donna walked away, then she said it was directed at Donna because Donna and Stephanie were still arguing. It could not have been said then when they were at the ramp because Stephanie and Jahlee were still back at the car. Donna could not be arguing with Stephanie at the same time as being at the ramp.

27. A further inconsistency is that she described talking to the sandy brown haired officer who then moved forward to arrest Jahlee. However she also described Donna as being first arrested following the “scrub” comment and response. If her version is to be believed she and Donna went to the ramp following a direction to leave, leaving Jahlee arguing with Stephanie. Donna has an insult directed to her while they are at the ramp, Donna swears at police and they return to the argument scene where, Donna is arrested and she, Anna, has a conversation in polite terms with an officer until he steps forward to arrest Jahlee. Then a few minutes later she is taken hold of by Nancarrow even though she has not sworn or entered into the argument with the Asian girls. I do not find this version of events credible.
28. The defendant denied swearing at police, except for when she was on the ground. In terms of her being physically apprehended by police she said she was grabbed by her arm and this was at a location about three meters from where the car (not the paddy wagon) was – the location of the argument between the girls. She identified the apprehending officer as Constable Nancarrow.
29. She said she didn’t start swearing until she was on her belly. She said that her understanding was that she was just being walked to the ramp. She said she was walking up the ramp when she was chased, pulled back, told she was getting locked up and that is when she went ballistic. This is inconsistent with the accounts of Constables Nancarrow and Thomas who were walking her to the vehicle. Although there was an inconsistency in

that evidence as to whether Nancarrow lost his grip and she fell or was taken to the ground stabilise position by him, I accept that she went to the ground in some fashion, as a result of her struggling, when they got to the back of the van. I do not accept that she began walking up the ramp and was grabbed.

30. For each of the reasons that I have identified above I reject her evidence of the sequence of events and of the conversation she was said to have with the police officer while Donna and Jahlee were arguing with Stephanie. I accept the evidence of each of the police officers that she was a participant in the yelling and swearing that was part of the fight with the Asian girls. Although there is some inconsistency in the police evidence I do not regard it as going to the facts in issue and some inconsistencies are to be expected when witnesses recollect an incident of this nature. I also reject her evidence that the incident she described was the one and only time that night that she was in the carpark because of the lack of credibility as to her version of events overall, noting also my rejection of Donna McDonald's evidence on this point also and the reason for the rejection.
31. The defendant became very distressed in the giving of her evidence, in describing what occurred whilst she was on the ground. I do not doubt the distress as genuine. She said she did not hear anyone say "you're arrested" but agreed that she formed the opinion that she was getting arrested by Constable Nancarrow. She did hear that she was resisting arrest when she was on the ground. She agreed that when she was on her back on the ground, she kicked Constable Nancarrow. She agreed that she threw punches whilst she was on the ground and that they connected. She said she didn't remember scratching and gave a description of bangles that she had been wearing that night and which were damaged and broken in the physical altercation with the police. She said she kicked Constable Nancarrow because of his position between her legs.

32. I will deal first with the counts 5 and 6 because the findings in respect of the assault and resist police charges depend on the outcome of those counts.
33. Count 5 charges that the defendant used obscene language in the carpark of the Darwin Entertainment area the particulars of which are that she said “Fucking Khaki Cunts” and “Youse all have small cocks, you dogs”.
34. Various versions of phrases such as these were given in evidence by the witnesses. Constable Hayden believed it was one of the McDonald girls that used words to that effect. Constable Howe said it was Donna McDonald. Maccioni identified the words as coming from the defendant immediately before Nancarrow took her arm and Nancarrow in his evidence in chief said it was the defendant who made that comment but in cross examination agreed he could not be absolutely sure it was the defendant that made the comment. Constable Thomas remembered similar words being used but couldn’t remember the exact wording but this was while he was escorting her to the van with Nancarrow. Donna McDonald gave evidence of using an abusive phrase that involved police genitalia but it is not the same phrase as particularised in the account. The police evidence generally is that all three girls were swearing and I have no doubt words such a “khaki cunts” and “small cocks” were part of it. I could not be satisfied beyond a reasonable doubt however that it was the defendant who uttered the phrase particularised in Count 5 and I find her not guilty of that count.
35. Count 6 charges that she behaved in a disorderly manner in a public place with the particulars being that she swung her arms about, yelled abuse and made threats to other people. I am satisfied beyond a reasonable doubt as to this charge. I have accepted that the defendant was present on two occasions in the carpark as earlier stated in these reasons. On each occasion the police broke up a fight, physical on the first occasion and verbal on the second. It was loud enough to be heard over the noise on Mitchell Street to cause police to go down there. I have rejected the evidence of the defendant

that she stood by engaging a “conversation” or “discussion” with one of the police officers that she described but could not identify. She described the incident as being a “heated discussion” or “argument” between the girls but in my view these descriptions were a deliberate attempt to downplay the nature of the altercation and her participation in it. I have no doubt that she was involved in swearing and making threats together with threatening physical gestures as described by police witnesses. I reject her version that she stood by speaking to an unidentified officer while the McDonald girls were going off at the Asian girls. I am satisfied beyond a reasonable doubt that the defendant engaged in disorderly conduct as described in Count 6 and I find her guilty of that offence.

36. Being satisfied of her guilt in relation to count 6, her arrest by Constable Nancarrow for that offence was justified. I was referred to a NSW judgement of *DPP v Carr* (NSWSC 25/1/02 unrep) by Ms Bennett for the Defendant. That case deals primarily with the exercise of the discretion to exclude evidence improperly obtained and emphasises that arrest should be a last resort for what are commonly referred to as “street offences”. If they can effectively be dealt with this is the preferable course because arrest may escalate the offending into more serious charges. I have no doubt that this view is correct. However this was not a situation in my view where the police could be criticised for dealing with the fight by way of arrest. It had been broken up once. The girls, all of them were back again and into it. They were directed to leave but kept coming back and made in my view no real attempt to stop the altercation. It escalated into abuse directed at police. Police could not have simply walked away from the situation and left the matter to a summons. Not least of all they did not know the name of the defendant at that point. They needed to bring some finality to the situation. I note that had they proceeded by way of summons that the McDonald girls would have faced court and the possibility of a conviction

rather than expiating the infringement notices for disorderly conduct which they received and which action they took in dealing with the matter.

37. I am satisfied beyond a reasonable doubt of the resist arrest charge, count 4. The evidence of Nancarrow, Thomas and Howe is consistent of an account of her struggling, pulling her arms and digging her heels in on the way to the van. In any event her actions on the ground which she admits were clearly a resistance to the final stages of the arrest to place her in the van. As she said she “went ballistic”. I find her guilty of Count 4.
38. There is no dispute on the evidence that when on the ground the defendant deliberately kicked out and threw punches at the officers attempting to restrain her. Her kicks were intentionally aimed at Nancarrow – she does not dispute this or that she connected with him. Her reasons do not at law justify that assault.
39. In the course of her kicking and punching, Constable Thomas was contacted. He received a blow to the neck behind his ear. It is evidenced by the photo tendered and his testimony. It does not matter whether the defendant intended to strike Constable Thomas in particular – her kicks and punches were directed at those seeking to restrain her and I find that she intended that force to connect with any of those involved in the restraint.
40. I am also satisfied beyond a reasonable doubt that she scratched Constable Maccioni in the way in which he described. This evidence was supported by Constables Howe and Hayden who both saw her strike him with Howe describing the scratch. The wound is consistent in my view with the descriptions given. There was a suggestion that the wound to Constable Maccioni’s arm may have been caused by the defendants bracelets which broke during the struggle. Her bracelets may well have broken but they do not raise a doubt in my mind as to the cause of the injury which is I find inflicted as described in the police evidence.

41. On the basis of each of these findings I am satisfied beyond a reasonable doubt that the defendant committed the assaults as alleged in Counts 1, 2 and 3 and I find her guilty of them.

Dated this 1st day of October 2007.

Sue Oliver
STIPENDIARY MAGISTRATE