

CITATION: *Rigby v Drew* [2008] NTMC 048

PARTIES: KERRY RIGBY

v

KEVIN DREW

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20712880

DELIVERED ON: 17th July 2008

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JUDGMENT OF: Relieving Magistrate Fong Lim

CATCHWORDS:

Court of Summary Jurisdiction – unlawful arrest – admissibility of evidence – collusion in police evidence

Bunning v Cross [1978] 141 CLR 54

Heanes v Herangi [2007] 1750A Crim R 175

REPRESENTATION:

Counsel:

Crown: Ms Ganzer

Defendant: Mr Mathews

Solicitors:

Crown: Summary Prosecutions

Defendant: Welfare and Associates

Judgment category classification: C

Judgment ID number: [2008] NTMC 048

Number of paragraphs: 82

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

No. 20712880

[2008] NTMC 048

BETWEEN:

KERRY RIGBY
Crown

AND:

KEITH DREW
Defendant

REASONS FOR DECISION

(Delivered 17th July 2008)

Ms Fong Lim RSM:

1. The Defendant is charged with two offences, disorderly conduct in a public place, section 47(a) of the *Summary Offences Act* and disorderly conduct in a police station, section 47(c) of the *Summary Offences Act*.
2. The allegation is that the Defendant became disorderly when being asked to leave the Karama Tavern after a security guard assessed he should not be served any more alcohol. The further allegation is that the Defendant continued to be disorderly by swearing, shouting and waving his arms about while outside of the Tavern. The Defendant was arrested and conveyed to the watch house where he allegedly continued to abuse police officers and threw his boot at a police auxiliary.
3. Prosecution called evidence from Mr Bernie Lewis, the security guard, Mr Eamon Shaikh, manager of the Tavern at the time, the arresting officers, Constables Wethers and Frame, their supervisor, Sergeant Astridge and the officers in attendance at the watch house, Auxiliaries Dash and Freshwater.

Auxiliary Oliver was also called to explain the downloading of the watch house footage.

4. The Defendant, Mr Welfare and Mr McMaster gave evidence on behalf of the defence.
5. The Defendant submits that the evidence of all of the police officers was a product of collusion and not the independent memory of those officers and therefore, should not be relied upon. The Defence also submits that any evidence in support of the second charge of disorderly conduct in the police station should be disallowed because it arose out of unlawful conduct of the police in taking the Defendant into protective custody (see *Bunning v Cross* [1978] 141 CLR 54).
6. In relation to the first offence of disorderly conduct in a public place, evidence was taken from Mr Lewis, Mr Shaikh and the Defendant. The charge is particularized as:

“you did yell offensive language whilst being escorted from the Karama Tavern”

7. The charge of disorderly conduct in a police station is particularised as follows:

“you did abuse police members. You threw your boot at police members”

8. The Evidence - Mr Lewis’ evidence is he came onto shift and observed the Defendant staggering and missing the cue ball while playing pool. He assessed the Defendant as too intoxicated to continue being served alcohol and advised him that he was on his last beer. The Defendant became belligerent about being told he was on his last beer and started to abuse Mr Lewis. It was then Mr Lewis decided that the Defendant should be asked to leave straight away. Mr Lewis’ evidence is that the Defendant then became loud and aggressive, demanding that he be refunded for his beer and

refusing to leave. While Mr Lewis was continuing to attempt to get the Defendant to leave, Mr Shaikh then joined him and attempted to find out the problem.

9. After Mr Shaikh intervened, Mr Lewis says that they managed to get the Defendant out of the Tavern. Once outside the Tavern the Defendant continued to be abusive and continued to ask for his beer refund.
10. Mr Shaikh confirms Mr Lewis' evidence that he went out into the bar to hear a loud argument ensuing between Mr Lewis and the Defendant. When Mr Shaikh intervened, the Defendant was demanding a refund and after being told he was to leave and when told he would not get a refund, he continued to abuse and swear at both Mr Lewis and Mr Shaikh. At one stage the Defendant referred to Mr Shaikh's race in a derogatory manner.
11. Once the Defendant was outside of the Tavern, the police were called by Mr Shaikh and arrived soon after. It is Mr Lewis' evidence that the Defendant had calmed down a little after being outside for a while and before the police arrived. Mr Shaikh says that the Defendant had continued to be abusive until the police arrived. Mr Shaikh's further evidence is that the Defendant at one stage fell down while outside.
12. If the Defendant behaved in the manner described by Mr Lewis and Mr Shaikh, then he was clearly behaving in a disorderly manner, the language and behaviour used by the Defendant inside and outside of the Tavern before the police arrived was clearly offensive and would have caused some distress to those members of the public in the Tavern and around that area.
13. Once the police arrived, both Mr Lewis and Mr Shaikh say they spoke to one police officer and the Defendant spoke to the other. They could not hear what was being said between the Defendant and the other officer. It was when the second police car arrived and that officer got out of his car the Defendant immediately became aggressive again. Both Lewis and Shaikh

remember the Defendant saying something like “fucking member” towards that officer. They also remember seeing the Defendant being escorted to the back of the paddy wagon and struggling with the police officers.

14. The evidence of Constable Frame is that she with her partner Constable Wethers, attended a call to the Karma Tavern and when they arrived, they observed a male person arguing with the security officers just outside of the Tavern near the main entrance of the shopping centre. She spoke to the security officer while her partner dealt with the Defendant. She does not remember hearing any of the conversation between her partner and the Defendant, just that the Defendant was talking in a raised voice.
15. Constable Frame remembers that her supervisor Sergeant Astridge then arrived and that when he alighted from his car, the Defendant immediately launched into abuse of Sergeant Astridge. She remembers that the Defendant was being abusive and when placed under arrest by her partner, she assisted with taking him into custody while he struggled and continued to swear and carry on. She gives evidence of quite a few people around observing this interchange. Constable Frame also gave evidence of holding the Defendant at the rear of the paddy wagon to allow Sergeant Astridge to search him before putting him in the back of the vehicle.
16. Constable Wethers was in the witness box for a whole day and most of that was taken up by cross-examination by the defence counsel. His evidence accords with that of Constable Frame about the Defendant’s demeanour when they arrived and the circumstances of his arrest. His observation of the Defendant is that he was being loud and aggressive, he was unsteady on his feet and couldn’t stand still and while he was rational in his request for a refund, he became more abusive when Sergeant Astridge arrived. He says that the Defendant immediately became more vocal and abusive towards Sergeant Astridge as soon as he alighted from his vehicle. From what the Defendant was saying to Sergeant Astridge, Constable Wethers understood

that there had been some previous dealings between the two. Wethers decided that the Defendant was intoxicated and should be placed under arrest pursuant to s 128 of the *Police Administration Act* because the Defendant was a danger to himself and others given his behaviour.

17. Wethers remembers taking the Defendant to the back of the wagon and assisted by Frame getting him into the back of the van after he was searched by Astridge.
18. Sergeant Astridge's oral evidence of what happened at the Karama Shopping Centre did not accord with the evidence of Wethers and Frame in one particular and that was in relation to the search of the Defendant before him being placed in the paddy wagon. Both Wethers and Frame were certain a search was undertaken by Astridge. In his written statement, Astridge says he searched the Defendant and then in his oral evidence, he was adamant that no search took place. He could not explain that inconsistency or why the other police officers' evidence was contrary to his oral evidence.
19. The Defendant's evidence about what happened at the Tavern was that he attended the Karama Tavern at about lunchtime and met up with some friends there. He says he was also introduced to others at the Tavern by his friends and they were all drinking and playing Keno. The Defendant apparently had very good luck on the Keno that day winning about \$700 in total and so did others in his group of friends and acquaintances. He states that he had approximately 5 - 6 beers of XXXX Gold, over a space of four hours and that his friends were drinking Rum.
20. The Defendant denies that he was intoxicated or that he was loud and aggressive when the security guard asked him to leave. His evidence is that when the security guard tapped him on the shoulder and told him that he should leave, he was compliant and replied that he would just finish his beer and then go. It is then the Defendant says the security officer "assaulted" him by grabbing his wrist and wrestling his beer from him and "stole my

property”. He says the security officer grabbed at his beer and smashed it to the ground. Even after that happened the Defendant says he calmly asked the security officer to call the police and took himself outside to wait for them to arrive. He denies ever using any offensive language inside the Tavern and also denies ever having seen Mr Shaikh, the duty manager, before he gave evidence in Court. The Defendant is also adamant that Mr Shaikh was not present at the time of the incident and that he did not address any words to Mr Shaikh. The Defendant is adamant that the only conversation he had inside the Tavern and outside of the Tavern while waiting for the police was with Mr Lewis and that was to accuse him of stealing his property, demanding a refund and also requesting that the police be called, all in a calm and reasonable manner.

21. Both Frame and Wethers gave evidence about what occurred at the watch house. The Defendant was apparently put into the holding cell and when released from the holding cell, was directed to stand at a particular place and remove his belt and shoes. They both indicate that when the Defendant saw Sergeant Astridge in attendance, he recommenced his abuse of him. He removed his belt violently, threw it down and also threw his boot at Auxiliary Dash. It was after that throwing of the boot that the Defendant was restrained up against the counter and searched again by Astridge and out of that search, a mobile phone was located inside of his underpants.
22. The video footage of the watch house incident was played into evidence and it is noted there was no audio accompanying the video. The video shows the Defendant standing in the allocated place removing his belt with some force and removing one boot which ends up on the floor next to the Auxiliary Dash. It is not clear from the video that the Defendant threw his boot deliberately at the Auxiliary, although it is the evidence of Constable Frame and Constable Wethers that they thought it was a deliberate action given the Defendant’s general demeanour and aggressive behaviour.

23. The evidence of Auxiliary Dash is that he believed the Defendant to have thrown the boot deliberately because he remembers the Defendant “squaring up” to him before throwing the boot. It is clear from the footage that the Auxiliary felt the need to move the box away from the Defendant after he removed his belt. Constable Frame suggested that was to make room just in case the Defendant got out of control and Auxiliary Dash confirmed that to be the reason in his evidence.
24. Auxiliary Freshwater was called and her evidence of what occurred at the watch house accords with the evidence of Auxiliary Dash, although her memory was not as exact as others. She used the IJIS system to put together her statement and to refresh her memory before giving evidence. Most significant of her evidence was that she was of the impression that the Defendant had deliberately thrown the boot at Dash because of his general abusive demeanour and the force at which he threw it. She also gave evidence of having observed the Defendant’s demeanour when being taken to the holding cell as being agitated and abusive, which she concluded showed he was intoxicated.
25. The video footage also shows the Defendant walking from the holding cell in a relatively straight line towards the footprints marked on the floor and placing himself on those footprints. The Defendant then stands with his hands clasped in front of him and proceeds to speak aggressively towards Sergeant Astridge who does appear to be saying something. The evidence of all of the officers and Auxiliaries concerned is that the Defendant was continuing to yell abuse at Sergeant Astridge, whereas the Defendant’s evidence was he was yelling his response “where is what” to several people asking him “where is it?”.
26. The lack of audio on the CCTV footage caused the Defendant some concern and certainly lessens the weight the Court should put on it.

27. It is the evidence of Wethers that he, as the OIC of the investigation, requested the footage from the watch house once he was advised that the matter was not going to be satisfied by an infringement notice and was going to Court. He was advised that Sergeant Astridge had already requested the tape and assumed he had done so because he had dealings with the Defendant before and thought the matter may go further. Astridge stated in his evidence that he ordered the tape from the watch house just in case the matter went beyond the infringement notice as the tapes are deleted after 30 days.
28. When questioned about the lack of audio on the tape, Constable Wethers gave evidence that he made enquires of administration why there was no audio and he was advised that there had been problems with audio during that time. Constable Wethers was not told where the problems lay with audio, whether it was the watch house cameras or the system which downloaded that tape, however he accepted that it had been a technical problem.
29. The Court heard evidence from Auxiliary Oliver who was the officer who physically downloaded the footage onto the DVD tendered in Court. Ms Oliver told the Court that at the time she was learning the system and another officer was teaching her. She remembers receiving the email request and the other officer taking her through the steps to download the particular footage. She says that once the download has occurred, it is now her usual method to check a couple of seconds of the disk to see if the download has worked and label the disk. She cannot remember whether she did that on this occasion and it was the other officer who labelled the disk on this occasion. Ms Oliver did not accept that she should have noticed that the audio was not working because even if she had replayed the disk, it may have been that the section she replayed did not have audio anyway. Ms Oliver did explain that to ensure audio was also downloaded, a particular button marked "audio" had to be checked, but she could not remember

whether she did that on this occasion. It was also Ms Oliver's evidence that it was not unusual for there to be problems with audio, but she was unable to assist as to the technical reasons why this might occur.

30. Analysis of Evidence

I remind myself that to find the Defendant guilty of both charges, I have to be satisfied beyond a reasonable doubt of each of the elements of the offence.

31. It was intimated in the cross-examination of Constable Wethers that the issue of the Defendant's behaviour in and outside of the Tavern could have been clarified with the viewing of security footage of the Tavern, however no footage was produced.

32. Constable Wethers was challenged as to why he hadn't requested the video footage from the Tavern before he did and why he accepted the word of Mr Lewis that there was none when Mr Lewis had been accused of assault by the Defendant. He was referred to his responsibility to make sure evidence is preserved and was accused of not being diligent in his pursuit of that evidence. Until such time that Wethers was made aware of the fact that this matter was not to be dealt with by an infringement notice, it would be impractical and onerous to expect that he should have followed the possibility of footage up from the Tavern. It is not clear from the evidence whether there had been footage and had since been destroyed or whether there just wasn't any security footage and never had been.

33. The Defendant gave evidence that he summonsed the CCTV footage from the Tavern, however no such footage was produced on that summons. The Defendant did not advise what steps he took to further investigate the existence of the footage or whether he had been advised that there was footage available. He gave evidence that a person called "Trish" told him to get the footage, however he did not call "Trish" nor did the defence ask for a warrant to issue for the manager of the Tavern to answer the summons. I

cannot be satisfied beyond a reasonable doubt that any footage ever existed and therefore, can draw no conclusion about the non production of the alleged footage as evidence.

34. The Defence counsel also suggested that both Mr Lewis and Mr Shaikh had reason to lie about what happened on that day because of the allegation of the assault on the Defendant by Mr Lewis. Any allegation of assault was denied by Mr Lewis and even though the Defendant gave evidence of complaining to Constable Wethers of being assaulted by Mr Lewis, Constable Wethers did not give any evidence of that complaint being made to him.
35. There were some inconsistencies between Mr Lewis and Mr Shaikh in their evidence about whether the Defendant had calmed down after leaving the Tavern and when he abused Mr Shaikh, however those inconsistencies are not fatal to the reliability of their evidence and can be explained by the weakness of human memory. They are consistent as to their description of the Defendant's abusive and offensive behaviour and their assessment of his intoxication and the need to remove him from the Tavern.
36. Much was made by the defence of the evidence of Mr Shaikh about where the Defendant actually was, whether in the saloon bar or the public bar, however Mr Shaikh made the appropriate concession that he may have been mistaken where Mr Drew was situated, however it was really of no significance as there was a pool table in both areas and it was possible that Mr Drew was playing pool in the saloon bar prior to Mr Shaikh's attendance. It is also of note that Mr Shaikh gave evidence that he had to walk through the bar area to get to the saloon bar from his office and it is understandable that he may have been mistaken as to the whereabouts of the Defendant. What is relevant is that Mr Shaikh was aware of a loud argument between Mr Lewis when he came out of his office into the public area after having been called to assist. He was also aware of the language

being used by the Defendant and his demeanour and this all corroborates Mr Lewis' evidence.

37. The evidence of both Mr Lewis and Mr Shaikh was given in a straight forward and honest manner. The counsel for the Defendant cross-examined Mr Lewis at length about his observations of the Defendant's behaviour and his memory of what happened, however he was not shaken in cross-examination. He also cross-examined Mr Shaikh mainly about his recollection of where he found Mr Lewis and the Defendant and got some concessions in that cross-examination, but in relation to the demeanour and language used by the Defendant, Mr Shaikh was unshaken.
38. I find that I am unable to believe the Defendant was calm and rational the whole time of the interaction with Mr Lewis, Shaikh and Constable Wethers. He admits he was angry at being asked to leave and angry at the lack of refund for his beer. He had been drinking at the Tavern for about 6 hours (not four as he suggested) and would have the Court believe that he had only had a maximum of six beers in that time because he was winning at Keno.
39. Tellingly he does not even remember the presence of Mr Shaikh at the time of the incident, when it is clear from all other witnesses there that Mr Shaikh was indeed present. That is either an indication of the Defendant's impaired memory of the night because of intoxication or invention. There is no evidence to contradict Mr Shaikh and Mr Lewis' evidence that Mr Shaikh was on duty that night and it is clear that Mr Shaikh was an employee at the Tavern during that period.
40. Even eight months later after the incident, he refers to the spilt beer as having been "my property stolen" and when giving that evidence, his level of anger was clearly elevated. I cannot accept that he requested a refund calmly and civilly. The Defendant's evidence is that he had five - six, perhaps up to eight beers in the period of time he had been in the Tavern and his emotions were high because of some big wins on the Keno. It is highly

unlikely that he accepted an “assault” by the security officer and his “property (being) stolen” calmly and civilly. The Defendant has attempted to down play the effect the alcohol he had drunk had on his behaviour that day and the fact that he clearly lost his temper.

41. To accept the Defendant’s evidence, the Court would have to accept that there had been collusion between Mr Lewis, Mr Shaikh and to some extent, Constables Wethers and Frame as to his level of intoxication that evening. I cannot accept that to be the case. There is no evidence of a personal relationship between those witnesses, or even a common purpose which might have encouraged such collusion and the idea is fanciful.
42. It is of note that Mr Welfare gave evidence that he has seen the Defendant drunk on many occasion during their times together at University and that he had a tendency to become aggressive when drunk. That assessment of the Defendant’s behaviour while intoxicated certainly accords with the witnesses’ observations of him that night at the Tavern.
43. I am satisfied beyond a reasonable doubt that Mr Lewis was correct in his assessment of the Defendant’s intoxication in the Tavern and that when asked to leave, the Defendant became aggressive and abusive.
44. On his own evidence, the Defendant is a regular drinker of alcohol and regularly gets drunk on alcohol. I am satisfied beyond a reasonable doubt that he was drunk on this occasion. I am also satisfied beyond a reasonable doubt that the language being used by the Defendant and the volume and manner in which that language was delivered towards Mr Lewis and Mr Shaikh both inside and outside of the Tavern constituted disorderly conduct and therefore, he must be found guilty of that charge.
45. In relation to the second charge, the Defendant submitted that the DVD evidence of the watch house on that night should not be allowed in because of without audio, it would be unfair to the Defendant. The defence

maintained that the audio would have corroborated the Defendant's evidence. I allowed the tender of the evidence on the basis that the lack of audio is something I would take into account when considering its probative value. It can be argued that the lack of audio is unfortunate for both sides, because it could have corroborated the police officers' evidence or it could have corroborated the Defendant's evidence as to what went on at the watch house.

46. Defence had a further complaint about the reliability of the police evidence because it was a product of collusion and not the police officers' independent memory of what happened.
47. Wethers was cross-examined at length about his knowledge of the contents of other officers' statements and the similarities between some parts of the statements. When he was asked if he could explain the similarities, he gave evidence that the other officers may have referred to his statement on the PROMIS system to help them prepare their statements. His evidence is that he was the first to make a statement and cannot recall when the others had made theirs. He also stated that he did not see a problem with the police officers collaborating in their evidence, given that they attend to so many matters. He confirmed that while he used his notes and the infringement notice to prepare his statement, he was certain that his evidence was his true recollection of what happened on the day. The Constable was honest in his responses and gave consistent answers to persistent cross-examination on this topic.
48. It is not my view that Constable Wethers' use of the infringement notice to prompt his memory of the details of the offending was improper. Police officers are not criticized for use of their notes when preparing their statements. I am not of the view they should be criticized for using infringement notices for the same purpose.

49. It was also put to Constable Wethers that he had reconstructed his evidence regarding the level of intoxication of the Defendant, the search of the Defendant before he was placed in the wagon and his description of what happened in the watch house. Wethers was adamant that his observations of all of those things was from his own memory and by reference to the infringement notice he wrote out at the watch house. He is certain that the search took place and never wavered when he was asked that question several times.
50. Constable Wethers was very patient while the defence counsel spent an inordinate amount of time cross-examining him. He gave his evidence in what seemed to be an honest and straightforward manner. He accepted that his statement, once uploaded to the PROMIS system, was available to any member to view and accepted that it may have been referred to by the other officers. He conceded that the typed version of Mr Lewis' statement prepared by him did have an additional word in it than in the handwritten version - in the description of the Defendant's demeanour, that is the word "very" before the word "angry". He explained the addition as a mistake on his behalf because of his hand writing. The implication the defence counsel made was that Wethers had deliberately doctored the statement to knowing that the typed statement could be used in Court. This is, in my view, a naïve suggestion by defence counsel. Statements are not taken into evidence in summary hearings, oral evidence is adduced. The only use of those statements maybe for the purpose of cross-examination, unless adopted as evidence in chief with consent of the defence, if the additional word was added for the purpose of subterfuge, it is a very crude effort. The typed version of the statement was never signed and could never have been used in Court.
51. In his cross-examination of the police witnesses, defence counsel illustrated the similarities of the wording of the statements and challenged each witness as to their independent memory of the events. Each of the witnesses, except

Wethers and Freshwater, accepted that while they may have seen Wethers' statement and the video footage, their evidence was of their own memory and did not accept that their evidence was influenced by other officers.

52. Any collaboration between police witnesses regarding their statements can only affect the admissibility of that evidence if it can be proved that the probative value of that evidence is so compromised by the collaboration that it should not be admitted into evidence (see *Heanes v Herangi* [2007] 175 A Crim R 175). The Defence tendered the statements of the police officer Wethers, Frame and Astridge as evidence of the collaboration. There are similarities as to some of the content of some of those statements. The similarities went to the description of the Defendant's demeanour when he was first taken into custody, the way he was dressed and the fact that he was searched prior to being placed in the paddy wagon.
53. The oral evidence of the officers was not consistent with their statements in every particular the relevant and material facts were the same. That the Defendant was acting in a way in which they assessed him as intoxicated, that he abused Sergeant Astridge as soon as he saw him and continued to do so in the watch house and that he threw the boot at Auxiliary Dash and that he had to be restrained because he was not complying with requests to remove his property.
54. Defence argue that the evidence of the police was not reliable because they had access to each others statements in preparation of their own and the opportunity to review the footage before giving their evidence. Each officer, except Frame, was asked the question whether their evidence was a reconstruction and as their own memory was so vague and each denied that proposition.
55. Defence argued that the use of the footage to refresh the officers' memory so contaminated their evidence that their evidence as to that incident should not be allowed. He attempted to demonstrate the contamination of the

evidence by pointing out the similarities in the evidence of the officers about how the Defendant was dressed and the use of similar phrases to describe his intoxication. While I accept there are similarities in the police statements, there are also inconsistencies as would be expected given the passage of time. The similarity in language is to be expected from police officers as it is language they commonly use in their duties. I reject the defence submission in this regard.

56. In particular, I found Freshwater to be an honest and straightforward witness and accept her observations of the Defendant as her own. When she gave evidence she had just come off night shift and considering those factors, gave a good account of what she remembered. She did not have access to the PROMIS system, she only had access to her own entries on the IJIS system and therefore, her evidence could not be included in the criticism defence counsel had of the other officers regarding their access to each other's statements.
57. She confirms her observations of the Defendant's intoxication and his aggressive behaviour in the watch house which corroborates the other officers' evidence.
58. The probative value of the footage is compromised by the lack of audio, however the video was allowed because it at least gives the Court evidence of the positioning of where people stood and their physical actions.
59. The Defendant criticized Constable Frame's evidence because in her oral evidence, she couldn't remember whether he had sat on the bench to remove his boots or whether he was standing. Constable Frame's uncertainty is an indicator of the honesty of her evidence she couldn't remember whether the Defendant was standing or sitting, even though he was clearly standing in the video footage. However, her evidence of the Defendant's intoxication and aggressiveness is consistent with the other officers.

60. The evidence of Sergeant Astridge was not completely consistent with the evidence of Frame and Wethers as to interaction between the parties at the Karama Tavern. His evidence accords with them about his attendance as a supervisor and the fact that he stood aside just to observe, he also gives evidence that upon the Defendant observing his presence, the Defendant became loud and aggressive swearing at him. He states that he assisted in the arrest of the Defendant, but that Constable Wethers was the one who decided to put the Defendant under protective custody. His observations of the Defendant were that he couldn't stand still and was loud and aggressive, therefore he came to the conclusion, as did Wethers, that the Defendant was intoxicated.
61. Astridge's oral evidence is that there was no search undertaken of the Defendant before placing him into the paddy wagon and that sometimes such a search is not done in a public place to preserve the dignity of the person being placed into protective custody. He further stated that he knew the Defendant through previous dealings and did not believe him to be a person to carry a weapon or to attempt self harm. However, Astridge's written statement confirms the search. When asked why Wethers and Frame gave evidence of a search, Astridge could not give an explanation and did not change his evidence. Astridge was not referred to his own statement and asked to explain the discrepancy.
62. In a relatively short cross-examination, Astridge conceded that he used the PROMIS system to refresh his memory regarding this incident and accepted that he would not have known the actual words uttered by the Defendant had he not referred to the PROMIS system, however he was adamant that his evidence was his actual recollection of what was said and done on that day and certainly that he remembers the Defendant's immediate aggressive behaviour towards him at Karama and then later at the watch house.

63. He also accepted that he may have referred to Constable Wethers' statement when preparing his statement, but confirmed that his evidence, as given in the witness box, was his own observation and recollection of what happened on the day. Sergeant Astridge was also unshaken in cross-examination. When asked why Constable Wethers and Frame gave evidence of him searching the Defendant prior to being placed into the paddy wagon when he was certain the search did not occur, Astridge did not try and give a reason or explain the discrepancy and he did not try and make up some explanation. His inability or unwillingness to provide an explanation does cast some doubt on the reliability of his evidence. However this does not affect the reliability of the evidence of others.
64. The Defendant denies any offensive language or loud behaviour outside of the Tavern. The Defendant accepts that he was annoyed that Sergeant Astridge had turned up and that he thought to himself "here we go again", however he denies ever swearing at Sergeant Astridge using the phrases "fucking member" "fucking Astridge".
65. Constable Wethers' and Frames' evidence is that the Defendant swore at Astridge as soon as he arrived and the actual words he used "fucking member" "fucking Astridge" and that evidence is corroborated by the evidence of Mr Lewis and Mr Shaikh. There is no suggestion that Mr Lewis and Mr Shaikh had access to the PROMIS system and police officers' statements when they made their statements, yet Lewis and Shaikh both gave evidence that the Defendant was swearing and kicking in at the door of the cage when he was being put into the wagon. Again, there is no evidence of collusion or motive for collusion between Lewis, Shaikh, Wethers and Frame and any suggestion of either is fanciful.
66. It is the Defendant's evidence that he remained calm at the watch house and that the footage shows him to be steady on his feet and compliant. He says that as soon as he entered the watch house, he was yelled at by all officers

and auxiliaries present asking “where is it?” several times, to which he answers “where is what?”. Amongst all of that yelling he explains he may not have heard Auxiliary Dash’s requests to remove his belt and shoes.

67. The Defendant denies throwing his boot at Dash and says that he had difficulty removing the boot and it accidentally slipped from his hand towards Dash. He says he apologised, then picked up the boot and put it into the box.
68. The Defendant states that he was then manhandled to the counter, roughly searched, his property removed and he was placed in the cell until he was released to Mr Welfare. The video footage certainly confirms the restraint of the Defendant, however that is after the alleged offence and therefore, has little relevance except to support the view that the officers clearly thought that restraint was necessary.
69. I accept that the video footage shows the Defendant to be standing, without unbalancing and without the evidence of the police officers who were present at the time the boot “throwing”, is not clearly deliberate. However when considered together with the oral evidence of all officers, and particularly Auxiliary Freshwater, who did not have access to the footage or other officers’ statements before giving her evidence and the aggressive action in which the Defendant removed his belt, there can be little doubt that the Defendant’s version of events cannot be believed. The footage also clearly shows the Defendant shouting in the direction of Sergeant Astridge.
70. Mr Welfare gave evidence on behalf of the Defendant confirming he had received a call from the Defendant from the back of the paddy wagon requesting his assistance. He was not asked to repeat what the Defendant said to him, so he did not corroborate the Defendant’s evidence about what was said. Mr Welfare says he often got calls for assistance at the watch house. Mr Welfare agreed that the Defendant was a friend, but not a close

friend and that while they saw each other more regularly while studying together, they only saw each other on occasion now.

71. On that day, Mr Welfare said that he had been drinking at home and that when he received the call he decided it was not prudent to drive so he enlisted the help of Mr McMaster to drive him to the watch house to help Mr Drew out. It is not clear from the evidence of either Mr Drew or Mr Welfare the capacity in which Mr Welfare attended on that day. What is clear is that Mr Welfare's practice is presently retained by Mr Drew to represent him in his defence of this matter and that Mr Welfare has had some conferences with his employee, Mr Mathews about the defence of these charges strategies in that defence as well as what witnesses to require and call. I have to take Mr Welfare's evidence in light of his role in Mr Drew's defence and also in light of the fact that he himself had been drinking on that night.
72. Mr Welfare stated that even though he had been drinking and even though he thought it prudent not to drive, he was able to assess the sobriety or otherwise of the Defendant. Mr Welfare says he observed the Defendant walk out into the reception area, to Mr McMaster's car just down the street and spoke with him on the drive out to the Airport Hotel and to Mr Drew's address in Alawa. He also says that he has previously observed Mr Drew while intoxicated and that he "usually got angry" and he wasn't in that state on this occasion. It was Mr Welfare's opinion that Mr Drew was not drunk at the time he was picked up from the watch house but that he "wanted to get drunk" and that is why they drove him home via the Airport Hotel where Mr Drew purchased a carton of beer to take home.
73. I also heard from Mr McMaster who said he was a little irritated by Mr Welfare's request for assistance because he was in the middle of exams. His evidence is of little probative value except to confirm Mr Welfare's evidence of the reason he became involved and to confirm that Mr Drew was desperate for more alcohol that they stopped at two bottle shops on the way

to drop Mr Drew home. Mr McMaster gave the opinion that while Mr Drew had clearly been drinking he was not drunk in his opinion. Mr McMaster believes he can tell when someone is drunk because when he was growing up his father used to drink a lot. With respect to Mr McMaster his observations of his father may not necessarily apply to Mr Drew given the reaction to alcohol of an alcoholic is different to that of someone who may not be an alcoholic. Mr McMaster would also have been concentrating on driving and therefore his observations of Mr Drew's sobriety or otherwise were limited.

74. The evidence of the sobriety or otherwise of the Defendant when collected by Mr Welfare and Mr McMaster must be considered in light of the fact that it had been about an hour to an hour and a half passed from the time the Defendant had been asked to leave the Tavern to the time he was released to Mr Welfare. In that time he had not consumed any alcohol. Defence counsel submitted that I should take judicial notice of the "fact" that a person's intoxication levels rise after time (he did not qualify this statement in reference to type of alcohol or time of last drink). This is not something I can take judicial notice of, there are many different factors which affect a person's level of intoxication not in the least, what beverage he was drinking (cold or hot), whether he had in fact already reached a certain level of intoxication and within that hour/hour and a half and may have in fact been going down in level of intoxication, the temperature of the beverage, whether he had eaten during his consumption and other factors which may have effected the absorption of alcohol and intoxication etc. These are matters for expert evidence and not for judicial notice and I was not provided with that expert evidence.

75. Even if the Defendant was not severely intoxicated at the time of his apprehension under section 128 and therefore not lawfully taken into custody, which is not accepted, it is not my view that the *Bunnings v Cross* discretion would be exercised in favour of the Defendant. The evidence is

that he became aggressive and abusive when he saw Sergeant Astridge arrive at the Karama Tavern and again at the watch house. He admits he has a real dislike of Astridge and it was clearly evident that even just the thought of Sergeant Astridge made the Defendant angry when giving his evidence.

76. If Mr Lewis, Mr Shaikh, Constable Wethers and Constable Frame are to be believed, the escalation of the Defendant's behaviour was caused by the presence of Sergeant Astridge, not his subsequent apprehension under section 128.
77. It is clear from the evidence of Astridge and the Defendant that they have had dealings with each other and that the Defendant does not hold Astridge in high regard as a police officer. The Defendant boasted in his evidence in chief about having "beaten Astridge in Court before and going to do it again". He confirmed he called Astridge a "member" because he does not believe Sergeant Astridge is a fit person to be a police officer.
78. Given the Defendant's vehement dislike of Sergeant Astridge displayed when he was giving his evidence, I am satisfied beyond a reasonable doubt that he did act in the way described by the witnesses calling Sergeant Astridge a "fucking member" and similar terms and that it is highly unlikely that he would have addressed him as "Astridge me old mate".
79. It is also evident that the escalation of the Defendant's behaviour, the Defendant's inability to stand still and the reason for the call out gave Constable Wethers reasonable grounds to believe that the Defendant was seriously affected by alcohol, necessitating the apprehension under section 128. In those circumstances, I do not accept that Constable Wethers or Sergeant Astridge acted unlawfully or that their actions caused the commission of the offence of which the Defendant is accused of that is the disorderly conduct in the Police Station.

80. Given the corroboration by Lewis and Shaikh of the Defendant's behaviour once Sergeant Astridge arrived and upon his "arrest", I am satisfied beyond a reasonable doubt that the Defendant's bad behaviour continued outside of the Tavern and that continued behaviour gave Constable Wethers reasonable grounds to believe that the Defendant was intoxicated. Therefore the *Bunnings v Cross* situation does not arise in these circumstances.
81. Given all of the above, I am satisfied that the apprehension of the Defendant was lawful and that the evidence of the police officers of his conduct within the watch house can be relied upon. I do not accept the Defendant's explanation of his behaviour in the watch house and for reasons previously explained, I find that the Defendant continued to rant and rave at Sergeant Astridge at the watch house, although I cannot be satisfied beyond a reasonable doubt that he intentionally threw his boot at Auxiliary Dash. Nevertheless, these findings support the finding of guilt on charge 2.
82. I will hear the parties on sentence.

Dated this 17th day of July 2008.

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE