

CITATION: *Michael Brennan v Daniel Wood [2007] NTMC 072*

PARTIES: MICHAEL DAVID BRENNAN
Complainant

v

DANIEL GORDON WOOD
Defendant

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Darwin

FILE NO(s): 20613394

DELIVERED ON: 3 December 2007

DELIVERED AT: Darwin

HEARING DATE(s): 8, 9, 10 and 11 May 2007, 22 August 2007,
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JUDGMENT OF: Ms Little SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Complainant: Ms Baohm
Defendant: Mr Rowbottom

Solicitors:

Complainant: ODPP
Defendant: Withnalls

Judgment category classification: C
Judgment ID number: [2007] NTMC 072
Number of paragraphs: 51

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

No. 20613394

[2007] NTMC 072

BETWEEN:

MICHAEL DAVID BRENNAN
Complainant

AND:

DANIEL GORDON WOOD
Defendant

REASONS FOR DECISION

(Delivered 3 December 2007)

Ms LITTLE SM:

1. The defendant is charged that on 1 April 2006 at Darwin, he unlawfully assaulted Shann Milan Tanaskovic. The allegations include two circumstances of aggravation, namely that Shann Tanaskovic suffered bodily harm and Shann Tanaskovic was threatened with an offensive weapon, namely a glass bottle. These offences are pursuant to section 188(2) of the Criminal Code and the Code as at 1 April 2006 applies. The defendant pleaded not guilty and a hearing was conducted.
2. Prosecution bears the onus of proving each and every element of this offence and if they do not do so, the Defendant is entitled to be found not guilty. The burden of proof is beyond reasonable doubt.
3. The hearing proceeded by way of oral, documentary and video surveillance evidence. Rulings have been made during the course of the hearing.
4. I will now summarise the evidence in the matter.

5. Shann Tanaskovic is an operator in the Army and has been in the Army for 12 years. On 1 April 2006 he went out with a group of friends prior to deployment to Iraq. They went to Hog's Breath and he had three to four beers. They went to Duck's Nuts and he had two vodka drinks. They then went to Rouke's Drift and he had two pints of beer. They went to Lost Arc and had two or three drinks, then went back to Rouke's. They arrived at Discovery at about 10.30pm. At Discovery they had a round of drinks and were socializing and dancing. Alcohol had affected him to the extent that he was very cheery, but he was still functional. At about 11.30pm he went to the bar to order a drink. He was waiting at the bar for some time and a drunk guy came up to the bar saying he wanted to be served. The witness said to the bartender that he was waiting first. The bartender served both of them at the same time. The witness got his drink and walked away. The drunken guy was tall, had brown hair, he looked fit and because of the haircut, he assumed he was in the Army. This man was extremely drunk and the witness had said to the bartender "you shouldn't even serve him anyway", because he was so intoxicated. The man was wearing a white shirt. He estimated his age to be around 25. He sensed something was wrong and he looked back, believing the man was looking at him. He got back to his table and continued drinking. The man was getting tumblers of spirits.
6. The witness felt someone or something hit him from behind and he fell forward. This caused the table to be pushed over and glasses be smashed. He was stumbling forward and next minute he felt something hit him in the back of the head again. He was stumbling towards the top of the bar area. Then he felt people dragging him and he was still stumbling. He was hit two times to the back of the head. The first one was more to the side of the head and the second one was direct to the back and side of the head. He was punched forward. He could not see who hit him or what he was hit with. After the first blow, he took approximately three steps and then there was a

further blow. He saw the man who was beside him at the bar getting dragged out to the front door. He was standing and felt blood to the back of his neck. Security then came and escorted him outside. This person tried to stop the bleeding. He was taken by ambulance to the Hospital. He received 16 stitches to his ear and 17 staples to the back of his head. He was in Hospital for three or four days and tried to go back to work but was dizzy and so he was put back into Hospital. For a long time he could not move his head properly. There is now a big scar at the back of his head. Photographs were taken of his injuries and became Exhibit P2. He gave no-one permission to assault him.

7. He was then cross-examined. He agreed that in a period of approximately two hours, he had about eight standard drinks. He had also had a large meal in that time. It was put to him that he also went to Shenanigans, but he said he could not recall going there. He agreed there were a lot of rumours about the case. The plan he had drawn at the time of the incident showed three people at a table marked as offenders. He described himself as drunk at the time. He agreed that he had made an assumption as to who he thought had hit him. He had spent all night without feeling he was in any danger. One second he was getting funny looks from the guy at the bar and the next second he was getting hit. He did not see who struck him. He saw the man walking over to his mates. The man was putting his drinks down; the witness did not see where he sat. It was put to him that he had stated to the Police the man had black hair. He did not tell the Police that he had said to the bar manager he wished to be served first. He told the Police he did not know where the person who had assaulted him had gone. He believed there were a lot of things that he missed out on saying to the Police through being emotional. He did not recall who had helped him over to the bar. He got lifted up quickly and it was quite hazy. There was also blood. He was hit, and then one, two, three, he started to get up again and got hit again. Then

he did a couple more steps and then people were dragging him. It seemed like there were a lot of people in the area.

8. On 1 April 2006 Darren Chadderton arrived at Discovery at some time between 10.00pm and midnight. He had one or two drinks. Not long after he arrived, he heard a bottle break and turned around. He saw a man staggering back after he had been hit and then saw a guy trying to hit the person again with a bottle. He put his hand up to stop that from happening. He pushed the man up against a railing and a couple of other people came in and then the bouncers arrived. The man was staggering back towards the bar. Security grabbed someone and walked them out of the building. They then grabbed the man who had been hit and the witness then noticed the man had a cut on his neck from just behind his jugular up around his ear. He thought the bottle that was used was a beer bottle, a green beer bottle. He could not describe the person who hit the man. The man may have had a darker colour shirt on. In cross-examination, he said there were four or five people around the area that the incident happened. There was another table with a group of people nearby. He grabbed the man's arm and the bottle was taken from his hand. Two other people pulled the man away from where the incident happened. Security then came along. At the time of the incident, there weren't many people there and it was not hard to get a drink.
9. Stephen Summers works for Proactive Security and on 1 April 2006, he was working as a crowd controller at Discovery Nightclub. He was advised that there was an incident in bar 1. He got to that area within seconds. It was after 1100pm. There was a man standing over another man. There was one man holding his head down, with another standing over him. The man on top was throwing punches. He was the more aggressive of the two men. The witness hung onto this man and when the other man stood up, he saw a wound to his neck. The witness let go of the first man, as the wound was more important than the man who had done it. The wound was to the area below the ear on the right side. The man who had his head bowed was not

fighting at all. Another guard came along and he told the guard to take the first man away. He explained to the injured man that it was a major injury and he had to get a mop. He let go of the man because the wound was bleeding quite profusely. He got hold of the man by the neck and shut the wound and tried to drag him out of the club. He asked for bandages and pressure pads and for an ambulance to be called immediately. He got the man out of the club and they came with the bandages. He did not have a good look at the first man. The first man was approximately six foot and slim. He had a white shirt on. His hair colour was fair or blond. There was a certain amount of movement, but he could not tell if the blows had landed. The last he saw of the first man was him walking off in the distance. The man with a cut to his neck was protesting about being asked to leave. The man with a cut to his neck was saying things such as “you don’t have to touch me and get you’re hands off me”.

10. Joshua Hampson is employed with the Defence Forces and on 1 April 2006 had been with Shann Tanaskovic celebrating his deployment. He is close friends with Shann Tanaskovic. They had a meal and drinks at Hog’s Breath Café and then had drinks at various clubs. He was drinking scotch and coke or scotch and dry. He set out the various locations and amounts of alcohol he had consumed that night. He was with a group at a table at Discovery Nightclub. They were drinking and talking. He was talking to Shann and someone came up behind Shann and hit him over the head with a bottle. When Shann was hit, he pushed Shannon over and the witness caught Shannon. He saw the person that hit Shann from the feet up to about the elbow area. The person had dark coloured shoes, blue jeans or dark coloured pants and a white coloured shirt. The person used their right hand with a bottle, then withdrew his hand. The bottle smashed. Shann grabbed the right side of his head and fell forward. Two bouncers and a group of guys pulled the person away. Rohan Brooks grabbed Shann and took him backwards or away from the entrance. The person with the bottle was

grabbed by people. He saw one swing. He could not describe the facial features of the person who had the bottle. He did see the person on the floor at some stage. The offender was taken out and then Shann was taken out to the front stairs to the right of the building where the ambulance picked him up. The witness was under the influence but knew what he was doing. He has never seen the person with the bottle before. In cross-examination, he agreed that he'd had about seven drinks over the period of four hours. He has discussed what happened with the people he was with that night.

11. Shane Bohr works in the Army and has known Shann Tanaskovic for about two years. On 1 April 2006, he went with a group to locations around Darwin. He was drinking mostly beer. They went to Hog's Breath and other locations. At Discovery he had had a couple of beers. He was standing at the table. He heard someone yelling abuse and turned around and saw someone with a glass bottle in their hand. Shann had his back to this person and the bloke came from behind and whacked him on the back of the head. He demonstrated a movement with the right hand coming down. Shann fell to the ground and the person made a movement towards the back of Shann's head. He did not see that movement connect. From the first blow he saw glass shatter, connecting on the back right side of Shann's head. It was the same person who made the second movement as the first movement. The person had short light coloured hair, about six foot tall and was medium build. The person had a white coloured shirt on and jeans. The hair was short on the sides and a bit longer on the top. After he did the stabbing motion, about four guys grabbed him and dragged him out, down the stairs and out of the nightclub. He did not see if the stabbing motion connected. He saw Shann on the ground on his hands and knees. After Shann got up, he was holding the back of his head. When Shann got up he was walking out towards the stairs at the nightclub. The witness and Rohan were walking behind him. The witness noticed the gash on the back of Shann's neck. One of the bouncers came over and took Shann outside to the

stairs next door to Discovery and applied first aid, waiting for the ambulance to arrive. The gash was on his neck behind the ear and along the neck. It was about 10 to 15 centimetres long. He was not overly intoxicated and was still capable of walking and talking coherently. In cross-examination, he said after Shann had been hit, he was falling in front of the table. He agreed that the venue was packed and noisy. To a degree, it was darkened. No one in their group was overly intoxicated. He did not see where the person who attacked Shann was taken to.

12. Bridget Lenicka is a soldier and on 1 April 2006, had gone out with a group which included Shann Tanaskovic. She outlined the places the group went and the alcohol she had consumed. She described herself as intoxicated by the time she got to Discovery, but it was not affecting her behaviour too much. The group was a bit happy, but everyone was in control of themselves. Shann was behind her at the time of the incident. She did not see the incident. She turned and saw that Shann's shirt had started filling up with blood. He was grabbing the back of his neck and leaning forward slightly. As he was walking out the door, his shirt was quickly filling up with blood. They stopped on the way out as the bouncer was waiting for a pad. She grabbed at his neck to try and stop the bleeding. The bouncer ripped her hand away and then a dressing arrived.
13. The next witness was Ashley Barlow. He was a bartender and works at Discovery Nightclub. He was working on 1 April 2006. He recalled a couple of fellows who were a bit agro over the bar. One guy seemed a bit upset that maybe the witness was serving someone else before him. They did not seem very happy, then he saw the other guy covered in blood about a minute or two afterwards. The taller guy with the brownish hair ordered three bottles of Bundaberg rum and cola. Then the first man got a little bit frustrated. He was shaking his head and had a bit of an angry look on his face. The man directed that towards the witness, but a bit was directed towards the guy who was buying the bundies. He took the other man's order

and that was for a Corona. He got both of the drinks at the same time, got the cash off the guys and got their change. The guy with the Corona was still muttering a bit. He looked like he was muttering something about the other guy. The other guy seemed to pay no attention. They went off in the same direction but he did not see where they went. Literally a minute and a half afterwards he saw the security guards holding up the bald guy (the man who brought the Corona) and that man had a deep looking cut under his right ear with blood all over him. He looked dazed and confused. The bald guy was pointing at the witness and shaking his head. He was then cross-examined. The man being held up by Stephen Summers did not appear to be aggressive but was upset. He recalled that the night was reasonably busy.

14. On 1 April 2006 Brett Douglas went into town with his daughter. He was drinking rum and coke. They went to Discovery. It was around midnight when he arrived. He heard a glass smash and a bloke came staggering backwards towards him. He did not see the events that lead to this man staggering. Another bloke, holding what appeared to be a stubby, came up and threw the stubby into the back of the other man's head. He demonstrated an action of the man's hand being held up and then moving it down. The man's hand had a stubby in it and it connected. It connected with the man on the right side of the neck around the ear area. Across the back of the neck. There was a whole heap of people around. He was a metre or so from where the man was swinging the stubby. He saw blood on the man's shirt and he went to see how he was. A security officer came up and said "you better get outside and get an ambulance". The cut seemed fairly deeply. He then saw the man with the bottle in his hand from behind. The man was taller than the witness. The witness is 176 centimetres. The man who had the bottle was maybe six foot, he was thin build and shortish hair. It seemed to be lightish coloured hair. He was wearing jeans and a white coloured shirt. After it all happened, he picked up two rum and coke stubbies off the floor, which were unbroken. They were Bundaberg

stubbies. There was broken glass on the floor. He did not get a good look at the person who had the bottle.

15. The next witness was Wayne Turner. He undertakes casual security work and on 1 April 2006, was working at Discovery Nightclub. He saw Stephen Summers and the bar manager pointing at two men. Both men were in their early twenties, clean cut with polo shirts and looking quite healthy. One was quite tall, about 185 centimetres and the other about 176 centimetres. They were wearing jeans and coloured shirts. The taller one had a light coloured shirt possibly white or light colour. He walked straight towards him and said “come outside”. He said “I want to talk to you” and the man and the people with him just turned and kept walking. They did not look back. They looked reasonably calm. They just kept walking. He then saw Stephen with the victim walk past and there was a big gash over his neck. Stephen Summers was escorting the man out. He offered Stephen some help and he was requested to get an ambulance and police.
16. The next witness was Rohan Brooks. On 1 April 2006 he went out with a group of friends to town, including Shann Tanaskovic, and they arrived at Discovery at about 11.00pm. By this stage he was showing the effects of alcohol, but was not drunk or out of control. Shann was standing opposite him. He heard the sound of breaking glass and out of the corner of his eye he saw Shann stumble forwards, towards the table. Some of the glass fell onto him. He then saw a hand come down and hit Shann again at the back of the neck area. He was hit with the remains of a glass bottle which had been broken across the back of his head on the first blow. He only caught a glimpse of the person as the person was being pulled away. He was more concerned with Shann. The person was about his height (the witness is a little over six foot), wearing a pale shirt. He thought it was a clear bottle that was used, but he only saw it for a brief fraction of a second as it was brought down across the back of Shann’s neck. He was standing looking down at Shann. Shann was half crouched in front of him and he saw an arm

come down and that was when Shann got hit again. He was hit from behind. The man was then being pulled off and dragged away out of the front entrance by the bouncers. The man's friends were around as well. There was a group around him. The witness then went back to see if Shann was alright. He was cut badly across the back of his neck. He grabbed a bouncer and said that an ambulance should be called. A bouncer took hold of Shann and took him out the front door. Shann was a bit angry at this point and they got him to sit quietly and try to stem the flow of blood. He did not see the man who hit Shann again after he was pulled away.

17. The next witness called was Guy Dunn. He was the duty manager at Discovery Nightclub. On 1 April 2006, he was standing at the bar near the entrance. He noticed two guys standing ordering drinks. One was on each corner of the L shape of the bar. Moments after they were ordering drinks from the bar, he heard the sound of breaking glass behind him. He turned and saw the person who was to the left of him at the bar and doubled over holding his head. He could see that he was cut on his right ear, down to the back of his neck. The other man was standing at a table and the witness saw him pick up a Bundaberg and cola bottle off the table and raise it above his head to hit the gentleman on the back of the head. The witness rushed towards the guy to try and stop it but it was too late, he had been hit by the bottle. The witness grabbed the attacker and pushed him towards the railing. The man's mates were trying to get the witness off the man, saying everything was alright. Security then came over and the witness released the attacker to security and he turned around to look at the man who had been attacked. The witness would have been less than two metres away from the man who had been attacked when it happened. The man picked up the Bundaberg bottle from the table, holding it by the top. The man raised the bottle and with the victim doubled over, he brought the bottle straight down to the back of the head of the victim. It made a pretty loud thud, but the bottle did not break. The man had already been hit in the head, so the

witness reacted as quickly as possible to try and stop the second blow, but he was out of reach. The man fell to his knees. Another security guard, Stephen Summers was there and was calling for bandages. The witness could see that the man was cut pretty badly. The witness ran to get the first aid kit. When the witness had the man held up against the rail, he had him pinned by the arms by his side. He described him as docile at that stage. When asked what the person looked like, he said that he could not really remember, but he was a taller guy with dark hair and a blue shirt. It was all in the dark. It happened very quickly, within a matter of ten seconds between the time they ordered their drinks and stepped away and the man getting hit. The witness then went to the security footage to ensure it was available. He then went up the road to try and find the attacker, as he was no longer with security.

18. In cross-examination, the witness said that he did not see anyone grabbing the man's hand. There were people trying to separate the witness from the attacker and these were people who he assumed were the attacker's friends. These friends came in straightaway and then security was there. From the time he noticed them to the incident was ten seconds. He knew they were the same people he had seen at the bar. He was certain before he left to get the first aid kit that it was the same people involved in the incident as he had seen at the bar. He was certain of this prior to any discussions with the barman that occurred after the incident.
19. The next witness called was Jason Dyer. He was previously employed by Discovery as Assistant Manager. On 1 April 2006, he was working in that role. They were quite busy and so he assisted with the bar work. As he was coming out of the bar area, he saw a person with a large gash to his head. He pointed to an area in the neck area below the right ear. The man appeared to be fixated on Ashley, the person working at the bar. The man was pointing with his arm at the barman. He seemed quite angry. The witness was trying to get people's attention to get medical help. About 10

or 15 seconds later, Stephen Summers pushed him out of the way and grabbed the person. The witness knew that Stephen Summers had first aid experience, so there was no need for the witness to go out to the front where Stephen had taken him. The witness then cleaned up the mess, in particular broken glass on the floor was swept up and put in the bin and tables and chairs be picked up off the ground and put back into place. There was a lot of clear broken glass. It was dark inside, he could not really see. He did not know how the person came to be injured. In his role as Assistant Manager, he's been previously requested to supply video footage. Every bar in the nightclub has a camera pointed at them. There are also cameras in the foyer area. In this case, the bar 1 camera footage was provided to the police, as well as footage from all front cameras and the foyer camera. There was an objection to the disc which the security footage had been copied onto being admitted into evidence. There was a disc that had a summary of the footage and then there were three separate discs. Ultimately, all four discs were received into evidence and became Exhibits P3 and P9. The witness was the person who burnt the video footage onto the cds.

20. Isaac White was the next witness called. He's a rifleman in the Australian Army. He has known the defendant for nearly six years and described him as a good friend. On 1 April 2006, he attended a buck's party for the defendant. They went to a range of locations and he set the various locations out. He could recall being at Lizard's bar and that he was drinking alcohol. He could not recall how much he had to drink there. The group went to Sinsations but he could not recall how much he had to drink there. He could not recall how they got there. The defendant was with them, as well as other people. He could not recall what he was drinking at Sinsations, but it would have been alcoholic. He had a memory of 1 April 2006 but only bits and pieces. He agreed that he had made his statement to the police. From Sinsations they went to the Fox & Fiddle. He could not

recall how they got there or who was there. He was wearing a pair of jeans, striped shirt and a pair of plain white shoes. The defendant was wearing a white shirt, jeans and shoes. The witness recalled that the defendant was wearing a collared t-shirt.

21. From the Fox & Fiddle they went to Discovery. He recalled himself and the defendant being at Discovery, but he could not recall who else went there. He did not know what time they went there. He thinks they walked there because it was in the same area as the other location, but could not recall. He could not recall which entrance they used. He could not recall what they were doing at Discovery, but suggests they were drinking. He did not recall how much he was drinking or what he was drinking. More than likely it would have been alcoholic. He could not recall what the defendant was doing, but he mentioned that he was drinking as well. He could not recall how drunk he was. He could not recall if an incident took place involving the defendant. He did provide a statement to the police. He was telling the truth to the police when he spoke to them. He has listened to the tape since. He could not recall what he told the police and so he was not able to answer whether the tape was a true record of what he told the police.
22. An application was made to have the witness Isaac White declared adverse. A ruling was made and the ruling in full can be found at pages 161-163 of the transcript of the matter. I found that the witness Isaac White was deliberately misleading the Court. He was able to recall certain matters in quite some detail, but could not recall anything which may have implicated his friend. I formed the view that the witness Isaac White was deliberately withholding evidence and that he was unwilling to tell the whole truth to the Court. I formed the view that he was adverse and leave was granted to the prosecutor to prove he has made a statement which was inconsistent with his present testimony. He had made a taped statement to police and this had been typed into a transcript of the statement. The statement made to the police was read (and at time played) line by line to the witness.

23. Certain matters were admitted. Questions which related to Discovery were often responded to “if that’s in the statement, then that must be right”, or words to that effect. The witness often denied that he had any recollection of the statement he made to police. He did not deny he had said what was read to him as being his statement. His statement was not tendered as part of the prosecution case. During the taking of this evidence, the witness was warned as to his attitude to the proceedings and in particular, the attitude to the oath which he had taken. The statement made to police was read and at times played to him and he then answered with a series of affirmative responses when asked whether he had made certain statements to the police.
24. When questioned by the police, he was asked whether or not he had seen Danny having an altercation with anyone and his answer was “I didn’t exactly see an altercation up until that point because I was doing my own thing, talking to other people as well”. He was asked by the prosecutor “is that the truth was that the answer you gave the police?” Mr White’s response was “well, if that’s in the statement, yes”. He was again asked and responded “well it was up from that point that I turned and saw an altercation between him and another guy”. “Do you agree that was your answer?” “If that is in the statement, yes, that’s what I said” replied Mr White. The prosecutor then asked “do you agree that’s true?” The response was “if it’s in the statement, then I agree that’s what I said”. He was then asked by the prosecutor “ ... and referring to him you were talking about Danny as in Daniel Wood having an altercation with another guy, that’s true isn’t it?” The witness, Isaac White responded “yes, that’s true”. It was then put to him that he was present at the altercation and he answered “by the statement, yes, it says altercation which is obviously something I said then”. He then continued to answer questions asked of him. “I agree it’s in the statement, yes”. The statement that was being read to him was extremely detailed and in accordance with the incident which has been described to the Court.

25. There was one part of the statement which the witness believed was confusing and perhaps could have been transcribed wrongly. The prosecutor then sought to have the tape played to the witness and there was some difficulty finding the appropriate part of the tape. The witness indicated not to worry about it and that he would agree that that must have been in the statement. At that point, I warned him that I was finding it difficult to accept he was taking his oath seriously. After the lunch break the tape was played to him and his answers were in the affirmative when asked questions such as “do you agree that is what you told the police?” Questions asked by the police included “so you were standing up when you saw Danny hit him with a bottle?” and he replied “yes”. He agreed that was what he had said to the police. When asked by the police where the bottle struck the guy in the head, he responded “I reckon, yeah, just on his head, in his head area”. “Once again I can’t give an exact sort of spot because I’m not really scrutinising it like, I just remember seeing it and going oh no (inaudible). Obviously remarked on, I remember at the time that it didn’t break and that was pretty much it”. He was asked whether that is what he told the police and he replied “yes”.
26. The witness was asked “do you agree that the police officers who read your statement to say it was a true and solemn declaration of the Oaths Act that you were agreeing to” and he replied “yes”. “In fact you read that back out, didn’t you?” He replied “that’s correct”. He was then asked “and do you still agree today that what you told the police that day was a true declaration” and the witness replied “to the best of my knowledge at that time”.
27. He was then cross-examined on behalf of the defence. He said he had no idea whether the group went to the Honey Pot. Last year his preference would have been for scotch and dry or beer when drinking alcohol. In the past, he has had blackouts as a result of his drinking. He has sought treatment for his drinking.

28. Steven Gross then gave evidence. In April 2006 he was a crowd controller and on 1 April 2006 was working as a crowd controller at Discovery. He received a call over the radio with respect to an incident at about 11.30pm. He saw a gentleman being carried out. He saw two crowd controllers walking out with a male. They had him by the arms and he was calmly walking out. Two of this man's male friends were walking behind him. He was about six foot, three inches with a white button up collar shirt with a black pattern running length ways. He had blue faded jeans on. He had very short light brown hair. The witness guessed that the man was intoxicated following observations he made of the man's behaviour. The man and the other people with him walked towards Daly Street. He then saw a man coming out with a large group of people around him. He had a scratch to his left eye and a large gash around his neck region, behind his ear. This man seemed quite calm at the time. First aid was administered to him. The witness was directed to go and see if he could locate the man who had left earlier and he went looking for him. He did not locate the man. He was then cross-examined. On average at Discovery, 20 – 30 people per weekend would be evicted.
29. Some documentary evidence was tendered. A notice to admit facts set out the injuries sustained by Shann Tanaskovic and admitted that the injuries constituted bodily harm. There are a series of plans drawn by various witnesses who gave evidence which assisted in locating the incident. Photographs of the complainant were tendered. The photos demonstrate the extent of the injury and the stiches which were used to treat the injuries he received.
30. As previously stated, a series of CDs were admitted into evidence. A ruling on the admission of that material was given during the hearing. A large amount of the surveillance tape evidence which formed part of P9 had not been handed to defence prior to the hearing. Indeed neither prosecution nor defence seemed to have appreciated how much material there was. That led

to an adjournment being granted, which significantly delayed proceedings in the matter. This demonstrates the need to ensure that parties are aware of the material which they are seeking to tender. Evidence such as material contained on CDs needs to be scrutinised in the same way that documentary evidence and statements would be scrutinised. That now finalises the summary of the evidence on the matter.

31. After considering the evidence before the Court, I make the following findings. I find that on 1 April 2006 Shann Tanaskovic was assaulted to the neck and head. There is some evidence that connection with his head and neck only occurred once, with the second blow not connecting. I find he was hit twice to the back of the head and neck area. There are no matters raised on the evidence that go to the question of whether the assault upon him was excused, justified or authorised and I find that he was unlawfully assaulted. I further find that he suffered bodily harm as a consequence of the assault upon him and in particular, that he suffered a severe cut to his right ear and the area immediately below his right ear and to the back of his neck. This issue was not in dispute, there being an admitted fact before the Court on that issue. This injury required stiches and he suffered ongoing pain and suffering. I also find that he was threatened with an offensive weapon, namely a glass bottle. There was an issue raised as to whether the item was a glass or a glass bottle. There is no doubt that the object was made of glass and constituted an offensive weapon. Based upon the evidence before me, I find that it was a glass bottle.
32. This case highlights the need for consideration to be given to eliminate glass and glass bottles from venues such as this. All too often persons fuelled with alcohol react angrily and viciously using glass as a weapon. It is a very dangerous weapon. I do not know if this issue has been considered by licensing authorities but the number of serious injuries which arise in these circumstances justify consideration of the question.

33. Security assisted in moving the man off the complainant and assisted the complainant prior to the arrival of the ambulance. They are to be commended for that and in particular, Mr Summers' actions are most likely linked to the complainants' recovery.
34. However in this case, whilst there was ample security staff on duty, there appears to have been a lack of attention paid to ensuring the likely offender in the matter was contained for the police upon their arrival or able to be located by the police. The potential offender and his group (who were potential witnesses) are allowed to leave the premises. Given the severity of the injury, this seems an oversight. The complainant had suffered a severe injury to his neck and yet security officers have no recollection of the offender's identity and indeed, appear to have little documentation of this incident. The priority seemed to be to get the persons involved in the incident out of the venue and the venue back to business. The crime scene was interfered with. No written details of the attacker were recorded.
35. The video surveillance footage in this matter has severe defects and the Court is not able to view crucial aspects of the incident. There is camera footage which goes close to the scene of the incident yet, notwithstanding the fact that it occurred in one of the main bar areas of a licensed premises, there is no footage available of the actual incident. The area where the incident apparently occurred is not covered by CCTV which can be viewed. Further, what footage is available is not of a high quality and does not assist the Court. These are matters which could be referred to the licensing authority for consideration. In particular, there is the question whether the licensing requirements for the premises to be adequately covered by surveillance cameras were complied with on this occasion at this venue. There is no evidence obtained from the video surveillance footage which can be pointed to by prosecution as evidence as to who was the person who unlawfully assaulted Shann Tanaskovic. Indeed, as already referred to, there is in fact no CCTV evidence of the actual assault.

36. The evidence of the barman was that the same person who had been at the bar with Shann Tanaskovic had been the person who had assaulted Mr Tanaskovic. The task of the Court is to inspect the video footage and ascertain whether identification can be made of the person who is being served at the same time as Shann Tanaskovic. I have considered the CCTV footage and can make no identification from the footage which can answer that question beyond reasonable doubt. I accept the evidence of the Discovery staff (who were sober) that the two people who had had some interaction at the bar were the same two people who soon very afterwards were involved in the incident. In particular, the evidence of Guy Dunn was very strong on this question. None of the sober Discovery staff can identify the two people involved. The evidence is that the same two people involved at the bar were later involved in the incident leading to the injury to the neck. I find that is proven beyond reasonable doubt.
37. The complainant himself has directed the Court to parts of the footage. His evidence is that he can see himself in the CCTV footage and also see the person who assaulted him being removed from the premises. He does not assert that the incident itself can be seen. It is for the Court to consider the footage and make what findings it can on the footage. I have reviewed the CCTV footage and am not able to make any identification or rely upon any of the footage to find that any part of the prosecution case is proven beyond reasonable doubt.
38. The witness, Isaac White was found to be an adverse witness. Prior to this occurring, he gave evidence that the defendant was at the Discovery Nightclub on 1 April 2006. He also gave evidence as to the clothes that were worn by both he and the defendant. That evidence is accepted. I find it proven beyond reasonable doubt that the defendant was at Discovery on 1 April 2006.

39. His memory then became non-existent as to any events which occurred at Discovery. There is no explanation for his selective memory – it can not be alcohol induced as he had already drunk a considerable amount of alcohol prior to arriving at Discovery and he recalls arriving at Discovery with the defendant. The court is aware of the close relationship between the defendant and the witness Isaac White. An application was successfully made to declare the witness adverse. After the witness was declared adverse, he admitted that he had made a statement to the police. That statement was taken soon after the incident on 1 April 2006 and is detailed. The fact of a detailed statement being made soon after 1 April 2006 is inconsistent with his testimony that he had no recollection of an incident involving his friend the defendant at Discovery. The witness Isaac White gave a full statement *to police* implicating the defendant as the assailant who carried out the actions upon the complainant. He did not give this evidence in Court. I find that Isaac White made a prior inconsistent statement. The question is, what use can this prior inconsistent statement be put to in the fact finding process?
40. Before he was declared adverse, Isaac White was asked “so do you have a memory of what happened on 1 April 2006? Bits and pieces yes. Bits and pieces? Yes Did you speak to the police after the events of 1 April 2006? What sort of timeframe are we talking about? After that evening did you speak to the police? I’ve spoken to them the following week. Did you make a statement to them at that time? Yes I did. When you spoke to the police and you gave that statement were you telling them the truth? Yes my word yes.” (page 120 of the transcript).
41. I advised the parties that there were matters which required further submissions. The following questions were put to Counsel with respect to the witness Isaac White’s evidence :
1. Consideration needs to be given to the case of *Bull v The Queen* 201 CLR 443 at 466 – is it agreed that that is the relevant case in these circumstances and if not which is the relevant case?

2. Has the witness Isaac White deposed that the facts (or some of them) in the statement to the police are true?
3. If so, which facts are said deposed to be true?
4. What weight can these facts be given on the question of who the assailant was?

Counsel gave written submissions on these questions. I am grateful for the assistance given in those written submissions by both Counsel.

42. It is agreed that the case of *Bull v The Queen* (2000) 201 CLR 443 at 466 is relevant in this matter. The High Court has held at paragraph 79 as follows:

At common law, when a witness who is not a party admits in cross-examination that he or she previously made a statement that is inconsistent with his or her sworn evidence, the contents of the statement are evidence only of the extent of the inconsistency. The contents of the prior inconsistent statement affect the credit of the witness and are not evidence of any of the matters asserted in this statement. Similarly, when a witness has been declared a hostile witness and admits that he or she has made an inconsistent statement, the contents of the statement are not proof of the facts therein stated. The matter is different if the witness not only admits that he or she made an inconsistent statement but also deposes that the facts in that statement are true. In that situation, the contents of the statement are evidence of the facts which it contains.

The contents of the statement to the police are not proof of the matters set out in the statement. The question that remains to be considered in this case is whether the witness, Isaac White has deposed in Court that the facts in his statement to the police are true.

43. The case of *Reg v Jacquier* (1979) 20 SASR 543, was decided before the High Court case of *Bull v The Queen* (supra). Nevertheless the Supreme Court of South Australia assists in answering this question when they set out as follows:-

“Where the witness admits having made a prior statement, inconsistent with his present testimony, and swears that the facts asserted by him in that statement are true, then there is positive evidence on oath of those facts which, *though obviously calling for critical examination*, is evidence upon which a jury is entitled to act”. (Page 554) (my emphasis).

44. In isolation, some of the responses given by Isaac White depose that what he said to the police was true, or perhaps more accurately, that some of what he said to the police was true. At one stage he does depose, in a general way that what he has said to the police was true (see page 120 of the transcript). When the evidence of the witness Isaac White is read in its totality, it can be seen that the witness prevaricates between being quite certain of some matters to returning to evasive answers such as “if that’s what the statement says, to the best of my recollection” or “to the best of my knowledge at that time”. At times he adopted a cavalier attitude towards his evidence and the oath he had taken and other times he was more careful in the way he answered questions. An example of the evidence given by the witness Isaac White with respect to important parts of the material which was put to him is set out below:-

So the police asked you what else happened and you responded, ‘Well it was up from that point that I turned and his altercation between him and another guy’. Do you agree that was your answer?--If it was in the statement, yes that’s what I’ve said.

And do you agree that’s true?---If it’s in the statement then I’m agreed that what I said.

And referring to him, you were talking about ‘Danny’ as in Daniel Wood having an altercation with another guy, that’s true isn’t it?---Yes, that’s true.

And you were present when that altercation occurred weren’t you?---By the statement, yes it says altercation, which is something obviously I said then.

And in fact you say that it had been resolved, the guy was on the ground, he was standing himself up and then we got escorted out, the bouncers came over, that’s true isn’t it?---If it’s in the statement, yes that’s correct.

Well it’s true that you were escorted out of Discovery that night yourself and Daniel, was that true?---Well the statement it says the bouncers came over, I’m assuming they escorted us out by this, yes, it would have to be true if it’s in the statement.

And the police officer asked you, 'Who was standing himself up?' and you said, 'The guy that he had the altercation with Danny'. That's true?---If it's in the statement, yes.

You were asked whether you witnessed that altercation and you said that you did, is that true?---If it was in the statement, yes.

Can you tell the court today that you witnessed an altercation between Daniel Wood and another person?---From my memory I can not, but from the statement what it says there, is what it says.

You agree that the truth?---I agree that the statement ---

Is true?—Recorded what I said then.

You were asked to describe what you saw and you responded, 'I saw the separation of the two and a bottle being swung, Danny swung the bottle, hit this bloke in the head and the bottle was then put down, I intervened and the bouncer came – then came over and that was it'. Do you agree that's the truth now that you've read it in your statement?---What's in the statements I agree that's what I said at the time.

You were asked 'Okay the bottle, do you know where Danny got the bottle from?' and you answered 'Yes, it was a bottle we were drinking'. Is that true?---It's in the statement so that's what I said at the time.

Was it a Bundaberg and Cola bottle?---I can't remember, I personally never drink Rum anyway, so.

Would Danny drink Rum?---Not to my knowledge.

Does he drink beer?---Yeah, he drinks beer (inaudible).

He drinks beer. Do you remember if he was drinking beer at Discovery that night?---No, I can't remember, I can't remember what we were drinking.

But you were drinking, you know that much?---I imagine so, yes, it was a bucks night, so.

The police officer asked what were you drinking, you said, 'It could have been something we were drinking, it could have been a bottle on the table. I don't know'. Do you agree that's true?---Yes, it's in the statement, so.

What did the bottle look like, you said once again your ‘I can’t ---’ and the police officer interrupted you and said, ‘Was it a dark beer bottle, was it white glass?’. You said ‘I honestly can’t remember what the bottle looked like, I know it was a bottle though’. Do you agree that’s true?---I agree that’s in the statement, yeah.

The police officer asked you, ‘With this bottle you saw Danny strike the guy, with which hand did he use?’ and your answer was, ‘I don’t honestly – can’t remember’. He asked you again, can’t remember, and you said, ‘As I’ve told you it’s very - the point that I remember I just saw it happening, I was taken aback, I saw the guy getting up coming between’ the police officer said ,’Yes’ ‘His friends were just sort of standing around watching him and I saw him righting himself again, that was the point where the bouncers came, that’s all – that’s really all I can come forth with’. That’s the truth of what you told the police officer, isn’t it?---That’s what I told the police officer at the time, yes, if it’s in the statement.

Police officer asked you, ‘So what you saw is Danny hit with the bottle, what you saw is Danny hit with a bottle, he falls over and he was righting himself again, is that what you’re saying?’ and your response was, ‘So to speak, yes, exactly – that’s exactly what I can recall seeing’. Do you agree that was your answer?---Yes, if that’s in the statement, yeah. (Excerpt from hearing transcript of 10 May 2007, pages 9-11).

45. This material is important as it is seeking to identify the incident which is said to implicate the defendant. Apart from one statement where the witness agrees that it is true that Daniel Wood was involved in an altercation with another guy, he does not admit to the truth of any of the other material which is put to him. An altercation with another guy does not particularise the incident with any degree of precision.
46. Later in his evidence he declared that he had made a true and solemn declaration under the Oath’s Act in making the statement. He told the Court that “to the best of his knowledge, at that time” he did still agree that what he had told the police was a true declaration. This does not go as far as to depose that the facts in the statement to the police were true.
47. During very crucial parts of his testimony, the witness Isaac White has resorted to answers such as “yes, if it’s in the statement”, or “to the best of

his knowledge at that time”. The very first part of Isaac White’s evidence had him with a clear memory of matters such as what both the defendant and the witness were wearing on the buck’s night. As soon as he considered he may have been implicating his friend in the incident, his memory became virtually non-existent.

48. The majority of the evidence of the witness Isaac White’s evidence lacks credibility. Apart from the very beginning of his evidence in chief, his evidence can not be relied upon. I am satisfied that the witness Isaac White was deliberately evasive in his evidence. His responses to questions by the use of a standard phrase “yes, if it’s in the statement” were answered in a rehearsed manner and were in no way convincing. These answers were often made so quickly it was simply inconceivable that he was thinking carefully about the question prior to answering. I am satisfied that it is most likely because of his long standing friendship with the defendant that the witness Isaac White gave his evidence in the way he did. Whatever his motivation, the witness Isaac White did not honour his oath to tell the truth to the court.
49. I order that the transcript and rulings made relating to Isaac Whites’ evidence in this matter be submitted to the relevant authority (or authorities) for consideration as to whether proceedings should be commenced as against Isaac White. Those investigations will likely involve consideration as to whether the defendant had any part to play in the way the witness Isaac White gave his evidence. I make no comment on that question in this decision.
50. In the final analysis, I am of the view that the witness Isaac White was deliberately withholding evidence and that he was unwilling to tell the whole truth to the court. His evidence can not be relied upon on crucial questions relating to the incident at Discovery. I cannot be satisfied beyond reasonable doubt that he has deposed to the court that facts relevant to this particular incident, that he told the police, are true. His evidence must be

examined critically. When his evidence is subjected to critical examination, it is not evidence which can be relied upon to make findings beyond reasonable doubt.

51. Suspicion can not be used in the fact finding process. Guess work can not be the basis of a decision. Only credible admissible evidence can be relied upon in the fact finding process. There is no evidence before the court which can be relied upon to make a finding beyond reasonable doubt as to who the assailant was in this case. A finding of not guilty is recorded as against the defendant.

Dated this 3rd day of December 2007

Melanie Little
STIPENDIARY MAGISTRATE