CITATION: Davis v Thorne *[2010] NTMC 037*

PARTIES: STUART DAVIS

v

DANIEL JOHN THORNE

TITLE OF COURT: Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20912698

DELIVERED ON: 28.5.10

DELIVERED AT: Darwin

HEARING DATE(s): 11.2.10, 12.2.10 & 22.3.10

JUDGMENT OF: Mr Daynor Trigg SM

CATCHWORDS:

Police Administration Act – sections 123 & 126
Police Administration Act – sections 158 & 159
Criminal Code – section 189A
Words and Phrases – "hinder police"
- *"resist police"*
- *"in the execution of his duty"*

Arrest without warrant

REPRESENTATION:

Counsel:
Prosecution: Ms Horvath
Defendant: Ms Bennett

Solicitors:

Prosecution:	Summary Prosecutions
Defendant:	NTLAC

Judgment category classification:	A
Judgment ID number:	[2010] NTMC 037
Number of paragraphs:	79

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

No. 20912698

[2010] NTMC 037

BETWEEN:

STUART DAVIS
Complainant

AND:

DANIEL JOHN THORNE
Defendant

REASONS FOR DECISION

(Delivered 28 May 2010)

Mr Daynor Trigg SM:

1. On 5 May 2009 a Complaint was taken out charging the defendant with the following offences:

> On the 13th April 2009
>
> At Darwin in the Northern Territory of Australia
>
> 1. did hinder Constable Domenic Crea, a member of the Police Force, in the execution of his duty:
>
> Contrary to *section 159* of the *Police Administration Act.*
>
> AND FURTHER
>
> On the 13th April 2009
>
> At Darwin in the Northern Territory of Australia
>
> 2. did resist a member of the Police Force in the execution of his duty:
>
> Contrary to *section 158* of the *Police Administration Act.*

2. In addition, on 5 May 2009 an Information was laid charging the defendant with two further charges. However, when the matter commenced before me on 11 February 2010 charge 4 was stood aside, and I was advised that charge 4 had now been replaced with charge 5. Charge 5 was laid by an Information that was taken on the 16th day of October 2009. Charges 3 and 5 were as follows:

> On the 13th April 2009
>
> At Darwin in the Northern Territory of Australia
>
> 3. did unlawfully assault a Police Officer, namely Constable Domenic Crea, whilst in the execution of his duty:
>
> Contrary to *section 189A* of the *Criminal Code*
>
> On the 13th April 2009
>
> At Darwin in the Northern Territory of Australia
>
> 5. did unlawfully assault a Police Officer, namely Constable Nicolette Krepapas, whilst in the execution of her duty:
>
> And that the said assault involved the following circumstance of aggravation, namely,
>
> (i) That the said Police Officer thereby suffered harm
>
> Contrary to *section 189A* of the *Criminal Code.*

3. When the hearing commenced before me on 11 February 2010 charges 1, 2, 3 and 5 were read and the defendant pleaded not guilty to each of those four charges. Ms Horvath (who appeared to prosecute the matter) then read onto the record some particulars (apparently as requested by defence). These particulars were as follows:

> Charge 1: Constable Crea was standing at the defendant's front door asking to see the children to ensure their welfare. The defendant became abusive towards Constable Crea. He tried to shut the front door stopping police being able to enter or look

inside. The defendant yelled abuse at police and would not allow them to check on the children's welfare or his welfare or further investigate the report.

Charge 2: After being told he's under arrest for hinder police and police took hold of the defendant's arms, the defendant pulled away attempting to break his arms free and began to violently struggle and refused to comply with Constable Crea's directions.

Charge 3: Constables Crea and Krepapas had the defendant restrained in the kitchen. Crea instructed the defendant to walk to the police vehicle. The defendant started to kick at Crea breaking free from the hold and throwing punches at Crea hitting him in the chest.

Charge 5: The defendant was taken to ground in the kitchen by police where he reached out and grabbed the right wrist of Constable Krepapas and pulled in a downward motion pulling Krepapas down to the ground resulting in bruising and minor grazing to her right wrist.

4. After these particulars were read and before the first witness was called Ms Bennett (counsel for the defendant) indicated that the defence were challenging the lawfulness of the police entry into the defendant's house "and the circumstances that presented themselves to the police when they arrived and in the five or so minutes that followed" (T6.9). What Ms Bennett was trying to convey by this latter statement was somewhat confusing. But as the matter progressed I understand that she was intending to suggest that:

- The entry into the defendant's house was unlawful;
- The purported arrest of the defendant for hinder police was unlawful;
- Therefore the defendant was entitled to resist an unlawful arrest;

- And therefore the defendant was entitled to defend himself and use reasonable force to do so.

5. With those preliminary issues identified, it appears to me that the appropriate starting point is to consider the state of mind and knowledge of Crea up to the point that he purported to arrest the defendant. In my view, that is necessary in order to decide upon the preliminary issue as to whether the arrest was lawful. If the arrest was not lawful, then issues (such as whether the police were thereafter acting "in the execution of any duty", and self defence) would arise when considering the remaining charges. On the evidence it was Crea's decision to arrest the defendant, and therefore it is only his subjective knowledge and thoughts that are relevant. Once these subjective facts have been identified, they then need to be subjected to an objective analysis.

6. Further, charge 1 was the one that arose first in time, and it was as a result of police attempting to arrest the defendant for that charge that the later charges arose.

7. Accordingly, I will commence by looking at the evidence of Crea up to the point that he purported to arrest the defendant. His evidence was as follows (with the "T" references being to the relevant page and part of the page of the transcript where the evidence is taken from):

   - At about 3:30 we got the call via police despatch to attend an address in Stuart Park, 40 Armidale Street – T7.6;
   - He was in the Casuarina police station muster room, we were just about to commence our afternoon briefing – T8.2;
   - It was given to us as a priority 1 – T7.7;

- It was outside our sector so it was probably a good 10 or 15 minutes away – T7.9;
- There were no Darwin units available – T8.2;
- Being a priority 1 we left straight away – T7.9;
- Priority 1 just meant we could utilise our emergency provisions as far as activating lights and sirens – T7.9;
- We were advised that a **female had called requesting police assistance** – T7.7;
- The call taker could hear **yelling in the background** when they took the call – T22.8;
- Caller stated **she had children in the premises** – T7.7;
- And that **she had been assaulted by her partner** - T7.7;
- That **she'd been pushed up against the wall** – T7.8;
- **By her partner** – (T22.7);
- That **she wanted her partner out of the house** – T7.8;
- And that **alcohol was a contributing factor, had been consumed** – T7.8;
- **He was intoxicated** – T22.7;
- Crea drove to the address with Krepapas using lights and sirens – T7.9;
- Crea and Krepapas were both in police uniform – T17.6
- He turned the lights and sirens off prior to arrival – T 22.5;

- He stopped out the front of the driveway – T8.4;
- It was an elevated house and he saw two sets of stairs – T8.4;
- The house was quiet when they arrived – T22.6;
- Crea was alert because a domestic situation and his training dictates that these situations can get volatile. He's going into a house in a situation he doesn't know anything about – T26.1;
- Crea saw someone looking through a bedroom window….he initially thought it was the defendant and he yelled out "mate, can you come down? Police" – T8.5;
- Crea then heard a child's voice and it was sort of crying and said "why, what have I done?" – T8.8;
- Crea then realised it was a boy aged about 10 or 11 – T8.10;
- Crea said ""can you get your mum and tell her the police are here" – T8.8;
- Crea heard the boy yell out "mum, the police are here" – T8.9;
- Crea then heard a female voice sort of yelling "where are the keys, where are the keys" – T8.9;
- Crea then heard a male voice yelling "I don't fucking know, and tell them to fuck off" – T8.9;
- Crea heard a door open probably about 20 seconds after all that happened – T9.4;
- And a female (he now knew as Tina Thorne, hereinafter referred to as "TT") came down the stairs – T9.4;
- **TT was visibly upset** – T9.4;

- **TT was crying and shaking** – T9.4
- Crea said to TT “what’s wrong, come and tell me what happened” – T 9.4;
- TT sort of stormed past Crea and walked down the stairs…..Crea was at the bottom of the stairs – T9.5;
- TT walked past Crea and walked out under the elevated house, there was a chair there, and she sat down – T9.6;
- Crea went closer to TT – T9.6;
- Krepapas indicated she was going to go up the stairs – T9.6;
- Crea spoke to TT for about 30 seconds and TT said “I’m just sick of life in general, I’m sick of this. The kids don’t need to see this anymore” – T9.7;
- It was put in cross-examination that he recorded the words used by TT as “we’ve had a fight and I’m sick of it, he’s been drinking” and Crea said if that’s in his statement he stands by it – T25.1;
- Krepapas was out of his sight – T9.7;
- Crea could hear a **male voice yelling and swearing, just constantly “get the fuck out”, “fuck off”, “I don’t want to fucking talk to you”** – T9.8;
- It progressively got sort of louder and he could hear like pacing – T9.8;
- Crea told TT to wait there he was going to check on his partner, and Crea walked up the stairs – T9.9;

- **Defendant was yelling, and then his rage seemed to double when he saw Crea there and he directed his abuse at Crea** – T9.10;
- The internal door was open and Krepapas was talking through the security screen door that was closed – T10.2;
- **Crea tried to talk to the defendant**, saying "look, we've been called here for a domestic disturbance, **we just need to speak to you and make sure that everyone's okay.** Just calm down, we just need to speak to both parties", but Crea was sort of saying that in staggered sentences because **the defendant kept yelling over the top of Crea and interrupting him**" – T10.4;
- The defendant kept walking up towards the door within a metre and then walking back into the house – T10.4;
- The **defendant was saying "get the fuck out", "I know my rights, you can't come in"; "I don't want to speak to you"; "fuck off"; "my kids are alright, I'm telling you they're alright"** – T10.4;
- Crea could see another adult male standing about half way down the house (and he now knew this person as Christopher Bruckshaw, hereinafter referred to as "CB", a friend of the defendants) – T10.5;
- At the end of the house **Crea could see two boys, aged between about 10 and 13, and they were both crying and shaking and visibly upset** – T10.5;
- Crea did not notice any injuries on either of the two boys, and they never complained of any injuries to him – T21.2;

- The two boys never said they were frightened and wanted to be removed from the house – T21.3;
- Crea had opened the flyscreen door, but he was still standing outside – T10.7;
- **The defendant made a tirade of verbal abuse and pretty much slammed the internal wooden door shut with such force that the door actually bounced back open again** – T10.7;
- Crea put his foot in the doorway just to stop the door from being closed and police being locked out – T10.8;
- Crea tried to tell the defendant "look, we do have a power to come in and you know, I need to make sure the kids are alright and that everyone else is alright" – T11.1;
- Crea took a couple of steps into the house – T11.2;
- This agitated the defendant and he just got angry, and **Crea thought he was going to be hit by the defendant** – T11.2;
- **The defendant's hands were virtually in Crea's face, pointing at him, and telling him to "get the fuck out, or he would make him"** – T11.3;
- Crea told the defendant "you are under arrest now for hinder police" and he took hold of the defendant's right arm – T11.3.

8. That was the extent of the evidence as what knowledge Crea had, and what he heard and saw up to the point he decided to arrest the defendant. Crea also was questioned as to his thought processes at the time, and what powers he was purporting to utilise. His evidence in this regard was as follows:

- The main concern at that stage was the children, I could see they were shaking – T10.9;
- With the information I'd received from police communications about TT having allegedly been assaulted, I didn't know if the kids were still in danger – T10.9;
- I didn't know anything about this second male there – T10.10;
- The defendant was fairly angry and with the information we got that TT wanted him removed, didn't want a situation where we were locked out and the defendant was in there with the children – T10.10;
- Crea didn't have the chance to ask TT to invite the children outside – T28.4;
- In particular the following evidence was given in cross examination at T27.5 – 29.3:

> I just asked if you understood that you were able to go into a house, a private house to basically rule out that threats are happening?---That's right.
>
> That's your understanding?---That's **my understanding that if I've got reasonable grounds to believe that a person has suffered injury or that they may be suffering injury, that I can enter that property to make sure that they haven't–to stop that or to provide myself with the belief that there's no further danger.**
>
> Where do you find that authority, officer?---In the Police Administration Act, s 126, power to enter.
>
> You say that's the power you were exercising on this day?---Pardon?
>
> You say that's what you were relying on in order to enter without invitation in this house?---I didn't say I was relying on that. I didn't specifically stop and think what Act and section

number. I'm aware that under the Domestic Violence Act and under the Police Administration Act that there's powers for police to enter a premises when we have the belief that a person has been injured, may be injured, will be injured.

You had no reason to think that Daniel Thorne had been injured, did you?---I don't know. I couldn't see any injuries on him; it's not to say he wasn't injured. And my thought at the time wasn't so much for Daniel Thorne, because the way he was acting I knew he wasn't injured or he didn't appear injured but **there were two children that were crying. I didn't know if they'd been injured, they were in the distance** they'd been---

They hadn't told you they'd been injured?---Pardon?

Nobody had told you they'd been injured?---No, nobody had told me they'd been injured.

And you'd not seen or heard anything to suggest that they had?---Well, no, not directly with the children at that time, no.

And you were aware that there were back steps to that building?---That's right.

Because you saw those when you entered the property?---That's right.

I take it you were aware there was a back door?---Yep, I would have assumed that if I saw the back steps.

Did you ask Tina Thorne to, for example, invite her children outside?---I didn't have the chance to, again. Twenty seconds, she stormed out of the house and came to us downstairs. So I started my job and asked her what happened and again, as I said, only 20 seconds, I didn't have a conversation with her other than what I've got in my statement.

I just to be clear on your evidence in relation to why you actually entered the house?---I had informed the reasonable grounds that someone had been injured and that was with the call that I received that Tina Thorne had told police communications that she had already been pushed up against the wall. She was visibly upset.

And she was outside of the house, wasn't she?---She was at that stage, that's correct.

So there's no need to enter to remove her from the house because she's outside of the house?---That's right.

And on your arrival she hasn't told you---?---No.

She's got no injuries on her when you get there?---I didn't see anything, no.

She told you she had a mental illness, didn't she?---No, she didn't.

Are you sure about that?---I'm 100% sure about that.

Okay. When you – well, you heard the defendant making it clear to Constable Krepapas that he didn't want her to come into the house but he also made that very plain to you, didn't he?---He did.

Yes. And contrary to that, I don't think you dispute that you went inside. You went inside?---I did.

And you told him that you had authority to do that. He told you that you didn't and to get out and you weren't welcome. And **you told him that you did have the power and that that power came from the Domestic Violence Act. Was that what you told him?---I did at the time.**

You did at the time. And what was your understanding of that power at the time?---That again I could enter the house in relation to preventing or stopping people from being injured that may have been injured, to prevent a breach of the peace and if necessary to make arrest under the – for the purposes of taking out a domestic violence order. (emphasis added)

9. I now turn to consider the applicable law.

10. *Section 159* of the *Police Administration Act* states as follows:

(1) A person shall not hinder or obstruct a member in the execution of his duty or aid or abet any other person to hinder or obstruct a member in the execution of his duty.

Penalty: $1,000 or imprisonment for 6 months or both.

11. I commence with the case of *Innes v Weate (1984) ACrimR 45* where Cosgrove J stated (@ 51):

> Before examining it in detail, it may be useful to reflect a little on the phrase "in the execution of his duty". The word "duty" does not refer, as was suggested in argument, to the constable's duty to obey superior officers. It refers to the duty of constables generally – the duty to prevent and detect crime, to apprehend wrongdoers, to keep the peace, and to protect life and property, (that is, to protect persons from injury and property from damage). In *Rice v Connolly [1966] 2QB 414 @ 419, Lord Parker CJ said:*
>
> *"It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice."*
>
> I would respectfully adopt his Lordship's words. See also *Johnson v Phillips [1976] 1 WLR 65.*
>
> There are two difficulties in this concept of duty. One is that it cannot be stated in other than general terms – the range of circumstances in which the duty to act may arise is too wide, too various, and too difficult to anticipate for the compilation of an exhaustive list. The other is that the existence and nature of the duty often depends upon a reasonable assessment by the constable of any given situation. That assessment may be examined in the courts and held to be right or wrong. These difficulties cannot be overcome. It is important that a constable should have a wide discretion to act swiftly and decisively; it is equally important that the exercise of that discretion should be subject to scrutiny and control so that he should not too easily or officiously clothe himself with the powers of the State and by so doing affect the rights and duties of other citizens.

12. Accordingly, in the instant case, having received the despatch to attend Crea, in my view, had a duty to attend and ascertain a number of things. Some of these (and the following is not intended to be an exhaustive list) were:

- What had happened that led to the call for police assistance;
- Whether anyone had been injured and needed medical assistance;
- What else had happened at the address (there was a ten minute gap between Crea being advised of the despatch and arriving at the address);
- Whether any, and if so what offences, may have been committed, and by whom;
- Whether anyone, and who, was to be charged (whether by summons, or arrest if sufficiently serious) with any, and what, offences;
- Whether there were safety concerns for anyone, and who, at the address;
- Whether there were grounds for the making of a domestic violence order against anyone, and if so whether anyone needed to be arrested for that purpose;
- Whether it was likely that a breach of the peace might occur if no action was taken;
- Whether it was likely that the safety of anyone might be at risk if no action was taken.

13. Accordingly, whilst Crea was attempting to ascertain any of these matters he was acting in the “execution of his duty”.

14. In my view, hinder police is a "conduct offence" in the same way that "resist police" has been found to be. Accordingly I respectfully adopt what Walters J said in *Hull v Noske (1974) 8 SASR 587 @ 598-599:*

> Despite the interesting argument put forward by the appellant's counsel, I think it is not now open to doubt that the offences created by the relevant sections of the Act are the resisting of a police officer, and the assault of a police officer, in the execution of his duty, and not the resisting and assault of a police officer who is known to the offender to be a police officer and known to him to be acting in the execution of his duty. The authority of the decision of the High Court in *R v Reynhoudt (1962) 107 CLR 381*, which approved the decision of the Full Court of Victoria in *R v Galvin (No. 1) [1961] VR 733*, clearly denies to the appellant the argument put forward on his behalf. It is my view that the prosecution was not obliged to prove that at the relevant time, the appellant knew that the person whom he resisted or assaulted was a police officer, and that the police officer was acting in due execution of his duty as such.

15. In addition, I respectfully adopt what Bray CJ said in *Leonard v Morris (1975) 10 SASR 528 @534:*

> If the appellant in saying or doing what he said or did at the relevant time –
>
> (a) intended to make, ie had the conscious object of making, substantially more difficult the performance by Constable Connell, whether he knew him to be a police office or not, of what Constable Connell was then doing in the execution of his duty, whether the appellant knew him to be engaged in the execution of his duty or not, or
>
> (b) being aware that what he was doing or saying or about to do or say was likely so to render such performance substantially more difficult, nevertheless did and said what he did and said, or persisted in doing or saying it, or
>
> (c) consciously and voluntarily used offensive or abusive language to or concerning Constable Connell while he was engaged in the execution of his duty, whether or not he knew that the constable was a member of the police force or was so engaged,

> then he possessed the necessary mens rea to constitute the offence of hindering a member of the police force in the execution of his duty…
>
> Notwithstanding that such mens rea be proved in either case, the appellant might still be entitled to acquittal if there was a lawful excuse or justification for his conduct.”

16. In the same case Walters J said (@ 535):

> Dealing briefly with the offence of “hindering”, I think the prosecution must prove something which is done in regard to the duty that the police officer is performing and which successfully impedes, obstructs or frustrates the officer in carrying out that duty. <u>The hindering could arise even though the duty being performed by the officer was merely the attempting to obtain evidence of an offence suspected to have been committed, or the pursuing of a lawful inquiry</u>. Nevertheless, it seems to me that the concept of “hindering” involves some positive and active conduct and that the word should not be given such a vague or notional meaning as would comprehend some trivial or ineffective impediment or obstruction of a police officer. (underlining added)

17. In the same case, Wells J said (@ 547):

> It is sufficient for the prosecution to prove that the defendant voluntarily committed acts that, as in the circumstances as he was aware of them, and he then and there realised, were likely to, and did in fact, substantially impede or obstruct certain acts being done, or about to be done, by another person; that that other person was in fact a police officer; and that the acts seen as likely to be, and that were impeded or obstructed, amounted in fact to the execution by that police officer of his duty or a part thereof.

18. In the instant case Crea had attended the address in response to a call for police assistance from TT relating to an alleged assault upon her by the defendant. As such, in my view, Crea had a duty to investigate this matter further and attempt to speak to potential witnesses (including TT, the defendant, the male inside the house and the two boys inside the house). None of the potential witnesses had any legal obligation or compulsion to speak to police if they did not

wish to do so, and the defendant made it abundantly clear that he did not want to speak to police. But the defendant had no right to attempt to prevent police from talking to others, or to make it "substantially more difficult" for police to do so. Nor did the defendant have the right to purport to speak for others (by saying "My kids are alright, I'm telling you they're alright"). It is clear from the evidence of Crea (which was substantially not disputed on this aspect) that the defendant was continually yelling at him, was not allowing Crea to speak or complete any sentences, and was determined to have Crea off the property immediately, and to exclude Crea from his house. As such, Crea was given no real opportunity to request to talk to the unknown male, or either of the two children. It was clear that the defendant was intent on closing the door thereby placing the police outside and himself inside with the unknown male and the two upset boys. Clearly, and I find, the defendant was so angry that it was not possible for Crea to have any reasonable conversation with him.

19. Police have the power to arrest a person without warrant under *section 123* of the *Police Administration Act*, which states as follows:

> (1) A member of the Police Force may, without warrant, arrest and take into custody any person where he believes on reasonable grounds that the person has committed, is committing or is about to commit an offence.

20. The power to enter premises is dealt with in *section 126* of the *Police Administration Act,* the relevant parts of which states as follows:

> (1) Where a member of the Police Force has, under a warrant, power to arrest a person, he may enter a place, by force if necessary, and with such assistance as he thinks necessary at any time of the day or night or between such times as may be specified in the warrant, for the purpose of arresting the person if the member believes on reasonable grounds that the person is at the place.

> (2) Subject to subsection (3), where a member of the Police Force may, without warrant, arrest a person, the member may enter, by force if necessary, and with such assistance as he thinks necessary, a place at any time of the day or night for the purpose of arresting the person if the member believes on reasonable grounds that the person has committed an offence punishable by a term of imprisonment exceeding 6 months and that he is at the place.
>
> (2A) A member of the Police Force may, by reasonable force if necessary, enter a place if he believes, on reasonable grounds, that:
>
> (a) a person at the place has suffered, is suffering or is in imminent danger of suffering personal injury at the hands of another person; or
>
> (b) a contravention of an order under the Domestic and Family Violence Act has occurred, is occurring or is about to occur at the place,
>
> and remain at the place for such period, and take such reasonable actions, as the member considers necessary:
>
> (c) to verify the grounds of the member's belief;
>
> (d) to ensure that, in the member's opinion, the danger no longer exists;
>
> (e) to prevent a breach of the peace or a contravention of the order; or
>
> (f) where a person at the place has suffered personal injury, to give or arrange such assistance to that person as is reasonable in the circumstances.
>
> ………….
>
> (3) Nothing in this section shall limit or prevent the exercise of any other powers of a member of the Police Force pursuant to any other law in force in the Territory whereby a member may enter a place, whether with or without a warrant. (underlining added)

21. I note that *subsection (2)* does not apply in the instant case as the offence of hinder police does not have a maximum penalty

"exceeding" 6 months imprisonment. It was the evidence of Crea that he arrested the defendant for hindering police, not for any other offence (such as any alleged assault upon TT).

22. Further, the "reasonable grounds" referred to in both *sections 123 & 126* is based on an objective, rather than a subjective test (see *Donaldson v Broomby (1982) 60 FLR 124*). In my view, it is necessary to look at the subjective matters known to Crea, and then assess them objectively to ascertain whether they did or did not afford "reasonable grounds".

23. A police officer has additional powers under the *Domestic and Family Violence Act* to enter premises (see *section 84(2)(a)*) and to take a person into custody (see *section 84(2)(b)*) for the purpose of making and giving a domestic violence order to that person. However, Crea did not arrest the defendant for that purpose. His investigation of the matter had been interrupted by the defendant's anger towards Krepapas. Accordingly, Crea had not got to the stage where he knew whether a domestic violence order was to be made or not.

24. Accordingly, any power that Crea had to enter the house (against the clear protestations of the defendant) would need to come from *section 126(2A).* Clearly, Crea had no information to suggest that anyone at the house had suffered any personal injury, but his ability to make inquiries was being effected by the defendant's attitude. In my view, given the extreme anger and hostility of the defendant Crea had reasonable grounds for believing that anyone at the house might be in imminent danger of suffering personal injury at the hands of the defendant. The defendant was highly excited and angry. Whilst that anger was currently being directed at police, it was not possible to predict what might happen next.

25. Crea had no idea what the argument between the defendant and TT was about. Crea had no idea who the adult male in the house was and whether he was in any way involved with the initial argument. Given the heightened anger of the defendant it was not unreasonable to be concerned as to the safety of the two boys, the unknown male and even the defendant himself (by self harm or otherwise).

26. In my view, Crea's ability to investigate the situation and do a "safety audit" in regards to all persons at the property was not possible because of the defendant's continual abuse and loud demands. There was nothing to indicate that the defendant was calming down, or that he might calm down soon. It appears that the only way Crea could properly have investigated the matter further was if the defendant quietened down and stayed out of the way and let the police try to talk to all persons present. But there was nothing from the words or actions of the defendant to suggest that he might be willing to allow that to occur.

27. Crea had commenced to investigate the matter and was in the process of talking to TT when his attention was directed to the defendant. Because of the defendant's obvious anger and verbal aggression to Krepapas, Crea had to cease his conversation with TT and attend upon the defendant. Accordingly, Crea's ability to investigate the reason why police were called was adversely effected by the defendant.

28. The defendant was continually yelling over Crea, and it was not possible for Crea to get any more than a few words out.

29. The defendant appeared intent on shutting police out of the house, and if that was allowed to occur, it would have the effect of shutting the defendant and the unknown male and the two boys inside the house. Whether the defendant would have allowed any of the

occupants out of the house to speak to police was unknown. Given his heightened state of anxiety, in my view, it could not safely have been assumed that he would have. Further, given the exchange (that Crea heard between the defendant and TT shortly before TT left the house) Crea would not have known whether TT had keys in her possession that would have allowed access back into the house.

30. If Crea had allowed the defendant to lock police out of the house, it may also have had the effect of locking TT out of the house and away from her two sons.

31. In my view, the only way that Crea could proceed to investigate the matter was if the defendant was moved (or removed himself, but not by locking himself and relevant witnesses, and potential victims inside the house) from the immediate area, and he was showing no signs of being willing to co-operate in any way.

32. Crea saw no signs of injury on any person present at the premises. He had a report of an assault (by pushing against a wall) by the defendant against TT. He had seen TT to be upset. He had two young boys in the house who also appeared upset. He had the alleged perpetrator who was loud and unhelpful, who was determined to shut himself (and the two boys and an unknown adult male) inside the house, and thereby shut the police and TT out of the house. What may have occurred if this had happened is conjecture. It is the sad fact that "domestic" incidents can have tragic outcomes.

33. In my view, I find that it was (in all the circumstances) reasonable for Crea to believe that any of the occupants of the house was in imminent danger of suffering personal injury at the hands of the defendant. As such, I find that Crea was entitled to enter the premises (and remain there) to ensure that the danger no longer exists (*s*

126(2A)(d)), as well as to prevent any breach of the peace (*s 126(2A)(e)*).

34. I also find that the defendant was hindering Crea in the execution of his duty to investigate the complaint that led to their attendance, and the only way Crea might be able to investigate the matter was if the defendant was arrested and removed (even if only into the back of a police van) so that police could speak to the other persons present to ascertain what had happened, and what if anything the police might need to do next. Having been able to speak to the persons present Crea would then have been in a position to make appropriate decisions.

35. I make that finding being mindful of what Smart AJ said in *DPP v Carr (2002) 127 ACrimR 151 @ 159:*

> This Court in it's appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded.

36. I take no issue with what Smart AJ stated. I respectfully agree with it, but that is not the situation on the facts of this case. In *DPP v Carr* the defendant was arrested for swearing at a police officer (an offence that carried a maximum penalty of a $660 fine, and imprisonment was not an available penalty). The arresting police officer knew that the defendant was a long term resident of the area, and knew where he

lived. There was no question as to the defendant's identity or his usual place of residence. The arresting police officer was aware that it was open to him to proceed by way of a summons or a "field court attendance notice".

37. In *Panos v Hayes (1987) 44 SASR 148* there was a dispute between two neighbours about a dividing fence and the proper alignment of the boundary. One neighbour commenced to demolish the fence and put up a string line along the proposed new boundary. There was a dispute when the other neighbour returned and police were called. The other neighbour commenced to remove the string line and ultimately the police were struck by the appellant. Legoe J stated (@ 154-5):

> I am satisfied that the two police constables were entitled to enter the premises and to investigate the nature of the dispute, when they were requested to go to the premises: see *Dowling v Higgins (1944) TasSR 32* in particular at 34, an authority referred to and discussed at some length by me in *Todd v O'Sullivan (1985) 122 LSJS 403* at 411. I note in particular that the conclusion of Morris CJ in *Dowling's case* at 34, was that the constable was entitled to enter the private premises (that was another husband and wife dispute as in *Todd v O'Sullivan*) and in so doing the constable was "acting in the execution of his duty"……
>
> Accordingly, circumstances where the police reasonably apprehend a breach of the peace, albeit within private premises, are entitled to exercise their power to restrain or prevent injury to persons, or damage to property. (underlining added)

38. I am also aware of the case of *Launder v McGarvie* an unreported decision of Angel J of 5 April 2006 in JA68 of 2005. I have a transcript of His Honours brief reasons in that Justices Appeal, which I now set out in full:

> HIS HONOUR: The appellant appeals from a conviction that on 27 April 2005 at Batchelor in the Northern Territory of Australia,

he did unlawfully assault a police officer, namely Senior Constable Justin Bentley, whilst in the execution of his duty, contrary to *Section 189A of the Criminal Code*.

The grounds of appeal are that the learned magistrate erred in convicting the appellant by finding that Senior Constable Bentley was lawfully acting in the course of his duty when the incident complained of took place.

Bentley was the sole police officer at Batchelor. He received a phone call and went on duty in his uniform. He received evidence of an assault and, in the course of his duties, took it upon himself to make enquiries.

He went to house premises occupied by the appellant. I quote from page 6 of the transcript in Bentley's evidence:

> 'I was driving the blue XR6 police car. I parked into the front of the driveway to 29 Kirra. I then exited the vehicle and walked to the front door of 29 Kirra, knocked there loudly. There was no answer. I could see some movement in the house there. I think there was a television. I could see some movement in there. I then walked around the back of the house to the door where I saw Jordie Launder,' (the appellant) 'the person sitting in court here, sitting on a chair, and he had a baby crawling around his feet'.

Later, Bentley said in evidence,

> "I went to the front door. Nil answer. And then went around to the back of the house'. He was then asked, 'What happened then?' and he replied, 'I asked Jordie I'd like to speak to him about some trouble that happened'. And Jordie replied to me, I'm going to swear a bit, he told me to "Fuck off cunt". I then said I wanted to speak about the trouble that happened. Jordie then said he had a spear, quote "I'm going to kill you cunt. You're going to have to shoot me". He then jumped up.'

The evidence accepted by the learned magistrate was that thereafter the police constable was chased off the premises by Jordie wielding a spear, an account given both by Bentley and by an onlooking neighbour.

There was no dispute on the present appeal that an assault took place. The sole issue on the appeal is whether, at the time, Senior Constable Jordan Bentley was lawfully acting in the course of his duty.

It was argued by the appellant, initially at least, that the implied licence to enter the premises did not extent to the rear door of the premises. It is clear, however, in my view, that the learned magistrate was correct in holding that the implied licence of the occupier extended to enable Senior Constable Jordan Bentley to pursue his enquiries to the back door, having knocked on the front door without reaction from the occupier, and knowing at the time that there was somebody within the house.

If authority for the proposition that the licence extends to the back door is required, it is sufficient to refer to the judgement of Diplock LJ, as he then was, in *Robson v Hallett (1967) 2 QB 939 at 953/954*, where it was held that ordinarily a householder in a dwelling house gives implied licence to any member of the public who has lawful reason for doing so, to proceed from the gate to the front door or a back door to enquire whether he may be admitted to conduct his lawful business.

That case was cited by Neasey J in the case of *M v AJ (1989) 44 A Crim Reports 373 at 379*, who noted that *Robson v Hallett* had the approval of the High Court in *Halliday v Nevill (1984) 155 CLR 1.*

Thus, I think the learned magistrate was correct in holding that the police constable had a licence to be at the back door in the circumstances evident at the time. He was lawfully acting in the course of his duty.

However, it was further submitted that as Bentley's own evidence showed, he was initially told in no uncertain terms, quite unambiguously, 'Fuck off cunt'. Bentley then said, 'I then said I wanted to speak about the trouble that happened'. And it was to that, that the appellant reacted with the spear.

It seems to me, consistent with the case of *Davis v Lisle (1936) 2 KB 434*, that although the constable had a right to enter the premises and go to the back door to make enquiries, he became a trespasser once he had been told to leave the premises and hesitated, albeit for a short time. And it is clear, on the authority of that case, that henceforward he was no

> longer acting in the execution of his duty having hesitated and not leaving promptly when told to leave.
>
> It follows from that, that the subsequent assault, albeit shortly thereafter, was not an assault upon the constable whilst he was acting in the course of his duty.
>
> Mr Adams, for the Crown, submitted that he was entitled to stay to see whether the implied licence could be reinstated, and that the short time between being told to 'fuck off' and the ensuring assault meant, in the circumstances, that he was still acting within his duty.
>
> I think the short answer to that really is that made by Ms Musk, that if he had turned on his heel and demonstrated that he was not going to persist with his enquiries, it may well be the assault would never have happened. It is really speculation as to what might have happened, but in all events, I think that the argument is correct, that at the time of the assault he was not acting within his duty.
>
> It follows from that, even thought there was an assault, it was not an assault as charged, that is, under *Section 189A of the Criminal Code*, and from that, it follows that the appeal should be allowed and the conviction set aside.

39. The factual background to the Appeal is not readily apparent from His Honours reasons. It is not apparent as to when or where the "assault" that was being investigated allegedly occurred. Nor is it clear what the other circumstances of the alleged "assault" might have been. In reaching his conclusion His Honour has relied upon the case of *Davis v Lisle [1936] 2 AllER 213.* In that case two police officers (only one in uniform) seeing a lorry in a garage which had earlier been causing what the police officers thought to be an obstruction, entered the garage to make inquiries. Neither had a search warrant nor was authorised to enter. The occupier of the garage told the police to leave, in strong terms. The officer in plain clothes proceeded to take out his warrant card, whereupon the occupier assaulted him. On those facts Lord Hewart (with DuParcq and Goddard JJ agreeing) held that

the police officer by producing his warrant card was asserting his right to remain, and was not then acting in the execution of his duty.

40. In *Launder v McGarvie* it is no part of His Honour's decision that the police officer was purporting to act under any statutory authority. That is not the situation in the instant case, and therefore that line of authority is distinguishable. Similarly, Napier CJ distinguished the case of *Davis v Lisle* in his decision in *Dinan v Brereton [1060] SASR 101.* He did so on the basis that in *Davis v Lisle* the officers were not acting under any statutory authority. Whereas in *Dinan v Brereton* (where an off duty police officer saw a driver, who he formed the opinion was highly intoxicated, go into a private residence, and when he went to arrest him for drink driving was told to leave) the police officer was found to be entitled to follow a suspected person onto private property for the purpose of effecting an arrest, in accordance with *section 75(1) of the Police Offences Act.* That *section* was in the following terms:

> Any member of the police force, without any warrant other than this Act, at any hour of the day or night, may apprehend any person whom he finds committing or has reasonable cause to suspect of having committed, or being about to commit any offence.

41. In the instant case the police had been expressly requested to attend the premises by TT. TT was present at the premises when they attended and did or said nothing to withdraw her invitation to police (up until the time police attempted to arrest the defendant). There was no suggestion that TT was not also an occupier of the premises, and the defendant's evidence was that she was. The defendant knew that police had been called to attend by TT. He knew that they were there as a result of TT's call for help. As noted earlier, shortly after police arrived and upon being aware of the police presence the defendant told TT to "tell them to fuck off". But it is clear from the evidence that

TT made no such request to police (prior to the commencement of the arrest), when she had the opportunity to do so.

42. The defendant was not the sole occupier of the premises. There was no evidence to suggest that the defendant had any greater right than TT as an occupier. There was no evidence to suggest that the defendant had (or might have had) any overriding right such that he could unilaterally withdraw TT's express invitation to police to attend. By his words to TT he in fact was acknowledging that he could not.

43. TT had not expressly invited the police into the residence at any stage. TT was outside the residence. The defendant was inside the residence and making it clear to police that he did not want them to come in. In entering the premises, was Crea then acting in the execution of his (and if so what) duty?

44. In my view, the defendant was entitled to refuse to speak to police. Accordingly, the defendant was entitled to refuse to allow police into his house to speak to him, but was he entitled to refuse police entry to speak to others within the house who might be witnesses or potential "victims". Exposing children to "domestic violence" would make any such child a "victim".

45. What was the other evidence in the case as to what occurred up to the point the defendant was first told he was under arrest. Constable Krepapas also gave evidence. She was Crea's partner at the time of this incident. Her evidence was to the following effect:

- They were tasked to a domestic disturbance;
- An allegation of a male assaulting a female (by pushing her against a wall) in the presence of children (there were three children there);

- She wasn't told by "comms" that TT wanted the defendant out of the house;
- It was not a "priority 1" as they don't use that any more;
- Police lights and sirens were activated to get to the house, but they were turned off prior to arrival;
- The house was quiet when they arrived;
- As she approached the house she could see a youth (maybe aged 10 or 11) at a window in the house, and he was visibly upset and crying;
- She could hear a female asking where the keys were;
- She went upstairs, knocked and said "police here, please open the door";
- TT came out and walked past her;
- Both doors were open and she stood at the door and called for anyone in the house to come out for a chat;
- She called out "we're the police, we've been called for a domestic incident and Daniel we need to talk to you about it";
- A male yelled "fuck off, you're not coming in, you're not welcome";
- She said "please come out and talk to me, we need to ascertain what happened and who else is in the house before we can go";
- The defendant came out and she told him "we just need to find out what happened";
- The defendant swore at her and was yelling over her and kept swearing and saying she was not welcome;

- Many times the defendant said that police were not to come into his house;
- Crea came up the stairs and commenced to talk to the defendant, telling him why we were there and what we were required to do;
- She could see two boys (aged 10 and 13) crying and they looked upset, and were motioning with their hands in a "come here" motion;

I digress to note that it was no part of Crea's evidence that he saw any "motioning" by any of the boys;

- The defendant slammed the screen door at some stage;
- Crea put his foot in the door;
- The defendant kept screaming and carrying on;
- Crea told the defendant he was under arrest (but she couldn't remember if he said what for) and grabbed one arm, and she grabbed the other;
- Police were there to ascertain what had happened in the domestic, and to ensure the safety of others in the house, particularly the children who were visibly upset;
- She didn't want to go into the house, she wanted the defendant to talk to her, and to check on the safety of others in the house.

46. Danny Thorne (hereinafter referred to as "DT") gave evidence in the defence case. He was 14 at the time he gave his evidence. He is the son of the defendant and TT. His evidence was as follows:

- The defendant and TT were having an argument and he didn't really know what was going on;

- The argument went for around half an hour, 45 minutes;
- He saw pretty much the whole argument and there was no violence;
- He didn't see TT call the police;
- Before the police arrived Zac "was a bit worried because like they were arguing; he always gets a little bit worried" – T80.1;
- The police pulled up and came up to the front door and the defendant told them that they weren't allowed to come in and they barged their way in anyway;
- When the police "came in and asked if we were alright and we said we were alright and so did Mum and Dad" – T79.5;
- "they didn't talk to me personally; they asked Dad and Mum if we were alright and I yelled out "yes we are", and so – and Dad told them that we were alright" – T79.7.

47. The defendant also gave evidence in his own defence. He stated:

- He had consumed about five cans of VB over about 3 hours and CB had had a few more over the same period, and he thought TT only had a couple of drinks that day – T86.8-89.2;
- He and TT "were having an argument, a rather loud, heated discussion" – T81.6;
- It was "mainly over financial and stressful things, responsibilities and that" – T81.6;
- The argument lasted for "half an hour, little bit more" – T 81.9;
- There was no "physical activity" involved in that argument – T81.10;

- Each of the children were upset (they were crying and asking us to stop arguing) before the police arrived because their parents were arguing – T85.2;
- He saw TT call the police – T82.1;
- DT came and told us the police were here;
- TT asked where the keys were;
- TT located the keys, let herself out and went downstairs;
- Krepapas came to the front door (the wooden door is on the outside and the screen door is on the inside) and the wooden door was open and the screen door was shut;
- Krepapas "sort of; she asked to come inside and I told her no, that she can't come inside" – T83.4;
- "I had no reason to let her into the house.......I had no reason not to let in the house either, except for the fact that she wanted me to come outside and talk to her; I didn't want to talk to her so – and she asked if she could come in the house and talk to me and I said no" – T83.5;
- He told her this at least 5 times and the screen door came open and she went to come in and she put her foot in the door, and "I went to close the door and I asked her to remove her foot and she wouldn't so I slammed the screen door on her foot. As a consequence, the screen door bounced open and, within five seconds, Officer Crea was at the top of the stairs" – T83.10;

I digress to note that DT gave no evidence to support this version, and the evidence of Crea and Krepapas was consistent with any foot in any door and any door slamming involving Crea's foot only. I prefer

the evidence of Crea and Krepapas in this regard. I return to the defendant's evidence:

- When Crea got to the top of the stairs "he pushed his way into the door and stood just inside the screen door, holding the screen door open……he was completely inside the house;
- He told Crea half a dozen times to get out of the house and Crea told him "he has police powers of entry to come into the house" – T84.4;
- He asked him on what grounds and Crea said "I didn't need to know" – T84.4;

I digress to note that this evidence might be contrary to his instructions as it was expressly put to Crea in cross-examination that "And **you told him that you did have the power and that that power came from the Domestic Violence Act. Was that what you told him?---I did at the time."**

- "I told him to get out several times and he was getting irate so I yelled….he was getting really red in the face and hyperventilating….I yelled at him rather loudly to get out of the house and he turned around and said, "or what, are you going to make me?"….I told him to get out again and then he's grabbed me and told me I was under arrest……and she grabbed me by the other arm" – T85.6-85.9;

48. I got the impression from the defendant's evidence in chief that he was trying to paint a picture of himself being relatively calm but forthright in stating to police that he did not want to talk to them and he did not want them to come into his house. He seemed to be suggesting that it was not until Crea came upstairs and Crea was "getting really red in the face and hyperventilating" that he "yelled".

But, in my view, this does not make logical sense. If there was no yelling or disturbance coming from the defendant, then Crea would have had no reason to cease his discussion with TT and go upstairs. In cross examination (T91.3) the defendant said:

> I did not swear at them at any stage. I was yelling at them yes but I didn't call – didn't say fuck or call them cunts or anything else like they have in their statements.

49. I don't understand why Crea would be "getting really red in the face and hyperventilating". In any event nothing like this was suggested to Crea or Krepapas in cross examination. Given what had gone on before and after the police arrived, it is more likely that it would be the defendant who was upset and agitated. I consider that the defendant has coloured his evidence to downplay his role and elevate the police role. I find that taking the evidence as a whole, based on principles of logic, an analysis of the evidence and my impressions of the witnesses I generally accept the evidence of Crea and Krepapas and prefer it to the evidence of the defendant.

50. It was suggested in cross examination to both Crea and Krepapas that TT was holding a baby when she came downstairs, and each officer denied this. Yet in evidence in chief the defendant said (that after TT went downstairs to talk to police) he stayed upstairs with CB and the children. The following question and answer was then given at T82.7:

> And that's each of those children you referred to earlier, is it?---Yes.

The children he referred to earlier "my three boys: Danny, Zac and Caleb" – T81.3, and there was no suggestion that he was only referring to two of the three he had mentioned earlier.

Accordingly, the only witness who suggested that TT had a baby with her was DT. I am unable to accept his evidence in this regard as it is against the weight of all the other evidence in the case.

51. At no stage in the defendant's evidence in chief did he give any evidence about any conversation with police about the welfare of any of the children. However in cross-examination at T89.1 the following exchange occurred:

> Well, you heard your son give evidence earlier that he was upset, little Zac was upset, Zac was crying. Police asked you whether they could just check that everyone was alright, they wanted to check on the children's welfare?---I turned around then and the kids – I seen the kids standing behind me in the lounge room and I pointed at the children and I said, "you can see the children there; there is nothing wrong with them".

In my view, it is difficult to work out where this fits in time on the defendant's version. It fits easily into the versions as given by Crea and Krepapas. Neither Crea, Krepapas or the defendant gave any evidence to suggest that at any stage police asked TT if the children were alright but DT said "they asked Dad and Mum if we were alright". On the evidence I am unable to find that this evidence of DT was correct. It was not suggested (by Crea, Krepapas or the defendant) that TT took any part in any of the conversation (apart from speaking to Crea downstairs briefly in the initial stage) leading up to the defendant being arrested. Further, DT said that he yelled out "yes we are", in order to let police know the children were alright. Again this is not supported by any of the other evidence in the case (including the defendant's). I am unable to give the evidence of DT much, if any, weight.

52. On the evidence taken as a whole, I find beyond all reasonable doubt that the defendant is guilty of charge 1.

53. Turning to charge 2, the resist arrest. *Section 158* of the *Police Administration Act* states as follows:

> A person shall not resist a member in the execution of his duty or aid or incite any other person to resist a member in the course of his duty.
>
> Penalty: $1,000 or imprisonment for 6 months or both.

54. As noted earlier, this is a conduct offence. In *Hull v Noske (supra) @ 597* Walters J said:

> I turn to the ground of appeal which asserts that the arrest of the appellant was completed in law before he began to offer any resistance to the police officers, so that thereafter he was no longer resisting them in the execution of their duty of arresting him for the offence of drunkenness. I do not deny that there may be an arrest by mere words, by saying “I arrest you”, without any touching (*Alderson v Booth (1969) 53 CrAppR 301*), but as Lord Parker CJ pointed out in that case, there is another factor which must necessarily exist in order to constitutes an arrest. Not only must the words used by the arresting officer be calculated to bring to the offender’s notice, and in fact let him know, that he is under compulsion, but he must thereafter submit to the compulsion and go with the arresting officer. If words are enough to bring home unequivocally to the offender that he is under compulsion, those words will be sufficient to constitute an arrest. But if a verbal intimation is insufficient to bring home to him that he is under compulsion, and if notwithstanding that intimation he continues to resist, then the use of reasonable physical force may be necessary to constitute an arrest.
>
> …………..
>
> In any event, it seems to me that it is a question of fact in each case whether a person has been arrested or not (*R v Inwood [1973] 2 AllER 645 @ 649*).

In that case Walters J concluded that the arrest of the appellant had not been completed until he had been placed in the police patrol vehicle.

55. In the case of *Hallion v Samuels (1978) 17 SASR 558*, Bray CJ found on the facts of that case (@ 562) that the arrest was complete by the time the appellant had been put on the ground and handcuffed. His Honour went on to say (@ 563) that “an arrest must at some time become complete and further obstreperous behaviour by the arrestee after that stage cannot constitute resisting arrest but must be punished, if at all, under some other category.” However, in my view, that decision may not have wide application and may be somewhat peculiar to the way the charge was laid in that case. The relevant charge is set out (@ 561) as follows:

> On the 8th day of May, 1977, at Adelaide in the said State, (he) resisted KCE and MH, members of the Police Force in the execution of their duty while arresting JGH whom KCE and MH had reasonable cause to suspect of having committed an offence namely assaulted (sic) KCE.

56. Accordingly, in that case “while arresting” was specifically part of the charge. I do not understand Bray CJ to be suggesting that a police officers duties cease at the moment an arrest is completed. Rather, once a person is informed that they are under arrest and submit (even if only temporarily) then the arrest is effected. If on the way back to the police vehicle a person begins to struggle, then they are no longer resisting arrest because the arrest has been effected. They might be guilty of assault thereafter, or attempting to escape custody, or some other offence. If authority is needed for this proposition (see also *Leachinsky v Christie [1946] KB 124 @ 134; and [1947] AC 573 @ 584* & 600) then I respectfully adopt the following words of Angel J in *Thomson v C (1989) 67 NTR 11 @ 13:*

> The execution of a police constable’s duty is not spent upon arrest, as was argued before me. It was said to be “in the course” rather than “in the execution” of the constable’s duties to convey the captive from the place of arrest to the police station. I disagree. The execution of a policeman’s duty includes conveyance of an arrested person to a police station

> for formal charging. It has been well said that arrest is not an end in itself. It is but a step in bringing offenders to justice, or, if you please, in the general administration of criminal justice. So too, is conveying arrested persons to police stations.

57. In *R v K (1993) 118 ALR 596 @ 601* the Full Court of the Federal Court (Gallop, Spender and Burchett JJ) stated:

> The effect of all those cases is that a police officer acts in the execution of hie duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of that duty for as long as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease to be acting therein.

58. Bray CJ went on to add (in *Hallion v Samuels* @ 563) that "if the resistance to arrest alleged is simply the use of force against the police officers, then the defendant cannot be convicted both of assault on them and of resistance to arrest." I understand this to mean no more than that two offences can not be committed by the exact same conduct otherwise duplicity occurs.

59. In the case of *Towse v Bradley (1985) 60 ACTR 1 @ 4,* Blackburn CJ noted:

> It is clear that the defence of mistake is available to a defendant charged with this offence (sic hindering police): *R v Reynhoudt (1962) 107 CLR 381; Leonard v Morris (1975) 10 SASR 528,* per Bray CJ at 533, 534........The appellant would have been entitled to be acquitted if she honestly and reasonably believed that the person hindered or resisted was not a police officer, or was not engaged in the execution of her duty at the time.........
>
> If the evidence relied on is evidence that the appellant was mistaken as to the powers of the police under the warrant, (as to which I am very doubtful) that mistake would be a mistake of law and not of fact and such a mistake would not provide a defence.

60. On the evidence in this case I find that the defendant was told he was under arrest for hinder police (the defendant says he was not told a reason for being arrested, and Krepapas couldn't remember, but I prefer the evidence of Crea in this regard), and that then Crea and Krepapas both put their hands upon the defendant in order to formalise and effect the arrest. I find that the decision to arrest was a reasonable one in the volatile and hostile environment that confronted police. It is then clear from all the evidence (except DT who suggests that police just "beat up" his father), including the defendant's, that the defendant did resist arrest, and did so with considerable force.

61. This is not a case where the police could simply have proceeded by summons. They were there to investigate a domestic violence offence, having been requested to attend by TT. They clearly could not leave the property until their inquiries were completed, and any safety concerns were alleviated. So long as the situation was hostile (and the hostility was coming from the defendant) the ability of police to investigate was compromised.

62. It appears from the defendant's evidence that he resisted arrest because (T90.7):

> I asked the police to leave and not come into the house and they didn't comply. At that time, as far as I knew, they had no investigation and they had no suspect and they had no reason to arrest me. As far as I can see, the only reason they arrested me is because I wouldn't talk to them or let them in the house.

63. If Crea had arrested the defendant because he was unwilling to talk to police then that would have been an unlawful arrest, as the defendant would not have been hindering police. But on the evidence before me I am satisfied beyond all reasonable doubt that that was no part of the decision of Crea to arrest the defendant. If Crea had arrested the defendant because he would not let them into the house, then this

may still be a hindering of the police given that at least three relevant and material witnesses (CB and the two boys) were also in the house, and that Crea had concerns for the safety of these persons (particularly the two young boys).

64. However, as found earlier the defendant (by his attitude and verbal anger and agitated state) was hindering police in their investigation of the alleged domestic violence offence and accordingly the arrest was lawful. The defendant appears to have based his resistance to police on his belief that police had no right to enter his house on this day. I find as a matter of law that they did. Accordingly, any belief held by the defendant in this regard was therefore an error of law, and as such, could not form any basis for his resisting being lawful.

65. As noted previously, the defence of honest and reasonable mistake is available. I am satisfied that the defendant honestly believed that he could preclude the police from the house, but on the evidence of this case I am satisfied beyond all reasonable doubt that the defendant's belief was based on an error of law, and was not objectively reasonable. It was the defendant's actions that caused police to have to focus on him. If the defendant had been acting in a reasonable manner then police could have conducted their inquiries.

66. I find that the defendant immediately and violently resisted the lawful arrest by Crea. If he had co-operated and gone with police and sat in the back of the police van for awhile that would have enabled the police to fully investigate the matter and speak to all other persons present. Having done that it is possible that the matter may have been resolved and it may have been resolved in a way favourable to the defendant. It may have transpired that police may have decided that there was no real incident and the call for police assistance was unnecessary. However, whilst the defendant was not acting calmly

real concerns for the safety of those present remained the paramount and over-riding concern.

67. The events after arrest were clearly very violent and somewhat confused. Crea and Krepapas were struggling to restrain the defendant and the defendant continued to violently resist all efforts to restrain him. TT became involved and was yelling and causing some distraction to police. TT also threw water (apparently because the defendant had been OC sprayed) at one point which further made it difficult to control the defendant, as he was now somewhat slippery. CB was lurking, and at one stage kicked Crea in the head. No doubt the children were upset and generally around. It was a chaotic scene, but one of the defendant's own making.

68. Doing the best I can with the evidence I find that the defendant did resist police efforts to arrest him by:

- Tensing his right arm to stop Crea getting his arm behind his back;
- Lowering his weight in order to pull the police down, and to stop being taken outside;
- Swinging his arms to break free of police;
- Lashing his legs to break free of police;
- Turning his head to avoid the OC spray and continuing to struggle;
- Continuing to thrash and kick out;
- Kicking and hitting Crea in the chest when the defendant was on the kitchen floor;
- Yelling at police the whole time to go away;

- Continuing to kick and wave his arms about and struggle violently until Crea emptied a can of OC spray into his face.

69. As a result of the defendant's violent resisting of his arrest he was sprayed with OC spray which had little effect upon him as he managed to turn his head to avoid most of the spray. He was punched in the head area 3 times and kneed in the stomach by Crea after the defendant had punched Crea in the chest (which forms the basis of the particulars to charge 3). He was direct contacted with a taser to his leg 2 or 3 times without effect. He was direct contacted with a taser to his chest 1 or 2 times without effect. Finally Crea emptied a whole can of OC spray into the defendant's face.

70. I find the defendant guilty of charge 2.

71. When the final application of OC spray occurred I find that the defendant was subdued and ceased to resist. It was then that the defendant was finally able to be arrested and he was handcuffed with his hands in front. Once restrained the defendant was rolled onto his side and Krepapas applied some water to the defendant's face.

72. I further find beyond all reasonable doubt that the defendant did assault Crea, who was a police officer in the execution of his duty. The assault was committed whilst Crea was still attempting to arrest the defendant for hindering police, and whilst the defendant was resisting such arrest. In addition to his general resisting I find that at one stage the defendant managed to break free from police and punched Crea 2 or 3 times in the chest.

73. I therefore find the defendant guilty of charge 3.

74. In relation to charge 5 it was the evidence of Krepapas that when the defendant was struggling and resisting police in the kitchen area he was at one point in time on the ground on his back. She said that the

defendant grabbed her arm and pulled her down, but she pulled away. She said she had a graze on her wrist which she guessed was from his finger nails. She said she had no other injury, other than the very minor grazes on her right wrist. She did not seek any medical attention.

75. I consider that it is necessary to be careful to avoid duplicity when lots of things are happening at the one time. Clearly the incident from the time the defendant was told that he was under arrest until he was restrained and handcuffed was all part of his resisting the arrest. It can be somewhat artificial to take particular incidents out of the general resist and say that is a separate offence. In my view, this can be possible where there is a distinct action which is different and distinct (as where the defendant punched Crea in the chest). However, in my view, the contact with Krepapas can be seen as part of the general resisting as opposed to a separate and intentional assault. Accordingly, I add it to the resisting as part of charge 2, and find the defendant not guilty of charge 5, so as to avoid any duplicity.

76. Before concluding this matter it is necessary to consider some additional evidence in the case. When back-up police arrived there was evidence that a police officer named Hawkins decided that the defendant should have his hands cuffed behind his back rather than in front. The evidence went on to describe a further violent struggle with the defendant when this occurred, and before the defendant could be re-handcuffed. This incident did not form any part of Ms Horvath's particulars that she read onto the record. Accordingly, I do not know what charge, if any, this evidence is alleged to be relevant to.

77. As noted earlier, I have found that the arrest of the defendant was complete after he had been handcuffed with his hands in front of his body. Whilst I can understand that it is safer for police if a person is

handcuffed with his hands behind his back, it was not suggested that this was a part of a policeman's duty. There appears to be no specific charge that relates to this incident, and it appears to post-date the four charges that were before me, so I ignore that evidence and make no findings in relation to it.

78. In summary, I find the defendant guilty of charges 1, 2 and 3 and not guilty of Charge 5.

79. I will hear the parties on the question of sentence and any other relevant matters.

Dated this 28th day of May 2010.

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DAYNOR TRIGG
STIPENDIARY MAGISTRATE