

CITATION: *McGarvie v Abdul Karim Khajeh* [2008] NTMC 006

PARTIES: MCGARVIE

v

ABDUL KARIM KHAJEH

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20626837

DELIVERED ON: 23 January 2008

DELIVERED AT: Darwin

HEARING DATE(s): 18 & 19 June 2007 and 27 November 2007

JUDGMENT OF: Relieving Magistrate Fong Lim

CATCHWORDS:

REPRESENTATION:

Counsel:

Crown: Ms McMasters

Defendant: Mr Rowbottom

Solicitors:

Crown: Director of Public Prosecutions

Defendant: Withnalls

Judgment category classification: C

Judgment ID number: [2008] NTMC 006

Number of paragraphs: 53

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

No. 20626837

[2008] NTMC 006

BETWEEN:

MCGARVIE
Crown

AND:

ABDUL KARIM KHAJEH
Defendant

REASONS FOR DECISION

(Delivered 23 January 2008)

Ms FONG LIM RSM:

1. The Defendant faces five charges, aggravated assault, 2 counts of threat to kill, assault police causing bodily harm and resist police. He has pleaded not guilty to all charges.
2. The Crown called evidence from 4 neighbours, the arresting officers, other police officers and Alexandrina Gerrasimopolous. The Defendant gave evidence, as did Ms Lorraine Gerrasimopolous. It should be noted that Ms Lorraine Gerrasimopolous was also subject of charges arising out of the same incident and she is the mother of the Defendant's child, Iran Khajeh.
3. The charges were particularised as follows:

On Count 1 the unlawful assault on Iran Khajeh that the Defendant grabbed the child violently squeezed her to his chest and punched his chest near her face causing her head to knock back and forth on his chest. Further that he kneed her off his lap causing the baby to topple to the floor.

On Count 2 the threat to kill to Constable Potter was “You are not taking my child I will kill her first and blow you up”

On Count 4 the threat to kill to Constable Smith-Lester was “I will fucking kill you next time I’m arrested I’ll be doing 15 – 20 years. I’ll find where you live and kill you and your family” which threat was repeated 3 times.

On Count 5 the police officer to whom the Defendant was alleged to have resisted was nominated as Constable Potter and the action alleged is that upon Constable Potter grabbing the Defendant’s arm the Defendant pulls his arm away from Potter in order to get away from Potter’s grip.

4. It is uncontroverted evidence that Constables Smith – Lester and Potter were, on 23 October 2006, tasked to attend a domestic disturbance at 26 Abrahams Court, Karama, they attended, spoke to Ms Gerrasimopoulos, resident of 26 Abrahams Court, who assured them there was nothing wrong. Smith – Lester and Potter looked through the house and couldn’t see any evidence of disturbance. Smith Lester and Potter then left the house, returned to their car, however waited for a little while because they wanted to make sure everything was as it seemed at 26 Abrahams Court, Karama. The Defendant then returned in his car. What happened when the Defendant returned to that address and what happened in the lead up to the police being called to that address is in dispute.
5. Mr Mulligan gave evidence that he lives just across the road from 26 Abrahams Ct Malak and on the night in question, he heard arguing from that house at about 8.00pm which he thought was too noisy and too loud to be a normal argument so he called the police. His further evidence is that after a couple of minutes he heard a car drive off and the arguing stopped. A short while later the police arrived and then another 10 minutes later, there was the sound of revving car, flashing police lights and the police telling someone to stop. He then heard yelling and screaming from a person he believed to be the Defendant and his “wife”, with the Defendant making threats to kill and the “wife” yelling “you’ve killed him, I’ve called the

police”. Mr Mulligan heard all of this from under his carport and his driveway. Mr Mulligan also saw the Defendant on the ground and the police officers taking him to the paddy wagon. He says he saw the police officers trying to get the Defendant to stand and struggle to get him into the paddy wagon. Mr Mulligan also heard some noise, swearing and threats coming from the van once the Defendant was placed in there.

6. The evidence of Ms Vella, Ms Marris and Mr Billing, all residents of the area, all corroborate Mr Mulligan’s evidence that there was some loud shouting and arguments emanating from 26 Abrahams Court between the hours of 8.00pm and 9.00pm. Mr Billing confirms a break in the shouting as suggested by Mr Mulligan, and then an escalation of the arguing before a person was arrested and put into the paddy wagon. Ms Vella heard threats to kill the baby and kill the neighbours, which caused her to be scared. Mr Billing also heard threats to kill neighbours and found the behaviour and threats worrying and disturbing. Ms Marris heard original arguing and an intensification of that argument some 20 minutes later she then heard words to the effect “you’ve killed him” from a female voice and then saw a person being carried to the paddy wagon by the police. Ms Marris also heard the women make accusations of police brutality and that a gun had been pulled on her daughter.
7. Alexandrina Gerassimopolous, the 15 year old daughter of Lorraine Gerassimopolous, gave evidence of what she experienced that night. Her evidence is that she was watching TV in her mother’s room by herself when just before dark, there was a visit from the police. One policeman flashed the light in the room she was in for about 20 seconds and nothing was said to her. She gave further evidence that she heard her younger sister Akeshia screaming later so she went out of the bedroom to investigate. It was then she looked through the lounge room window and saw her baby sister, Iran, fall to the ground, the Defendant sitting in the chair, and her mum and Akeshia near the door. She also witnessed her mum falling to the ground.

She did not witness how the Defendant got to the ground but when she got to the door, saw the big police officer on top of the Defendant. Her further evidence is that there was a lot of noise, but she couldn't remember what was being said except that her mother was yelling "police brutality".

Significantly she alleges she saw one of the police officers' pull a gun and point it at her mother and sister. She was not asked any questions about an argument prior to the police arriving.

8. Constable Smith Lester gave evidence that he and his partner, Constable Potter, were tasked to attend a possible domestic disturbance at 26 Abrahams Court Malak. They attended the address, the door was answered by Ms Gerassimopolous, who assured them nothing was wrong and was resistant to their presence, however after some persuasion, she allowed them into the house to check. They found nothing untoward however were not satisfied that Ms Gerassimopolous was telling the whole truth and decided to wait outside for a little while to observe. They were in the van outside of the property when the Defendant returned in his car. Smith Lester says he observed the vehicle going past 26 Abrahams Court Malak and then turn back so he activated the flashing blue and red lights to get the person to stop, as he thought the driver might be Ms Gerassimopolous' partner. The Defendant failed to stop and in fact sped up, drove at that police vehicle and only swerved at the last minute to just miss the police vehicle. Smith Lester got out of the car and followed the Defendant to Ms Gerassimopolous' door, where he challenged the Defendant for not stopping. Smith Lester's evidence is that the Defendant responded aggressively by saying "I don't have to, don't threaten me" he then grabbed the child from Lorraine and held her against his chest and continued to say things like "don't threaten me" and beat his fist against his chest. He was then asked to put the baby down so that they could talk to him.
9. Smith Lester gave evidence of his surprise at the aggressive manner in which the Defendant met them and also of his concern that because of the

aggressive manner, that the Defendant should put the baby down so that they could talk to him. The Defendant responded again with aggression and when Smith Lester persisted in asking the Defendant to put the child down, he then made the threat “I will kill her first and then I’ll blow you up” and gestured that he would break the child’s neck by twisting it. It was then that Smith Lester says he moved forward and grabbed the Defendant’s left wrist, who then punched Smith Lester and by doing so, released the baby who fell to the floor. A struggle ensued whereby the Defendant punched, kicked and scratched Smith Lester, who retaliated by ground stabilising the Defendant and punching him in the back of the head. The Defendant was also OC sprayed and handcuffed. Smith Lester was surprised at the aggression and strength of the Defendant who was a much smaller man than him. He gave evidence that it took all his strength and the assistance of OC spray and handcuffs to get the Defendant under control.

10. Smith Lester also gave evidence that at one stage the Defendant seemed to lose consciousness but he came to very quickly after and when he did, continued to struggle violently and yell threats.
11. Smith Lester stated that he and Potter lifted the Defendant by arms and shoulders to get him to the paddy wagon and that he struggled and made it difficult the whole time. He also gave evidence of threats the Defendant made to him from the paddy wagon.
12. The evidence of Constable Potter was mostly consistent with Smith Lester, except that Constable Potter gave evidence that he had advised the Defendant that failing to stop was an arrestable offence and that is when the Defendant became aggressive. Potter confirmed that the Defendant made a threat to kill the baby and to “blow up” Constable Potter. He also gives evidence that the Defendant had made a motion to twist the baby’s neck with his hand and that is when Potter grabbed the right arm of the Defendant to prevent him from doing harm to the child. He then remembers a subsequent

struggle where they all fell, the Defendant backwards into a chair. He also remembers the Defendant then kneeling the baby off his lap causing her to fall to the floor.

13. Potter then saw his partner in a struggle with the Defendant where the Defendant was kicking and punching Smith Lester but did not see all of the interaction between them as he had to deal with Ms Gerassimopolous who was on his back and impeding his assistance of his partner. He applied OC spray to Ms Gerassimopolous and then went to the assistance of Smith Lester by applying OC spray to the Defendant and handcuffing him.
14. Constable Potter states that at one stage the Defendant seemed to lose consciousness, but having checked his breathing they decided that it was OK to move him and proceeded to lift him up to take him to the van. Potter's recollection is that the Defendant "came to" about 15 seconds later and continued to act aggressively struggling and making threats. Potter confirms Smith Lester's account of the threats and struggling by the Defendant when they took him to the paddy wagon.
15. The prosecution called further evidence from other police officers who attended the scene later in answer to a call for assistance by Smith Lester. Kennon gave evidence of attending, speaking to Ms Gerrasimopolous, hearing her complaint about the police behaviour and advising her that she should first get medical attention and then come to Casuarina Police Station to make the complaint. He gave evidence that she complained of an assault on the Defendant and her children and the use of a gun. Burnett gave evidence of hearing a call for assist from Smith Lester and attending 26 Abrahams Court with his partner McCauley. Upon their arrival he observed other units in attendance, he heard the Defendant carrying on in the back of the paddy wagon and then moved over to where Ms Gerrasimopolous was being interviewed by Constable Dare. He heard her complaint that the Defendant had been assaulted and that she and her daughter had been

sprayed with OC spray and had a gun pulled on them. He was then tasked with getting statements from the witnesses.

16. Constable McCauly gave evidence of the complaint made by Ms Gerrasimopolous and that was consistent with the evidence of Constable Burnett. Both officers gave evidence that one of the daughters seemed surprised at the allegations her mother was making. Both McCauly and Burnett gave evidence of threats emanating from the paddy wagon and McCauly in particular saw the Defendant look directly at Smith Lester and threaten to “find out where you and your family live and kill you all”. McCauley also gave evidence of the injuries to Smith Lester.
17. Evidence was also taken from Constable Dare and he too heard threats from inside the paddy wagon and saw the Defendant kicking the cage. He spoke to Ms Gerrasimopolous, who made the complaint about assaults on the Defendant and the use of OC spray on her and her daughters and the pulling of the gun. He was then tasked, with his partner, to take the Defendant to the watch-house to be processed.
18. While transporting the Defendant to the watch-house, Constable Dare had to stop the vehicle and padlock the cage door because the Defendant was kicking the cage door so violently that they had to be sure that he would not succeed in kicking it open. Once at the watch-house, the Defendant was processed and placed in a cell. When Constable Dare and his partner were leaving, they were alerted by auxiliary staff that the Defendant was doing something to himself. They rushed to the cell and found the Defendant with a t-shirt wrapped around his neck pulling it really hard. Dare and an auxiliary entered the cell and removed the t-shirt from the Defendant’s neck and took the t-shirt away. The Defendant was left on the floor of the cell breathing heavily, Dare couldn’t remember whether the Defendant was conscious or not.

19. All of the police officers who attended 26 Abrahams Court were consistent in their evidence of the allegations made by Ms Gerrasimopolous, the state of Smith Lester and the threats and noise coming from the paddy wagon.
20. None of the prosecution witnesses were shaken in cross-examination.
21. The Defendant's evidence was that he had attended the address to pick up his daughter from Ms Gerrasimopolous. The Defendant and Ms Gerrasimopolous have a Family Court order giving the parties equal contact by agreement. The Defendant had made arrangements to pick up his daughter and when he arrived, Ms Gerrasimopolous was not there. Her older daughters and the baby were home alone. He then says he went with the middle child to go and find Ms Gerrasimopolous, as she was apparently at a friend's place. He says that they went to the friend's place he sent the child into get her mother and then they all returned to 26 Abrahams Court. The Defendant stated that he was unhappy about Ms Gerrasimopolous leaving the baby in the care of the other two girls and he let her know that. He says he was not angry, he was just sad and upset so he left without his daughter because he wanted to come back when he was a bit happier.
22. The Defendant says that he went to drive home but didn't make it there, deciding to call Ms Gerrasimopolous instead. He states that when he got through to her she told him not to come because the police were there. He ignored her request and returned to 26 Abrahams Court where he saw the police car and also saw them switch their lights on, but didn't stop because didn't think that they were looking for him. He says he pulled into the driveway, went to the front door which was answered by Ms Gerrasimopolous with the child. The child came to him straightaway and leapt into his arms wrapping her legs around his waist and her arms around his neck. It was then he says he sensed the police behind him and he was told by a police officer to "drop the baby we want to talk to you" he says he

responded with a denial of doing anything wrong and he also states that he refused to release the baby.

23. It is the Defendant's evidence that he was then told that he was under arrest for failing to stop and that he and the police officers then had an exchange where they were continuing to insist he "drop the baby" and he was refusing because he had every right to be there and had done nothing wrong. His evidence is that Ms Gerrasimopolous "nicely" asked the police officers to leave, repeating that they had no reason to be there. He then asked Ms Gerrasimopolous to call the police officers' supervisors. The Defendant says that the police officer continued to ask him to "drop the baby" and when he replied "not for you and not for anybody", he was grabbed around the neck by the police officer. The Defendant's evidence is that both he and Ms Gerrasimopolous were calm throughout this whole exchange.
24. Once the Defendant was grabbed around the neck he said that he felt he was fainting so he decided to sit down on the chair so he could release his baby in safety gently off his lap, which he did.
25. It was after he had released the baby that matters escalated, the police officer who had him around the neck said "Abdul I am going to send you back to your country" and continued to squeeze on his neck and punch him to the head and ribs. The Defendant says he struggled because he thought the police officer was going to kill him by depriving him of oxygen through the chokehold. He remembers his eyes burning and then fainting and the next thing he remembers is being in the paddy wagon and being wet.
26. The Defendant accepts that he was yelling while in the wagon because he felt his life was in danger and was saying "anything", he says he can't remember any of the actual words he used at that time.
27. Most significantly, the Defendant insists that both he and Ms Gerrasimopolous were calm and quiet through the whole exchange until he

was grabbed around the neck and only then did he “struggle”. He insists he was not yelling and made no threats until he was later put into the paddy wagon.

28. Ms Gerrasimopolous gave evidence that she had a disagreement with the Defendant about use of his phone and money earlier in the evening, when it was still daylight, when he came around to pick up Iran. She started yelling at him and he just got into his car and left without taking Iran with him. Then as it got dark she had a visit from the police asking for “Abdul” and at the same time she got a call from the Defendant apologising, at which time she advised him not to come around because she was sorting something out with the police. Having reluctantly shown the police officers around her house to prove nothing was amiss, Ms Gerrasimopolous says the police left but went to their car and “sat there and stalked me”.
29. She says that she then lay down with the baby and her older daughter and watched TV for 20 minutes when she went out into the loungeroom and saw the blue lights flashing. Her evidence is that she opened the door to the Defendant, her daughter ran to her father and just as he put his foot in the door the police officer came from behind and grabbed him telling him he couldn’t go into the house.
30. The next thing the Defendant did was to go and sit in the chair carrying his daughter and told Ms Gerrasimopolous to call the police officers’ supervisors. It was then that Ms Gerrasimopolous claims the police officer put his arm around the Defendant’s throat saying to him “we are going to send you back to your country”. It was also then when Ms Gerrasimopolous says she started screaming and going “off my head”. Ms Gerrasimopolous then says that she accused the police officer of killing the Defendant, at all times the Defendant was seated and his eyes were streaming tears. She saw the Defendant let go of the baby and the baby fall to the floor. She says she attempted to pull the police officer’s arm from around the Defendant’s neck

and that is when she and the other police officer had a physical struggle. She witnessed the Smith Lester punching the Defendant and she went inside to call “000”.

31. From inside the house she witnessed both police officers punch and kick the Defendant, get him on the ground face down, apply OC spray directly to his eyes by opening each one and spraying the spray in and Smith Lester on the Defendant’s back rocking back and forth. She says she also saw the Defendant being handcuffed and dragged away and dropped to the ground and told to “get up”. Her evidence in chief was that during the altercation the Defendant did not say anything about the baby or anything at all, she claimed the Defendant was calm and did not raise his voice until he was put into the paddy wagon. However in answer to a question in cross-examination, she says that “he was just swearing, fuck the police” and then she says she doesn’t know or remember exactly what was said by the Defendant because she was screaming as well. Ms Gerrasimopolous confirmed that more police arrived and she accused Smith Lester of police brutality and threaten to sue him if anything happened to her baby.
32. The defence also tendered photos taken of the Defendant by Ms Gerrasimopolous in the hospital the next day, which shows some abrasions on his arms and legs and a red mark on his neck.
33. I remind myself that I have to be satisfied beyond a reasonable doubt of all elements of the offences and that the Defendant only has an evidentiary burden on the balance of probabilities to establish any defence he may want to put forward. It is then for the prosecution to negate that defence beyond a reasonable doubt. In this matter, to find against the Defendant I must find the Defendant, Ms Gerrasimopolous and her daughter all to be unreliable witnesses. Their evidence of what happened is in the main part so diametrically opposed to the evidence of Smith Lester and Potter and the

neighbours that I must disbelieve their evidence to find against the Defendant.

34. I found all of the neighbours who gave evidence to be credible witnesses, they may have been slightly inconsistent as to the time and timing of the arguments they heard, however what is clear from their evidence is that there was a loud argument, with both male and female (possibly a child) taking place at 26 Abrahams Court well before the police arrived. The neighbours also heard the threat to the baby and threats to kill by the male voice before they saw the Defendant being put into the paddy wagon. This evidence is contrary to the evidence of the Defendant and Ms Gerrasimopolous and in my view should be accepted.
35. The evidence of both the Defendant and Ms Gerrasimopolous is unreliable. They are not only in conflict with the independent third parties, they are in conflict with each other about what occurred on the verandah of 26 Abrahams Court that night. Ms Gerrasimopolous gave evidence that the Defendant was pulled by the shoulder by one of the police officers while he was standing at the front door to her house, the Defendant says nothing about that, Ms Gerrasimopolous claims that the police said nothing about the baby when talking to the Defendant, the Defendant accepts he was asked to put the baby down, Ms Gerrasimopolous says she saw her baby drop from the Defendant's hold. The Defendant gave evidence that he gently placed the baby down, Ms Gerrasimopolous says she started screaming almost straight away when the police would not leave and the Defendant says she was "nicely" asking them to leave. Further inconsistency is shown when the Defendant says he sat down on the chair because he was being choked, yet Ms Gerrasimopolous says he calmly sat talking to the police for about 10 minutes before he was placed in a chokehold.
36. I found Ms Gerrasimopolous to be an excitable person in the witness box and by her own admission, a person who screams a lot. Her use of the phrase

that the police “stalked her” shows her to be a person who thinks nothing of exaggeration. I find that it would not be in Ms Gerrasimopolous’ nature to calmly and nicely challenge the police presence, if she really believed they had no right to be there. It is also significant that Ms Gerrasimopolous made the wild accusation about Potter drawing a gun on her and her child on the night, yet made no mention of it in her evidence at the hearing. She attempted to sanitise the argument which ensued between her and the Defendant by saying she screamed at him and he became a little upset. She distinguished between upset and angry, however became evasive when asked to describe what made her say he was “upset” as opposed to “angry”.

37. The Defendant’s explanation of his reaction to the situation that is he calmly responded to the police officer’s constant requests to “drop the baby” when he believed he had done nothing wrong, is unbelievable. Firstly it defies belief that any police officer would suggest that a person “drop” a baby and the Defendant showed in the witness box that he was plainly defiant and angry at the request to put the baby down. When it was put to him that he didn’t cooperate with police, he answered, “I wanted to but they wouldn’t cooperate with me”. The suggestion that he did not violently physically respond to Smith Lester allegedly choking him so that he thought he was going to kill him, is also unbelievable. It would be unusual for a person not to struggle violently if he believed he was being choked to death. It is even less believable that Smith Lester used a chokehold on a person he was clearly physically stronger than, or used a chokehold at all.
38. The evidence of Alexandrina Gerrasimopolous must also be looked at cautiously. She is a 15 year old girl who continues to rely upon her mother for emotional and financial support. She did not make any accusation about a gun being drawn on the night and apparently, seemed surprised at her mother’s suggestion on the night. She gave evidence at the hearing that she saw a gun on the night and was sure about that even when it was suggested that it could have been the canister of OC spray she saw. Even though I am

sure she believed she was telling the truth, is it possible that she has reconstructed in her mind that she saw a gun because her mother suggested it was a gun on the night. Significantly there was no mention of the gun by Ms Gerrasimopolous in her evidence and given that would be a significant event in anyone's life, it would be expected had it really happened she would have said something about it in her evidence.

39. The unreliability of Alexandrina's evidence is also highlighted in her evidence about what was being said when her baby sister was falling to the ground. Her answer was that there was a lot of noise but she couldn't remember what was said by anyone because she was concentrating on her baby sister, yet she could remember later that her mother was claiming police brutality. Her evidence was disjointed about the events of the night and this is, in my view, an example of a child trying not to tell positive lies, she doesn't want get her mother and the Defendant into trouble and at the same time she does not want to tell lies about what was said or happened so she chooses to say she can't remember. Except for the allegation of the gun and Alexandrina's evidence is consistent with others generally in that the baby fell to the ground, there was a lot of noise (in light of the other evidence, it can be safely inferred that the noise was that of people shouting and yelling) and that her mother accused the police of police brutality.
40. I find that both the Defendant and Ms Gerrasimopolous cannot be believed about their interaction and their interaction with the police that night. I accept the evidence of the neighbours that on that night there was a loud argument coming from 26 Abrahams Court and I am satisfied beyond reasonable doubt that the argument was between the Defendant and Ms Gerrasimopolous. I am also satisfied beyond a reasonable doubt that the Defendant was angry and when he returned he was not in any better frame of mind. I find that both the Defendant and Ms Gerrasimopolous to be unreliable witnesses, particularly in relation to the Defendant's aggression on that night and his threats to the baby. One of the independent witnesses

heard the threat to the baby. I am satisfied beyond a reasonable doubt that the Defendant made the threat to the child and that his demeanour and aggression on that night was sufficient for the police officers involved to fear for the child and attempt to get him to release the child and to arrest him.

41. Defence counsel submitted that the police exceeded their powers by insisting the Defendant release the child as he had the right to have the child because of a family court order. Defence counsel argued that the escalation matters were caused by the police officers exceeding their powers in a number of ways and therefore, anything arising out of the police exceeding their powers can be excused.
42. I wholly reject defence counsel's argument. I have found the Defendant to be an unreliable witness and not a witness of truth. The evidence of the Constables Smith Lester and Potter and Mr Mulligan all prove to the court beyond a reasonable doubt that the Defendant did rev his car and drive it straight at the police vehicle, which clearly had its lights activated and was attempting to stop him. I accept that the purpose of Smith Lester and Potter following the Defendant to the door was to question him about why he failed to stop and then his later arrest arose out of his totally unreasonable response to the requests to put his child down and talk to the police.
43. I find that the Defendant was aggressive, shouting and making threats and that it was reasonable for the police officers involved to use necessary force to protect the child and then later to protect themselves and effect an arrest of the Defendant. I do not accept the Defendant was placed in a chokehold as the only evidence of that was from the Defendant and Ms Gerrasimopolous. The red mark on the Defendant's neck can be explained by the incident in the cells at the watch house which I accept did occur.
44. Having found that the Defendant and Ms Gerrasimopolous cannot be believed, the evidence from the prosecution witnesses describe a scenario

where arising out of a dispute with the mother of his child, the Defendant became enraged having a sustained verbal argument with her before leaving for a short while and then returning for the child. Upon his return the Defendant continued to be enraged and failed to stop his vehicle when required to do so by the police. The Defendant had lost his temper and would not listen to reason, his behaviour was wild and reprehensible in particular in relation to his child. His behaviour was that of a person who had totally lost control of his anger and the ability to behave in an acceptable manner.

45. Defence counsel made much of the fact that Smith Lester is a large strong man and the Defendant not so large, the implication being that Smith Lester used unnecessary force in his arrest of the Defendant. I have found that the Defendant was enraged and beyond reason, it is a well documented fact that people in that sort of frame of mind can have strength beyond what might be expected from someone of their stature. The Defendant was clearly in that state and it took Smith Lester all of his strength to overcome the Defendant with the assistance of his partner.
46. Defence counsel also submitted that it would be unusual for a father to threaten his own child. Unfortunately it is just this sort of situation where there is a possible dispute about the care of a child of an estranged couple and that there has been many a matter before the courts all over Australia where threats have been made in relation to children and sometimes carried out. I accept it would be unusual for a father to threaten a child he loves, but it is not unheard of and I am satisfied beyond reasonable doubt that this is what the Defendant did on the night.
47. In conclusion, in relation to count 1, that is the charge of assault on Iran Khajeh with the aggravating circumstances that she was under the age of 16 years and she was unable to effectually defend herself, I find the Defendant guilty. I am satisfied beyond a reasonable doubt that he applied direct force

to the child by holding her tightly to his chest causing the child distress, by the Defendant's own evidence the child was distressed. I am also satisfied beyond a reasonable doubt that he applied indirect force to the child by pounding his chest with his fist which caused the child's head to knock back and forth. I am not satisfied beyond a reasonable doubt that the Defendant kned the child from his lap. I am satisfied beyond reasonable doubt that the child was under the age of 16 and that she could not effectually defend herself.

48. In relation to Count 2 the evidence is clear that the Defendant made the threat to kill Constable Potter by threatening to blow him up. Constable Potter's evidence is that the threat caused him concern and I accept that evidence from Constable Potter, given the Defendant's aggression and violent behaviour, it is entirely believable that Constable Potter was concerned for his safety and that of the child.
49. In relation to Count 3 that the Defendant assaulted Constable Smith Lester and the circumstance of aggravation that Smith Lester suffered bodily harm. I am satisfied beyond a reasonable doubt that the Defendant assaulted Smith Lester by punching, kicking and scratching him and that assault was not justified defensive conduct (even though that was not a defence raised by the Defendant). I am satisfied beyond a reasonable doubt that Smith Lester suffered a cut to the forehead arising out of that assault and an injury to his shoulder which hindered his full use of that shoulder for a couple of days and therefore Smith Lester did suffer bodily harm.
50. In relation to Count 4, I am satisfied beyond a reasonable doubt that the Defendant made the threat to Smith Lester as particularised as the evidence of the independent neighbours heard the threat in that form of words and so did Constable Kennon. Smith Lester's evidence is that the threat concerned him given the Defendant's aggression, anger and lack of control. I am

satisfied beyond a reasonable doubt that in the circumstances, the threat was such to cause fear to any person of reasonable firmness and courage.

51. In relation to Count 5, I cannot be satisfied beyond reasonable doubt that the Defendant resisted Constable Potter in the manner particularised, Potter himself did not give evidence that the Defendant pulled back when Potter grabbed his right arm, therefore that charge must be dismissed, even though there is ample evidence of resisting police in other ways.
52. To conclude, the Defendant is found guilty of charges 1 - 4 and not guilty of charge 5.
53. I will hear the parties on sentencing.

Dated this 23 day of January 2008.

Tanya Fong Lim
RELIEIVING STIPENDIARY MAGISTRATE