

CITATION: *Balchin v Bowman* [2010] NTMC 003

PARTIES: VIVIEN BALCHIN

v

MARQUICE SMITH BOWMAN

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Darwin

FILE NO(s): 20929896

DELIVERED ON: 18 January 2010

DELIVERED AT: Darwin

HEARING DATE(s): 23, 24 November 2009 & 15 January 2010

JUDGMENT OF: Ms Melanie Little SM

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Prosecution: Ms Nobbs  
Defendant: Mr Lee

*Solicitors:*

Prosecution: Summary Prosecutions  
Defendant: Mr Cook, Royal Australian Navy

Judgment category classification: C  
Judgment ID number: [2010] NTMC 003  
Number of paragraphs: 52

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

No. 20929896

*[2010] NTMC 003*

BETWEEN:

**VIVIENE LYNETTE BALCHIN**  
Plaintiff

AND:

**MARQUICE SMITH BOWMAN**  
Defendant

REASONS FOR DECISION

(Delivered 18 January 2010)

Ms Melanie Little SM:

1. The defendant is charged with two counts. Count 1 is that on 5 September 2009 at Darwin he did unlawfully assault Joshua Streeter, a Police Officer in the execution of his duty and there was a circumstance of aggravation, namely that Joshua Streeter did suffer harm, contrary to s 189A(2)(a) of the *Criminal Code (NT)*. Count 2 is that on the same date and at the same place he did resist a member of the Police force in the execution of his duty, contrary to s 158 of the *Police Administration Act*.
2. The Court was told that the charges arose in the context of a melee on Mitchell Street in Darwin city at approximately 4.00am on 5 September 2009. The Concise Oxford Dictionary definition of melee is a 'mixed fight or skirmish'. After hearing evidence in the case, I think the word melee has a tendency to trivialise what was occurring on the night in

question. The word riot is defined in the Concise Oxford Dictionary as ‘disorder, tumult, disturbance of the peace, outbreak of lawlessness on the part of a crowd’ and that probably more accurately describes what, on everyone’s version of events, was occurring that night. Whatever word is used, Mitchell Street, the road and footpath area outside of Discovery Nightclub and up to Mott Court was the scene of a very critical incident on the night in question. Estimates of numbers varied but at one point in the melee or riot it is said that up to 300 people were involved. Those people were male and they were charged with alcohol. What had started in Discovery Nightclub erupted when the patrons were outside.

3. Prior to evidence being taken, the Court was advised that the particulars with respect to count 2 were that having struck Officer Streeter, the defendant fled and was pursued by four Police Officers, including Officer Streeter. The defendant is said to have resisted by struggling, thrashing his arms and legs around and kicking the police. The Court was told that identification was not contested and the fact the defendant struck someone was not in issue. Notwithstanding those statements, the evidence must establish those matters beyond reasonable doubt.
4. The defendant pleaded not guilty and a hearing was conducted. I reserved decision after submissions. Prosecution bears the onus of proving each and every element of each of the offences beyond reasonable doubt and if they do not do so, the defendant is entitled to be found not guilty. If there are any matters raised on the evidence which are to be negated, they are to be negated by prosecutions. If not negated, the defendant will be found not guilty.
5. Oral evidence was taken from numerous witnesses and there was some documentary evidence. The majority of witnesses marked a plan which was a small section of Mitchell Street where the incident occurred.

Each witness had the same cross-section of the street marked with relevant premises. Witnesses made markings as to the locations of persons, vehicles, and where they say incidents occurred on their plan with an 'x' mark – each x was given a reference such as xA, xB, xC. It was agreed that the plan was not to scale. An aerial photograph of the region was also tendered to show that the blocks between Briggs Street and Mott Court and Mott Court and Peel Street were the same distance (the plan does not suggest that). The plans proved to be extremely useful. A blank copy of the plan has been scanned to the end of this decision. While I accept that without the individual exhibits, the summary of the evidence has its limitations, I think that the blank plan does help in understanding the evidence and this decision.

6. All admitted evidence has been taken into account in coming to this decision. I will refer to directly relevant admitted evidence in this decision.
7. I do not take into account any other material in the making of this decision. In particular, I did not read the document entitled “Application to consider the withdrawal of a Charge and the Transfer of Jurisdiction to the United States Marine Corps – Courts - Martial Jurisdiction – In the matters of Jackson and Bowman” which is contained in this file and which I assume was handed up when an application was made to the Chief Magistrate to transfer the charges to the United States Military Jurisdiction. From the file cover I am able to ascertain that that application was made and declined on 29 September 2009.
8. On 15 January 2010 I advised the parties as follows “On the 25<sup>th</sup> November 2009, the day after the second hearing day in this matter, I was travelling by plane to Sydney. Major Western was seated across the aisle from me. He introduced himself and explained his role in

these proceedings, that he was observing the hearing and reporting on primarily procedural issues. We talked about a range of subjects for a considerable period of time. I do not consider that anything was said which would affect my ability to decide this case – but raise this chance encounter to ensure all parties are aware. Since the last hearing date, on two occasions I have attended the Mitchell Street area where the events the subject of this charge occurred. I did not go to that location intentionally and both times it was not until I was there that I recalled that this was the area of the incident. Both times I was going to the Cinema complex in daylight hours. I did not undertake a site visit. Once again, I raise this so all parties are aware. I will hear from the parties if they wish to raise anything matters arising.” Major Western is a Staff Judge Advocate based at the US Embassy in Canberra. He was tasked to monitor this hearing and report on the outcome. Prosecution sought details as to how it came to be that I was speaking with Major Western. This was outlined and there were no other matters arising.

9. Also at the beginning of the day on 15 January 2010 defence applied to have some Police Officers recalled for further cross-examination. It was said that a United States Officer witnessed a group of Police witnesses in this case standing around the electronic whiteboard (which contained the plan of the street) in the Court foyer and talking with an instructing officer from prosecutions (not counsel), before evidence had been given. There was some suggestion that there was discussion about the fact that one of the Police Officer’s name was the same as one of the licensed establishments and discussion about whether the name on the plan was the officer’s name or whether it was the name of the establishment (Fox). Defence sought to recall Officers Streeter and Kren to explore what was said. Over objection from prosecution, I granted leave for further cross-examination on that point. Officer Streeter provided a sickness certificate and no application was made to

adjourn for him to attend. Officer Kren was further cross-examined. He could not recall that occasion. He believed he may have had a briefing about the plan on the whiteboard when talking with prosecutors in the prosecutors building. He was then released and this matter was not taken any further.

### **Count 1**

10. I will deal with count 1, the assault Police charge first. I found all of the prosecution witnesses credible and reliable witnesses with respect to the assault Police charge. Having said that the prosecution case on that charge does not hinge on credit issues.
11. The defendant is a Lance Corporal with the United States Marines. At the relevant date he was 19 years of age, he is now 20 years of age. He is six foot one inch tall and is fit and strongly built. He gave evidence he is not trained in hand to hand combat. Further he is not trained with respect to capsicum spray (or pepper spray as he referred to at times) and he has had no experience with capsicum spray. He did some boxing when he was in 8<sup>th</sup> and 9<sup>th</sup> grade school. He is based in Twenty-nine Palms California and has been in the Marines since 2007. His evidence is that he does not normally drink alcohol and when he does he drinks limited quantities.
12. The defendant is in the 1<sup>st</sup> Tank Battalion Alpha Company and he arrived in Darwin with his Company in late August or early September 2009 to undertake operation Gold Eagle in conjunction with the Australian Army. Approximately 90 - 100 US Marines took part in the operation. The US Marines were based at Robertson Barracks in outer Darwin and were given leave on the night in question. They had been in Darwin just under a week. Many of them chose to come into Darwin city on that evening and spend time in the Mitchell Street precinct, visiting bars, restaurants and clubs. This was the first time they had left

Robertson Barracks since they had arrived. The US Marines went out in groups of four, to ensure safety and accountability. One Marine has to be more responsible than the rest in each group. That is something they abide by – it is not a policy. They were also briefed on the need to be of good behaviour when out on leave.

13. Sergeant Medina is a Tank Commander with the United States Marines and the defendant has been a Junior Marine in his Company for nearly three years. He also knows him through sporting activities. Sergeant Medina was also in Darwin City on the night in question. He gave evidence in the defence case.
14. The events the subjects of the assault Police charge are not significantly in dispute. Findings I make from the evidence of matters leading up to the assault are as follows. The events arose around closing time at Discovery Nightclub on Mitchell Street Darwin at approximately 4.00am. Mitchell Street is a roadway open to the public and cars can travel both ways down the road. Discovery Nightclub is a premises licensed to serve alcohol. As persons were leaving, there was antagonism as between separate groups of people. There was no evidence in the prosecution case as to the cause of that antagonism. The defence case sheds some light on that issue, though by no means explains the speed and size of the melee. The people were reported to be males of various nationalities. The prosecution evidence suggested that there were three main groups of people – United States Marines, Australian Defence Force personnel and local males including some Indigenous males. The defence evidence added a fourth (smaller) group of people – a man who appeared Samoan who was with a group of six or seven other males.
15. The prosecution evidence does not suggest that all these groups were acting in unison, although there was a pattern of the separate groups

who were, to use a colloquial expression, 'backing their own'. Incidents were initially occurring inside Discovery. Fighting as between these groups erupted as they spilled out onto Mitchell Street. Initially Security Officers on Mitchell Street attempted to separate the groups. Police Officers arrived promptly in Police vehicles – caged vans and sedans – arriving from both ends of Mitchell Street. They arrived within a few minutes of each other. Officer Streeter was one of the first Police Officers to arrive at the scene. The Court heard from the majority of the Police who attended – some 10 Police Officers. While the Police Officers were trained, had communications open and were equipped, the Police were greatly outnumbered. Police cars were parked at various points on the road.

16. When Police first arrived, it was apparent that Security Officers present were in extreme difficulty. The Police sought to assist the Security Officers, while at the same time, trying to separate the groups of fighting males and stop the fighting. There was in effect a series of rolling fights going along Mitchell Street, heading towards the Peel Street area. Countless uncharged acts were occurring. There is little or no likelihood of these being investigated. Police numbers increased and they were all actively engaged in trying to separate the groups and resolve the fighting. As a consequence of the numbers and the actions of those on the road, the road was effectively blocked and cars could not travel down either carriage way. While there were some spectators, the majority of the people on the road area were actively engaged in either fighting or defending themselves. A few people were arrested and placed into the back of the caged police vehicles. Up to 300 people were involved, though I do not suggest that that number were protagonists.
17. As part of the efforts to diffuse the situation, capsicum spray was being used by the Police. Some witnesses attested to the effects of the



capsicum spray being greater than others. There is evidence that quite a lot of capsicum spray was used. References were made to large and small canisters, including the large XC9 canisters which were often referred to as 'party packs'. Near the end of the situation some of the United States Marines were loosely gathered in the Mott Court area, after being directed to that area by people in their direct authority. Fights erupted at the back of Mott Court when some of the other males ran around the back of Mott Court. People slowly began dispersing. Smaller groups of people continued fighting in various locations. A number of the witnesses described these fights as "spot fires". The circumstances on Mitchell Street were extremely challenging to both the Police and Security Officers. While being greatly outnumbered, they were ultimately able to disperse the participants without significant injuries or repercussions. That is to their credit.

18. The allegations with respect to the assault on Officer Streeter occurred during this melee or riot. I find Officer Streeter was a Police Officer within the meaning of the *Criminal Code* which defines Police Officer as a member of the Police Force (s 1 *Criminal Code*). He was part of the City Safe Unit based in the Mitchell Street area. Officer Streeter had been actively engaged in seeking to stop the disturbance for some time. I find he was acting in the execution of his duty as a Police Officer.
19. I find that Officer Streeter was standing near a Police vehicle. I find he turned around and, after taking 2 or 3 steps, he was struck to the head. This strike caused him to fall to his knees and he braced himself with his hands. I find that a clenched fist was used to punch Officer Streeter to the back of his head. Officer Streeter was wearing his full Northern Territory Police uniform with belt and equipment at the time he was struck.

20. It is charged that the defendant unlawfully assaulted Officer Streeter. Assault is defined in s 187 of the *Criminal Code (NT)* as follows:

In this Code *assault* means:

(a) the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of harm or by means of false and fraudulent representations as to the nature of the act or by personation; or ...

other than the application of force:

(c) when rescuing or resuscitating a person or when giving any medical treatment or first aid reasonably needed by the person to whom it is given or when restraining a person who needs to be restrained for his own protection or benefit or when attempting to do any such act;

(d) in the course of a sporting activity where the force used is not in contravention of the rules of the game; or

(e) that is used for and is reasonably needed for the common intercourse of life.

21. I find there was a direct application of force to Officer Streeter and that this application of force was without his consent. As regards the definition of assault, the application of force did not fall within any of the provisos in ss (c), (d) or (e) of s 187 of the *Criminal Code*. I find that Officer Streeter was assaulted within the meaning of s 187(a) of the *Criminal Code*. I find that the assault was by way of a punch to the back of Officer Streeter's head.
22. Officer Streeter did not see who inflicted the blow. After the blow he turned and he saw a large Afro-American male. The defendant fits that description. There were eye-witnesses to the blow and Police immediately pursued and apprehended the person who they say inflicted the blow. The defendant was the person apprehended immediately after the assault and very close to the scene. The defendant has never

disputed he was the person who struck the head of Officer Streeter. I find that the defendant was the person who struck the head of Officer Streeter, and that he used a clenched fist.

23. An assault has been proven. The next question is whether the assault was an unlawful assault. Unlawfully means without authorisation, justification or excuse (s 1 *Criminal Code*). If any of these matters are raised on the evidence, they are to be negated by prosecution.
24. Defensive conduct is contained within the justification provisions of the *Criminal Code*. Defensive conduct was raised on the evidence and is to be negated by the prosecution or else the defendant will be found not guilty. Section 29 of the *Criminal Code* reads:

#### 29 Defensive conduct justified

(1) Defensive conduct is justified and a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event.

(2) A person engages in defensive conduct only if:

(a) the person believes that the conduct is necessary:

(i) to defend himself or herself or another person;

(ii) to prevent or terminate the unlawful deprivation of his or her or another person's personal liberty;

(iii) to protect property in the person's possession or control from unlawful appropriation, destruction, damage or interference;

(iv) to prevent trespass to land or premises occupied by or in the control of the person;

(v) to remove a trespasser from land or premises occupied by or in the control of the person; or

(vi) to assist a person in possession or control of property to protect that property or to assist a person occupying or in control of land or

premises to prevent trespass to or remove a trespasser from that land or premises; and

(b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.

(3) A person does not engage in defensive conduct if the conduct involves the use of force intended to cause death or serious harm:

(a) to protect property; or

(b) to prevent trespass or remove a trespasser.

(4) For the purposes of subsections (2) and (3), a person trespasses if he or she enters or remains on land or premises:

(a) with intent to commit an offence; or

(b) in circumstances where the entry on to or remaining on the land or premises constitutes an offence.

(5) A person does not engage in defensive conduct if:

(a) he or she is responding to the lawful conduct of another person; and

(b) he or she knows that the other person's conduct is lawful.

(6) Nothing in subsection (5) is to be taken to prevent a person from engaging in defensive conduct in circumstances where the other person's conduct is lawful merely because he or she would be excused from criminal responsibility for that conduct.

(7) Sections 31 and 32 do not apply in relation to defensive conduct.

25. It is accepted that there is a subjective and an objective aspect to defensive conduct. The person must believe the conduct is necessary. The conduct must be a reasonable response in the circumstances as the person reasonably perceives them. Defensive conduct was raised on the evidence.

26. The defendant was an impressive witness. He was responsive to questioning. He gave detailed evidence and was not shaken on cross-

examination. He was frank as to his actions and did not seek to down play his role or embellish his account of events. I find he was a credible and reliable witness. I reject his evidence as to which side of the road he was on just before the assault. The rest of the evidence is either accepted or not rejected. Such was the chaos on Mitchell Street that night, much of his evidence was not the subject of evidence from prosecution. He and his companions were simply some of the people on the street. Sergeant Medina was also an impressive witness. I find his evidence was credible and reliable.

27. There is no prosecution evidence as to the defendant's state of sobriety or otherwise. After his arrest Police had close contact with him. There was no suggestion by any Police witnesses that the defendant was intoxicated. I accept the defendant's evidence as to how much he had to drink and his state of intoxication. I accept that he had no alcohol before leaving Robertson Barracks. After he finished work he had a sleep. Then he ate food both before leaving the Barracks and then again in Mitchell Street. He had soft drinks and water to drink. With respect to alcohol consumption, I find that the defendant had two beers and one shot of Hennessy brandy from the time he was in Mitchell Street that is from approximately 11.30pm to 4.00am. From the time he entered Discovery (approximately 1.00am), I find the only alcohol he had consumed was the shot of Hennessy brandy. After he left Discovery he had a quick snack. I find the defendant was not affected by alcohol to any relevant degree at the time of the incident.
28. While defence submitted that the defendant could have been said to be acting to defend himself as well as defending another person or persons, I find that the evidence does not specifically raise defence of another at the relevant time. It is accepted that the defendant had acted in defence of another person, namely Sergeant Medina, shortly before the incident the subject of this charge. I do not need to consider

whether that act was excessive in the circumstances. But it is part of the background to the incident.

29. It was night-time and there was some artificial street lighting. While I am not suggesting it was dark, the lighting would not have been as good as day-time. That is a factor to consider when making findings of fact. I do not have specific evidence as to the lighting in the vicinity of Officer Streeter before he was hit. Suffice to say that Officers Fox and Kren and Mr Thrupp were able to recognise that it was Officer Streeter who was hit.
30. The aerial photograph P17 assists the Court with distances on the road. Cars parked and apparently travelling along Mitchell Street are shown in the middle of the photograph. They show that Mitchell Street is wide enough to allow two cars to park (one on either side of the road) and two cars to travel on the road with adequate distance in between. In total the road width would be approximately the width of five cars.
31. Not all of the prosecution witnesses at the hearing witnessed the assault upon Officer Streeter. I will now summarise the prosecution evidence with respect to eye-witness accounts of the assault. I have already set out the evidence of Officer Streeter as to what occurred. I will not repeat that.
32. Constable Andrew Kren was working with Officer Streeter on the night in question. From the side of his vision, he saw a male punch Officer Streeter to the back of Officer Streeter's head. The witness was close to Officer Streeter, to the right of Officer Streeter. He saw Officer Streeter go to his knees and saw a male run. He was one of the Police Officers who then chased the male. He marked Officer Streeter at point J on his map, which is a quite small marking on the plan (P5). His evidence is that Officer Streeter was in the middle of the road, near the Mott Court turn-off. He said there were two Police cars, marked at

positions G and H. Officer Streeter is located between the locations of these two Police cars. He marks himself at position I, which is not a great distance from the Police vehicles.

33. The next eye-witness was Acting Sergeant Fox. He was approximately 10 – 15 metres from Officer Streeter and marked his position as E on his plan which became Exhibit P6. He was looking in the direction of Officer Streeter. Officer Streeter was in position F. There was a Police car marked at point D, parked in the middle of the road near Mott Court. Officer Streeter was located approximately two metres from the Police car, on the side of the car nearest the defendant. He saw the defendant run at an angle from the footpath on the Carinya flats side and all of a sudden, from the hip he drove straight into the head of Officer Streeter. The defendant then ran across the road in the direction of the witness and the witness attempted to apprehend him. He apprehended the defendant at position G on the plan.
34. The next eye-witness is Matthew Thrupp, a Security Officer. He marked a plan which became Exhibit P10. As a result of his work in the Mitchell Street area, he knew Officer Streeter personally, calling him Josh. He marked the position of Officer Streeter as position J, somewhat further away from the Mott Court area, but still on Mitchell Street. He marked the Police vehicle as point K and Officer Streeter's position as quite close to the Police vehicle. He saw Officer Streeter looking into the back of the vehicle and then as the Officer was bringing his head out of the vehicle, he saw a male come from the footpath area (marked location L). The man took a few steps and hit Officer Streeter to the right side of the face, top of the head area. He indicated the temple area. This caused the Officer to collapse and the man ran down Mitchell Street. He showed the area where the man ran, being chased by three Police Officers. Mr Thrupp described the man in position L as Afro-American, stocky but strong built and a bit shorter

than the witness. There were no other persons around Officer Streeter at the time. In particular, he did not see any other Police Officers around. He saw Officer Fox afterwards. He marked two other Police vehicles in the area being positions H and G. He believed that the person at position L took maybe four or five steps to get to Officer Streeter and took those steps in 'a bit of a jog and big king swing'. He described the steps as 'like a crows hop' and then he stood up and demonstrated the action. The movement demonstrated was a sideways movement of several steps, then putting weight to the other side of the body and then punching out. Evidence as important as this would be best videoed but as it transpires, we have no practice of recording evidence in this way. The witness was approximately four metres from Officer Streeter.

35. Witness David Cooper is also a Security Officer. He marked a plan which became Exhibit P11. He saw a Police Officer on the ground, but did not see who had hit him. He marked a circle where the Police Officer was hit. He could not recall if the Police Officer was near a Police van. The witness himself was assaulted in the melee. His main concern when seeing a Police Officer down was the fact that the Officer had his belt on and someone could have grabbed something from the belt.
36. Exhibit P9 is a medical summary from the Emergency Department of Royal Darwin Hospital dated 5 September 2009. The defendant had attended the Emergency Department of the Royal Darwin Hospital later in the day in question (arriving 2.00pm and being seen at 3.10pm). He was reviewed and it is reported that he had a boxer's fracture to the fourth metacarpal on his right (dominant) hand. He was treated and discharged. The metacarpals are the bones in the hand which join the fingers to the wrist. It is not in dispute that the defendant came into contact with Officer Streeter's head with his right clenched fist. The



fracture to his right hand could indicate the strength of the blow, the hardness of the area which he came into contact with or a combination of both. Alternatively, the injury could have occurred at the time of his arrest. It is reported by Dr Elsey in P9 that he attended emergency after being involved in a fight. There is no suggestion in that report that he mentioned the fact of the arrest. The defendant's evidence was that he did not know when he was injured. It is my view that the more likely scenario is that he was injured when he struck Officer Streeter's head.

37. Sergeant Gray gave evidence as to the charging of the defendant. At 10.00am on the morning of 5 September 2009 (some six hours after the incident), he charged the defendant with offences of assault Police and resist Police. The defendant was then cautioned in the following terms "you are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence, do you wish to say anything?" In answer, the defendant said "I didn't know I hit an Officer". That statement was recorded on the charge sheet which became exhibit P14. In cross-examination, Sergeant Gray said the defendant made the same comments some five minutes later.
38. The defendant was not offered a record of interview. He did not have the opportunity to consider whether he wished to give a record of interview, setting out his version of events. His evidence is that he made it clear he did not know he hit a Police Officer as soon as he became aware he had hit a Police Officer, which is at the point of being hand-cuffed when he was told by the arresting officer.
39. The defendant gave evidence that he had been in Discovery dancing and enjoying himself. There had been some trouble in the club directed towards the Marines. As far as the defendant knows that trouble had been started by a large Samoan man and his group. He was bumped by

the Samoan man on the way to the toilets. When he was back he saw the man and his group of six or seven men arguing with other Marines. He heard a lot of cursing words. He went back to dancing and then another Marine was bumped by the Samoan man. Security in the club asked people to disperse. This was near to closing time. The defendant went out, got something to eat and then wanted to get back to Barracks. He was with Sergeant Medina and some other Marines while getting a snack. Beer bottles and bricks were then being thrown and they were keen to get back to Barracks. He was following directions of Sergeant Medina and they intended to move towards the taxi stand. Sergeant Medina became engaged in an argument with a large Samoan man (who in cross-examination he conceded may not have been the same one from Discovery who had been causing the problems inside the Nightclub) and both were exchanging curse words. Sergeant Medina was then punched by this man, causing the Sergeant to fall backwards. While the Sergeant was still on the ground the defendant punched the man who had hit Sergeant Medina. He helped Sergeant Medina up and for awhile assisted him walking.

40. As he had turned a big cloud of pepper spray affected the defendant - it immediately burned his eyes and he could not see. His evidence was that a 'glob' got into his eyes. After that he could not see properly, he was seeing blurs, shapes and lights. Sergeant Medina was leaning on his shoulder. He kept walking and then he saw a flash movement and he swung. This was a quick motion and it was a blur. He thought it was the Samoan man. He hit a person who he now knows is Officer Streeter. He thought he hit the person about 30 - 40 seconds after he picked up Sergeant Medina. He demonstrated in Court that he turned his head and body and swung out with a clenched right fist, his right arm out at shoulder level. Sergeant Medina was on his left side and the flash motion was from his left side. He turned and saw three shapes running

after him and he ran. His plan is marked D19. He marked the position where he struck someone as on the cinema side of Mitchell Street, position D on his plan. He agreed in cross-examination that he did not know the person he hit was not a Marine – he said he took a chance as to who he was striking out at. He felt threatened by the blur and wanted to get away. He used a clenched fist but did not put that much power into the hit. He first heard he had hit a Police Officer when he was being handcuffed and he said sorry straight away. He denied he knew he had hit a Police Officer.

41. Sergeant Michael Medina then gave evidence. He was an eye-witness to the assault by the defendant upon the Police Officer. He places the incident on the same side of the road as prosecution witnesses. He had been assaulted shortly before, but was able to give a coherent and comprehensive account of what he witnessed. The group who been making trouble in Discovery came out and Sergeant Medina was not able to avoid them. The defendant was with him at this time. A group was throwing beer bottles and rocks towards them. Sergeant Medina is 6 foot 4 inches. He went over to one of the men, a male who was taller than he was, to ask why they were doing this. The larger man became hostile and put his hands up to fight. Sergeant Medina put his hands out, indicating he did not want to fight. Some other Marines came up to him at that point and he said for them to go and get a cab. As he turned he was hit to his right eye. The defendant had been with the other Marines and the defendant came back and then hit the man who had hit Sergeant Medina. The defendant then helped Sergeant Medina to his feet and for some time they were walking with one arm around each other. They were heading towards Shenannigans (towards Peel Street). Sergeant Medina described the situation at that time as chaos with people running around, people hitting people, people shouting and cursing. He was trying to get the Marines moving, saying that they

needed to leave. Police arrived with spray and he was sprayed. He felt the burn from the spray but could see. He and the defendant had split up. One of the defendant's friends was on the ground and being hit, another person was being hit. The defendant helped someone else up before the group got sprayed with capsicum spray. The defendant was on the side of the street and it looked like he had got sprayed to the face. The Marines were swinging out and were still getting hit by another group.

42. Sergeant Medina saw the defendant strike the Police Officer. Sergeant Medina was kneeling down and got a good angle on it. The defendant then wiped his face and one or two seconds later ran down the road. Before the defendant struck the Police Officer, he had been with a Marine named Quinn (one of the people the defendant had originally come into Darwin with). On his plan D20 he marked the point on the road where he says Officer Streeter was hit by the defendant as point H, at a point on the Discovery side of Mitchell Street, opposite Mott Court. He marked where he was hit himself at position D on the same side of the road, but nearer Discovery. There was a vehicle behind Officer Streeter. The defendant had come from point F, from the same side of the road. There was a big mass in the road and Sergeant Medina was trying to break things up.
43. There is some disparity as between the evidence of the defendant and Sergeant Medina as to whether Sergeant Medina was still directly next to the defendant immediately prior to the blow. The situation was chaotic and the defendant's eye-sight was affected by capsicum spray. Sergeant Medina was able to see and was seeking to ensure the Marines were able to get away. The defendant estimated the time between picking up Sergeant Medina and hitting the person as between 30 – 40 seconds. I find that Sergeant Medina was not directly next to the

defendant at the time of the blow. Sergeant Medina was not a long way away. Other Marines were near the defendant.

44. I find that Officer Streeter was standing by one Police vehicle and that he was not between two Police vehicles. I am satisfied that there were two vehicles in that vicinity at some stage. I find that there was nothing and there was no-one between Officer Streeter and the defendant. I find the defendant was located slightly less than half the road's width from Officer Streeter before he moved towards Officer Streeter. That is approximately 4 - 5 steps away. In the circumstances of this case, I find that that was in close proximity of each other. I find that the defendant was on the Discovery side of Mitchell Street and he was walking along Mitchell Street (either on the footpath or just on the edge of the road), heading towards Peel Street. Officer Streeter was to his left. Officer Streeter moved two or three steps. The defendant turned to his left and moved towards Officer Streeter. I accept the evidence of Mr Thrupp as to how the defendant moved towards Officer Streeter. I do not accept Mr Thrupp's evidence as to where on Officer Streeter's body the defendant struck him. I accept Officer Streeter's evidence on this point, he being the person who was struck.

**Did the defendant believe the conduct was necessary to defend himself?**

45. What does the defendant know immediately prior to the assault? There is fighting all around. Bottles and other missiles had been thrown. His Sergeant has been assaulted a short time before and he punched that assailant while his Sergeant was in a vulnerable position. That person was a very large person and had associates. There was other indiscriminate fighting. Large numbers of people were involved. The defendant was not looking for trouble. He had capsicum spray in his eyes and as a consequence, his eyes burned and his vision was affected. He could see blurs and shapes and some movement. He was not

intoxicated. The situation was chaotic and out of control. He wanted to get back to Barracks. He saw a blurred movement. He thought it may have been the Samoan man. He felt worried for his safety and did not know what to expect. He saw movement to his left. He could not see more than a blurred movement. The movement was in close proximity to him. He moved towards the blur and using his right hand struck out.

46. I am satisfied that the defendant did not know that the person he approached and hit was a Police Officer. I accept the defendant's evidence on this point. I am satisfied that the defendant did not know who he was assaulting or what nationality the person was. I am satisfied that the defendant could not see sufficiently to know who he was assaulting as a consequence of the effects of capsicum spray being sprayed in the area he was and that spray going into his eyes.
47. The defendant's evidence is not completely in accord with the facts I have found. He was not right next to Sergeant Medina at the time of the blow. I find he was mistaken about that. I find that in the circumstances, that was an understandable mistake. He was near another Marine. The location of the blow on his plan is opposite to where I have found the assault occurred. I have rejected that evidence. I do not regard these issues as especially significant in the fact finding process. When the defendant's evidence is taken as a whole, and his frankness in directly incriminating matters is considered, I do not find these matters to be significant. I am satisfied that the defendant believed that the conduct was necessary to defend himself.

**Was the conduct a reasonable response in the circumstances as the defendant reasonably perceived them?**

48. I am satisfied that the conduct was a reasonable response in the circumstances as the defendant reasonably perceived them. I find that the response was not an unreasonable or disproportionate one. The

defendant perceived there was movement. There was movement. He went towards the area of that movement and punched out. He immediately withdrew. Sergeant Medina saw him wipe his eyes after the blow – consistent with the defendant having been sprayed with capsicum spray. The defendant had a reasonable concern for his safety. He had helped other Marines. The situation he found himself in was potentially extremely dangerous. There was fighting in close proximity. It was indiscriminate fighting and the area was volatile. His eyesight was impaired. US Marines were being targeted for reasons unknown. The movement occurred quite close to him. His judgment was not affected by alcohol. He acted instinctively. In fact there was no threat from Constable Streeter. With the benefit of hindsight the defendant acknowledges that, but it is at the time of the defendant's action that the Court is focussed upon.

49. I find that prosecutions have not negated defensive conduct. Pursuant to s 29 of the *Criminal Code (NT)* defensive conduct is justified and as such, the defendant is not criminally responsible for the assault. I find that the assault was not an unlawful assault and I find the defendant not guilty of Assault Police, Count 1 on information.

## **Count 2**

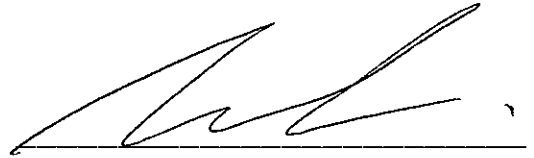
50. Count 2 will now be considered. I do not accept the defence submission that if the defendant was found not guilty of Count 1, then Count 2 automatically falls. That may be the case in some circumstances, for example if there is a finding that the Officer had not been acting in the execution of their duty and that same Officer (without any other reason) was seeking to arrest a defendant, but those circumstances do not apply in this case. In my view the Police were acting in the execution of their duty when they pursued the defendant. They were aware of, and some had witnessed, an incident where a Police Officer was struck. They had

a reasonable suspicion that an offence had occurred. The person was running away. They pursued the person. The evidence as to the facts surrounding count 2 is considerably different as between prosecution and defence. Issues of credit will determine this charge. The defendant has given evidence. I do not find there are grounds to reject his evidence as to his apprehension and his actions at the time of the arrest. In particular I am satisfied that he was being sprayed with capsicum spray and that he moved his hands to protect his eye and face area. Sergeant Medina was an impressive defence witness. His account as to the apprehension was completely different to the account given by prosecution witnesses.

51. The defendant gave evidence and he called a witness. When considering whether matters are proven beyond reasonable doubt, it is not appropriate to consider whether the prosecution evidence is preferred over that of the defendant's evidence. That is not the way to consider the material. It is an error to choose (or attempt to choose) who is telling the truth. If the Court finds that the prosecution evidence can be relied upon, the Court cannot then conclude that the alleged facts are found proven beyond reasonable doubt. The defendant has given evidence in this case. The Court can only find the alleged facts proven beyond reasonable doubt if there is sound reason(s) to reject the evidence of the defendant. I refer to the cases of *R v Calides* 34 SASR 355 at 358 and the case of *O'Brien v AK* a decision of Ms Blokland CM 11 December 2006. I find there are no sound reasons to reject the defendant's evidence. I make no findings as to what occurred upon the defendant's apprehension.
52. Prosecution have not proven beyond reasonable doubt that the defendant was resisting a member of the Police force in the execution of his duty. I find the defendant not guilty of count 2 on complaint, namely the charge of resist Police.



Dated this 18th day of January 2010.

A handwritten signature in black ink, appearing to read 'Melanie Little', written over a horizontal line.

**Melanie Little**  
STIPENDIARY MAGISTRATE

