

CITATION: *Police v Vsykala* [2010] NTMC 041

PARTIES: LEIGH CAHILL

v

LLANWYN NERIDA VSYKALA

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20902376

DELIVERED ON: 30 June 2010

DELIVERED AT: Darwin

HEARING DATE(s): 27 November 2009, 3 and 4 March 2010 and 8 June 2010

JUDGMENT OF: Ms Fong Lim SM

CATCHWORDS:

Criminal law – resist police in execution of duty – reckless to risk of serious harm
Section 27 and 43AK Criminal Code (NT)

Leonard v Morris (1975) 10 SASR 528 at 534,

Daye v Pryce [2003] NTSC 82

REPRESENTATION:

Counsel:

Plaintiff: Ms Truman
Defendant: Ms McClaren

Solicitors:

Plaintiff: Director of Public Prosecutions
Defendant: Asha McClaren

Judgment category classification: C
Judgment ID number: [2010] NTMC 041
Number of paragraphs: 88

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

No. 20902376

[2010] NTMC 041

BETWEEN:

LEIGH CAHILL
Plaintiff

AND:

LLANWYN NERIDA VYSKALA
Defendant

REASONS FOR DECISION

(Delivered 30 June 2010)

Ms FONG LIM SM:

1. Llanwyn Vyskala, (the defendant) is a woman who acrimoniously separated from her husband on 17 January 2009. Karel Vyskala (Karel) had been having an affair with Stella Calvert. The day before 17 January 2009 the defendant and her husband had an argument which culminated in the defendant tipping a drink over her husband and the husband staying overnight with Calvert.
2. In the afternoon of 17 January 2009 Karel Vyskala was served with a Domestic Violence Order issued by the police after which he attended 11 Bittern Street, the matrimonial home, to collect his belongings. Police were in attendance and arranged for Matos (a mutual friend of Mr and Mrs Vsykala) to come and collect Karel's belongings (including Karel's motor bike) on his behalf. After collecting the belongings Karel, Calvert, and Matos returned to Matos' house at 10 Isabel Court.

3. It is at 10 Isabel Court where the offences are said to have occurred. The defendant attended that place in her vehicle ramming Calvert's car once and then returning a second time, as short while later, to ram it again causing damage to Calvert's car, Matos' car and her husband's motorbike. It is alleged she had her children in the car at the time. When she first rammed Calvert's car, it was necessary for Karel, Calvert and Matos to move to avoid being injured. The defendant was later arrested by police at the scene and during that arrest bit one of the officers on the forearm.
4. The defendant has been charged with several offences. The defendant has pleaded guilty to the charges of engaging in conduct reckless to the danger of causing serious harm to her husband, Calvert and Matos, but not guilty to the same charge relating to her two children. She has pleaded not guilty to assaulting Calvert with a weapon, the value of the damage caused to Calvert's car and her husband's motorbike and not guilty to resisting police and assault police.
5. The Court heard evidence from Karel Vyskala, Stella Calvert, Carlos Matos, police officers Mullins, McKeowan, Fahey, MacMahon and Hill. The defendant, her daughter Sophie Pugh, and Judith Beard gave evidence for the defence. Due to the fact that the defendant still uses the surname of Vyskala, I will refer to her in this judgement as the defendant and Mr Vyskala as Karel.
6. The Court was also provided with recordings of "000" calls made by Karel and Calvert and the CAD log of when police cars were despatched and reports made by and to those police officers through police communications unit. Evidence was also given from the loss assessors of the damage to Calvert's car and Karel's motor bike. Documents called for in the cross-examination of the defendant were tendered at the request of the Defence and they included unsigned affidavits of the defendant, criminal history of Karel, a letter from the Australian Embassy regarding Karel, judgments

regarding Karel from a Court of the Czech Republic and a statutory declaration from Beard.

7. Ms Beard gave evidence of the defendant's good character and it was conceded by the prosecution that the defendant was of prior good character. I give myself the direction that a person of positive good character is less likely to lie about the allegations made against them. I also remind myself that I must be satisfied beyond a reasonable doubt in relation to each element of the offences and that the Prosecution must negative beyond a reasonable doubt any defence raised by the defendant.
8. The issues for the Court to be decided are:
 - (a) Was the value of the damage to Calvert's vehicle \$18,600?
 - (b) Was the value of the damage to the husband's motorbike \$14,653.20?
 - (c) Were the children in the car at the time the defendant used it to ram Calvert's vehicle and by having the children in the car, was the defendant reckless as to the serious harm to her children?
 - (d) Did the defendant attempt to attack Calvert with tinsnips?
 - (e) Did the defendant resist the police in the execution of their duties?
 - (f) Did the defendant assault Constable Xavier McMahon whilst in the execution of his duty?
9. **What was the damage to Calvert's vehicle?** Photos were produced by the police showing the damage to Calvert's vehicle. While there was some issue about which police officer took those photos, it is clear that they were taken by a police officer attending and showed the state of the vehicle as the police found it shortly after the attack by the defendant. Calvert's insurance company's assessors assessed the vehicle as a write off. The insurance assessor Mr Birse was called and his assessment tendered. He considered the book value of the vehicle, after referring to references used in the industry,

and assessed the book value to be \$14,000. The repair cost for Calvert's vehicle was assessed as approximately \$15,000, based on a quote Mr Birse received from Darwin Crash Repairs. The agreed value in Calvert's insurance contract was \$18,600. The defendant did not put any evidence to counter Mr Birse's assessment.

10. The damage particularised in the circumstances of aggravation was \$18,600. The significance of the value of the damage of the circumstance of aggravation is that should the damage be greater than \$5,000, then the maximum penalty for the charge moves from two years imprisonment to seven years imprisonment.
11. I must be satisfied the circumstance of aggravation is proven beyond a reasonable doubt. I cannot be satisfied beyond a reasonable doubt that the damage was \$18,600 however, I can be satisfied beyond a reasonable doubt that the damage was greater than \$5,000 being \$14,000.00. Mr Birse is an experienced loss assessor who explained his methods of assessing the market value of the car prior to damage. Mr Birse was a credible and reliable witness and provided the Court with appropriate information. His evidence was not contradicted.
12. The circumstance of aggravation is that the damage was over \$5,000 and therefore the defendant will be found guilty of that circumstance of aggravation.
13. **What was the damage to the motor bike?** Defence counsel raised a preliminary issue in her submissions that there was no evidence that the motor bike was the sole property of Karel and not matrimonial property. That submission was mischievous and clearly not sustainable in this case given the defendant had already pleaded guilty to that element of the charge and was only challenging the circumstance of aggravation that the damage was greater than \$5,000.00.

14. The assessment of the damage took place five weeks after the incident.
15. A quote was obtained from Precision Motor Bikes to repair the bike for \$14,653.20. Mr Clement, the person who provided the quote was cross-examined extensively about what items should be included and what should not, he was not referred to the photos taken by the police when providing his quote. There was some suggestion that the quote was inflated and there were unnecessary items included. It was conceded that the photos did not show extensive damage to the bike. Mr Clement stressed on several occasions that when they give quotes on repairs they give quotes on bringing the bike back to new.
16. There was no contrary evidence tendered regarding the alleged damage to the motor bike and I find that Mr Clement gave his evidence honestly and to the best of his ability. However Mr Clement could not give an opinion whether the damage he saw was consistent with the history given. He confirmed he only quoted on the new damage. The motor bike in question was a 2003 model, six years old at the time of the offence and there is no evidence of the value of the bike before the damage.
17. Karel is seeking restitution for the damage to his motor bike from the Defendant.
18. For the purposes of the circumstance of aggravation and restitution I must be satisfied beyond a reasonable doubt as to the value of the damage claimed. I cannot be satisfied beyond a reasonable doubt that the value of the damage is as claimed, nor can I be satisfied beyond a reasonable doubt as to any value of the damage.
19. Mr Clement could not confirm that damage he quoted on was consistent with the incident as described and his description of how the bike got damaged “just that it had been hit” gives me no confidence that he understood from what angle the bike was hit and at what speed. He did not and could not say

if the damage was consistent with the bike being impacted from behind and knocked to the ground from a standing position. He stated in examination in chief he only quoted on the new damage, however the values placed on the panel beating was outsourced so he could not positively confirm that cost. The inclusion of some parts in the quote because they may be needed to be replaced places some doubt on whether the value placed on the repair of the bike properly reflects the damage sustained.

20. There is no reliable evidence before me which could satisfy me as to the value of the bike before the damage.
21. There is no separation of the value of the motor bike before it was damaged and the value of a new bike. It is also clear from Mr Clement's evidence that some of the parts he had included in his quote were included because they were parts which may be necessary to bring the bike back to new. The bike was not new before it was damaged.
22. I cannot be satisfied beyond a reasonable doubt as to the value of the damage to the motor bike and therefore that circumstance of aggravation is not proved on charge 10 and restitution is refused.
23. **Were the children in the car?** The defendant denies having the children in the car at the time of ramming Calvert's vehicle. Karel says he saw the children in the car each time the defendant used her vehicle to ram Calvert's car. He saw the faces of his children through the window of the vehicle and heard them crying.
24. Calvert did not see the children at any time during the ramming of her car, but says she heard children crying during both incidents. She could not say if that crying came from the vehicle.
25. Matos says he only noticed the children in the car the second time the defendant used her vehicle to ram Calvert's car. He claims he saw the children in the car and heard them crying.

26. Pugh gave evidence that her mother had left home twice that afternoon, the first time she left the children with Pugh to babysit, the second time after she had confessed to Pugh about the ramming of the Calvert's car she took the children with her.
27. The defendant claims that she did not have the children with her at the time she used the car to ram Calvert's car and it was only when she returned to surrender herself to the police that the children were in the car because she intended to hand them over to their father if she were arrested.
28. To determine this issue I must examine the evidence about timing of the events and the reliability of the witnesses must be closely scrutinised.
29. It is admitted by the defendant that she rammed Calvert's car twice and there was only a short space of time between the two incidents. She says she did not get out of the car the second time, she got out the first time with the tinsnips to attack the car. She then went home, spoke with her mother in Perth about what she had done and asked for money to leave Darwin, had a discussion with her daughter about leaving, had a cigarette and then collected her children and went back to Isabel Court to surrender herself to the police. The phone records of the defendant's phone shows a call to her mother's number at 5:36pm being the call the defendant identifies as making to her mother after the rammings.
30. Pugh confirms her mother's evidence that the children had been left with her all afternoon and it wasn't until her mother returned after ramming the vehicles that she took the children with her. Pugh remembers her mother coming home confessing to her crimes, sending her out to get the suitcases and calling her grandmother. Pugh remembers having an argument about going to Perth and telling her mother she could not run away from her actions. She says she then went back to working on the computer and the next thing she knew her mother had left with the children. Pugh's evidence about times was a little confused. She accepts she told Fahey that her mother

had left with the children at about 6:00pm that night and had not returned. She became confused as to the timing of events under cross-examination and acknowledged in cross-examination that although she said in her statement that she saw her mother put the children in their car seats, she had not actually seen the defendant do that, she had assumed that the defendant had done so because one moment the children were there and the next her mother was driving away and the children and were not at home. Pugh was unshaken as to her evidence that the children were at home with her that afternoon while her mother was over at 10 Isobel Court ramming her vehicle into Calvert's car.

31. Pugh was detailed in what she remembers Charlie doing that afternoon and was clear that her mother left the house shortly after Karel had been to the house to collect his belongings and then she later returned after having committed the offences.
32. Karel, Calvert, and Matos are all consistent in their estimation of the timing of the incidents. They had just returned to Matos' house at 10 Isabel Court from 11 Bittern where they had collected Karel's belongings when the defendant came down the street in her vehicle at speed to ram Calvert's car. The defendant hurled some abuse out of the window towards Calvert and then left. They each called the police and were still on the phone to the police when the defendant returned to ram Calvert's vehicle again. The second time she got out of the vehicle with tinsnips in her hand and stabbed at the windows of Calvert's vehicle smashing the rear window. The defendant then ran at Calvert with the tinsnips in her hands.
33. The objective evidence produced to the Court was the phone records of the defendant's home phone, the log of CAD calls and an audio recording of the "000" calls made.
34. The phone records indicate a short call was made to the defendant's mother at 5:36pm. The audio of the "000" calls confirm that Karel and Calvert both

made calls to the police and were still on the phone when the defendant returned the second time (within a minute of first contact). There was no record produced of a call made by Matos and no explanation was produced why that would be the case.

35. In the recording of Karel's call to "000" the defendant can be clearly heard to be arguing with Karel on that audio saying "I am not attacking you" in response to Karel's comment to the operator that she was attacking him.
36. If it can be accepted that the defendant had already been to 10 Isabel Court and rammed Calvert's vehicle before the calls were made to "000", then the defendant's evidence that she only got out of her vehicle on the first occasion cannot be believed. The defendant states that she rammed Calvert's car twice in quick succession having driven up to the top of the circuit and back between each incident. Given the audio on the "000" calls corroborate she had already been there once, the defendant must have got out of the car the second time around as she can be clearly heard on that audio recording.
37. Pugh stated in her evidence that she had the children, Charley and Bellamy, with her until about 6:00pm when the defendant then took them with her. She did not know where her mother was going as the defendant did not tell her she was leaving. What is of significance is that Pugh says that her mother only took the children after she had returned to the house and told Pugh what she had done. Sergeant Fahey confirmed Pugh had told her that her mother had left with the children at about 6:00pm. Fahey observed that Pugh did not seem upset at all, just curious as to why she was asking these questions.
38. Pugh was taken to a previous affidavit she had made in which she did not state she had the children with her that afternoon. She stated in that affidavit that her mother had left at about 4:30pm returning about 5:20pm when she advised Pugh she had rammed Stella's car. There was no explanation why she omitted that fact of the children being with her in her earlier statement.

39. Counsel for the prosecution suggested Pugh should not be believed because she was clearly loyal to her mother and her evidence must be viewed with caution. Pugh was vague about the time her mother was home after she returned having already rammed the cars and accepted in cross-examination that she had not actually seen her mother put the children in their car seats, even though she had told Fahey that she had and signed a statement to that effect.
40. Pugh had signed two inconsistent sworn statements, one in which she told Fahey that her mother had left at 6:00pm failing to mention an earlier time and then in affidavit three days later said it was about 4:30pm. Pugh's evidence is important because it corroborates the defendant's claim that the children were not in the car when she rammed the vehicles. However the inconsistency in Pugh's evidence can be explained by the fact that the statement she gave to Fahey about when the defendant left was in answer to an enquiry from Fahey about the last time she saw her mother. There was no questioning about the movements of the defendant for the whole of the afternoon, just when was the last time Pugh had seen her mother.
41. Karel has a history of dishonesty offences and therefore his evidence in general must be viewed with caution, however given both Calvert and Matos gave evidence of hearing children crying, his evidence about the children is somewhat corroborated.
42. Without objective evidence to corroborate the either version of events the exercise of assessing the reliability of each witnesses' evidence is more difficult. Fortunately the Court was provided with some objective evidence, the audio of the "000" calls, the printout of the CAD entries and the telephone records of the defendant's home phone.
43. The audio of the "000" calls show both the calls of Calvert and Karel to last about two minutes and 35 seconds. Both calls report the defendant having just been at 10 Isabel Court and ramming Calvert's car. Both Calvert and

Karel are still on the phone to the police when the defendant returns a second time to ram the car again. Calvert's call mentions the motor bike in the second attack and it is clear on Karel's call that the defendant is out of the car and yelling at Calvert after the second ramming. The defendant is heard to clearly say " I am not attacking you" after Karel reports to police that she was attacking him. The defendant is also clearly heard to say "Come on bitch".

44. The CAD report was referred to extensively by both sides. Defence counsel submitted that the CAD report supported the defendant's version of event because it shows that Karel and Calvert were wrong in their evidence about timing. Defence counsel came to this conclusion by submitting Karel's call to the police was at least 10 minutes long because his call was recorded as being received at 17:28:39 and shown, in the left hand column of the CAD report as cutting out at 17:36:51. This analysis of the CAD records shows that Defence counsel completely misunderstood the nature of the CAD records. Even without looking at those records it is clear from listening to each of those calls they were approximately 2:30 minutes long. It is also clear from the CAD records that the time on the left hand side of the document is the time and date at which the operator was able to enter the information into the system. If the entry on the top of page 4 of the CAD records is considered, the left hand column shows an entry at 17:36:52 but refers to a call (Calvert's call) of 17:26:45 slightly earlier than the entry referring to Karel's call recorded at 17:36:50 referring to a call at 17:28:39.
45. It is important to note that the calls from Karel and Calvert were taken by two different operators, their voices are distinctly different, and therefore they are recording the information at slightly different times.
46. In summary the CAD records need to be considered carefully, because it is a printout of all of the communications regarding the particular job and the

notes are entered by the different operators not a real time transcript of the calls received.

47. The timeline which can be supported by the CAD records is as follows:

Time	Event
17:26:45	Record of call from Calvert to "000" regarding defendant's first approach to 10 Isabel Court
17:28:39	Record of call from Karel to "000" reporting defendant trying to run him over and attacking him. During that call the defendant and Karel can be heard to be arguing.
17:36:48	Unit 409 is dispatched to attend
17:39:49	Unit 409 arrives at scene advises offender has decamped, there is a description of the vehicle and mention of 2 children in the vehicle.
17:55:14 (being the time the entry was made)	Unit 409 reports offender back LOC is handcuffed as caused a dist.

48. The CAD report therefore confirms there was a short time, 2-3 minutes, between the defendant's first approach to 10 Isabel and the second attendance. Then sometime between 17:39:49 and 17:55:14 the defendant has returned and been arrested and handcuffed.
49. The first mention of the children in the CAD report is after the police attend. There is no mention of the children by Karel or Calvert in their calls to "000".

50. The phone records show a phone call from the defendant's home to her mother's number in Perth at 5:36pm. The defendant, supported by evidence of her daughter, claims she made that call after having been at 10 Isobel Court. Taking into account that the police arrived at 10 Isobel Court at about 17:36 and at that time the defendant had already left. Taking into account the time recording for CAD and Telstra may not be synchronised. it is possible that the defendant had made that call.
51. I must also take into account the map tendered into Court and the route the defendant says she travelled between the two addresses. If the scale of the map is referred to then the route taken was between 2 – 3 kms and would not have taken a great deal of time to travel in a car. If travelling at 50 km per hour, then the journey would have taken approximately 2.4-3.6 minutes.
52. The police arrived at the scene about 3 minutes after they had been despatched, that is about 5:39 pm. They were despatched soon after Karel's call to "000" terminated at about 5:30pm. When they got there the defendant was not there and then it was only about 5 minutes later that the defendant comes back. There was about 15 minutes between the time the defendant left the second time and returned the third time.
53. The objective evidence on the timing of incidents is capable of supporting both the prosecution case and the defendant's contention that she had returned home to make the phone call to her mother at 5:26pm. The objective evidence does not support Pugh's evidence that her mother left with the children at about 6:00pm however, her evidence that the children had been left with her to babysit that afternoon and her mother took them after she had committed the offences, cannot be totally disregarded. There was enough time for the defendant to return home make the quick call to her mother, have a conversation with her daughter and put the children in the car and return 10 Isobel Court.

54. The lack of preciseness about times by the defendant in these circumstances where emotions are high is understandable. Pugh's lack of preciseness about the times is also understandable given the emotional turmoil she may have been in when her mother told her about what she had done and the move to Perth and given her explanation that she had never been good at estimating times.
55. The fact that Karel or Calvert did not mention the children in the car in their calls to the police does not take the matter any further. The omission could have been because they were shocked as to what had just happened and they may have just failed to mention it.
56. Karel's evidence is tainted by his history of dishonesty offences and where his evidence is at odds with other witnesses, I view his evidence with caution.
57. Calvert was not sure that the children were in the car at the time of the offending. She heard crying but conceded it could have been coming from anywhere in the neighbourhood.
58. Matos, who I find to be a reliable and honest witness, says he saw the children in the car when the defendant rammed her car into Calvert's the second time and I accept that is what he believed he saw, however his memory was shown not to be completely accurate about what happened on that day. In particular, his description of what happened at 10 Bittern Court varied to most other witnesses, including the attending police officers. It is possible he remembers seeing the children in the car after the defendant returned the third time when she was being arrested.
59. The evidence in support of the proposition that the children were in the car at the time of the rammings is not sufficient to satisfy me beyond a reasonable doubt. The defendant's evidence and Pugh's evidence on this issue cannot be disregarded totally.

60. If I am wrong about the presence of the children in the car, there was no evidence put to me about the substantial risk of serious harm to the children even if they were in the car. There is scant evidence about where the children were seated and whether the speed at which the defendant's vehicle was travelling and the severity of the impact was enough to present substantial risk of serious harm to them. If they were in the car they could have been strapped into their properly fitted car seats and there is no evidence before the Court that children in that situation would have been at risk of serious harm. Although the defendant did give evidence that her son's car seat was in the front passenger seat, if he were in that seat there is likely more risk to him than if he were secured in the back seat.
61. The fault element attached to this offence is that the defendant must have been reckless as to the substantial risk of serious harm to the children. Section 43AK of the Criminal code attaches that fault element to this offence, that is the "result" is serious harm to the children and the defendant must be found beyond a reasonable doubt as reckless to that result. There must be a substantial risk of serious harm to the children, the defendant must have been aware of that risk and it must have been unjustifiable for her to take that risk. If I could find there was substantial risk of serious harm to the children, I would also find it was unjustifiable in the circumstances of this case to take that risk.
62. I cannot be satisfied beyond a reasonable doubt that the defendant had been reckless to the danger of serious harm to her children. There is no evidence that if the children were in the car, they were not properly secured or that the speed at which the defendant rammed Calvert's car was such a speed as to present a substantial risk of serious harm to the children. The defendant is found not guilty of this charge relating to her children.
63. **Did the Defendant attack Calvert with a pair of tinsnips?** The Defendant admits to approaching Calvert with both fists raised however denies ever

attacking her with a pair of tinsnips in her hand. Karel saw the defendant get out of the vehicle the second time with the tinsnips in her hand using a stabbing motion with them towards Calvert. He also says that the defendant did not use the weapon on Calvert because he stood between Calvert and the defendant. He says the defendant then used the tinsnips to damage the windows of the vehicle by stabbing at them and eventually smashing the rear window. Calvert confirms the defendant came at her with the tinsnips and says she removed herself from the situation by going back to the house. She did not see the defendant attack her car with that weapon.

64. Matos also states he saw the defendant get out of the vehicle after the second ramming and advance upon Calvert with the tinsnips in her hand.
65. The defendant's evidence is that she only got out of her vehicle the first time and that was to attack Calvert's vehicle, however she is clearly not telling the truth about only getting out of the car the first time because she can clearly be heard on the "000" call of Karel to be out of the car and yelling out "I'm not attacking you" (after Karel reports to the police "she is attacking me") and "come on bitch".
66. The defendant cannot be believed in relation to this issue, she is clearly trying to exculpate herself from her actions on that day. Her denial of not getting out of the car the second time is untrue and I disregard her evidence on this issue entirely. Her explanation of how the tinsnips came to be on the ground is unbelievable. She suggests Karel has taken the tinsnips out of her car in an unusual fashion and put them on the ground and while I accept that Karel may not necessarily be a truthful witness, I have found Matos to be a truthful and reliable witness. With Matos' evidence combined with the recording of the "000" recording and Calvert's evidence of the attack, I am satisfied beyond a reasonable doubt that the defendant did get out of her vehicle after the second ramming and attempt to attack Calvert with the tinsnips in the manner described by Karel, Matos and Calvert.

67. The defendant will be found guilty of the charge of aggravated assault on Calvert.
68. **Did the Defendant resist a Police Officer?** The evidence of officers Hill and McMahon is that they arrived at 10 Isobel Court to find Calvert's vehicle at a strange angle to the kerb and the defendant not present. It was only a short time later the defendant returned driving at speed and presented herself to the police for arrest. Both Hill and McMahon then say that before they could arrest her, the defendant ran away from them and towards Calvert with the clear intention of wanting to hurt Calvert. It is then they take the defendant into custody by both of them each taking a hold of one arm. She struggles (this struggle is observed by Matos) and then the defendant bites McMahon on the forearm.
69. Defence counsel submits that the defendant did not resist the police officers in the execution of their duties. There is no suggestion the officers were not in the execution of their duties. Defence counsel submitted that the evidence is that the defendant ran away from the officers and that is not a "resist" but an evasion of arrest. What Defence counsel failed to address is the defendant struggled when the police officers tried to stop her from attacking Calvert. There is no doubt that the police officers were acting in the execution of their duties to stop the defendant from offending. It is also clear from the evidence that the defendant struggled against the police officers and that she was aware they were police officers, the defendant agreed that she struggled. Struggling against apprehension is resisting, it is a conduct designed to resist the arrest (see Bray CJ in *Leonard v Morris* (1975) 10 SASR 528 at 534, Riley J in *Daye v Pryce* [2003] NTSC 82).
70. The defendant gave evidence that the purpose of her struggle was because the police officers were applying excessive force on her and she was trying to alleviate the pain she was experiencing because of that force. She claims she should be exempted from criminal responsibility pursuant section 29 of

the Criminal Code that is she was acting in self defence and her actions were a reasonable response to the circumstances as she reasonably perceived them. I will refer to the issue of self defence regarding this charge in my consideration of the alleged assault of Officer McMahon.

71. **Did the Defendant assault a Police Officer in the exercise of his duties?**

The defendant admits to biting officer McMahon and therefore I can be satisfied beyond a reasonable doubt that she applied direct force to the police officer without his permission. The defendant claims she had to bite the police officer to make him let go of her as she was suffering pain because of the excessive force applied on her. She has raised the defence of self defence. The defendant believed the officers were applying excessive force and she had to defend herself from that force by biting the officer.

72. **Was excessive force applied?** Both Hill and McMahon were cross-examined about the force exerted on the defendant and the way they held her. They were consistent in their evidence that they each held one arm by the wrist and the forearm, and they did not apply any unnecessary pressure. It is the evidence of both police officers that the defendant was resisting in such a manner that there was a need to hold her very firmly given the emotional state she was in and the aggression she was displaying. McMahon was cross-examined at one stage about having his knee on the back of the defendant and sitting on her when she was ground stabilised, an allegation he denied.

73. Both officers were asked in cross-examination about the defendant being slammed up against the police van door, an allegation they both denied.

74. The aggression being displayed by the defendant is confirmed by Matos who witnessed her arrest and by Calvert who saw her struggling. Neither of them say anything about the defendant being slammed up against the van nor of either one of the officers placing his knee on her back or sitting on top of the defendant. Calvert confirmed she saw the defendant twisting away from

the police officers and heard her say something like “ you’re hurting me”. When Calvert was asked about the defendant being slammed up against the van she stated the defendant was placed up against the van.

75. The defendant gave evidence of feeling pain (she did not elaborate as to where she was feeling the pain) when her arms were pulled up behind her back to such an extent that she had to bend over almost double. She did not give any evidence of any injuries she received as a result of the alleged excessive force, although Defence counsel cross-examined the police officers regarding possible injuries to the defendant.
76. The defendant was a person whose actions indicated she was out of control and in a fit of jealous rage, she could hardly contain her anger towards Calvert when she gave her evidence some 11 months after the incident. She was clearly overcome with anger and resentment and her actions of using her car in the manner admitted indicate she was not thinking with a clear head.
77. The police officers’ apprehension of the defendant after she charged towards Calvert was a lawful execution of their duties (see s 123 of the *Police Administration Act*) and it is beyond a reasonable doubt that they were concerned the defendant was about to commit another offence. The defendant’s language and aggressive mood was reasonable grounds for that apprehension. The defendant accepted she ran towards Calvert and Karel and that she was abusing them at the time. Officer McMahon gave evidence that he apprehended the defendant because he was concerned that she was about to breach the peace and there was a need to restrain her from possibly assaulting Calvert.
78. The independent witness Matos, corroborates the police version of the arrest as does Calvert. I cannot accept the defendant’s version of events, it is diametrically opposed to all of the other witnesses and it is clear she lost control of herself that evening. While I have directed myself that a person of

prior good character is more likely to tell the truth, it is my view in her evidence about her arrest the defendant is being untruthful and is trying to exculpate herself from her behaviour towards the police on that night.

79. I have found all of the witnesses for the prosecution to be reliable and they all describe the defendant as aggressive and emotionally out of control. Her verbal abuse towards Calvert after arrest such as “I’m going to slit your throat” is consistent with the witnesses’ observations of the defendant and the need for the police officers to be firm in their hold of her. The defendant was shown in the witness box to be very jealous and still angry at Calvert and Karel, even more than 12 months after the event. She was clearly a person who thought she had been wronged and was justified in what she did on that day. She had no remorse at all for her actions.
80. The defendant’s description of how she was able to bite Officer McMahon’s arm cannot be believed. She says the officers had her arms twisted up behind her back so hard that she was bent over and brought to her knees and that is when she turned and bit Officer McMahon, to get him to let her go. It would not be physically possible for someone whose both arms were twisted behind her back “up high”, who was bent over from her waist because her arms were twisted up high, to be able to turn her head to such an angle to be about to bite the forearm of the officer. However if the officers had hold of the defendant in the “escort hold” as described by each officer, that is one hand on the defendant’s upper arm and the other on the defendant’s wrist with her arms down beside her body, then is it conceivable she could have dropped to her knees and while doing that turned and bitten the officer’s forearm.
81. The defendant’s evidence in relation to her apprehension and the way in which she was arrested cannot be believed and I am satisfied beyond a reasonable doubt that she was not acting in self defence when she struggled against the police officers and when she bit officer McMahon.

82. The defendant is found guilty of both charges 7 and 9.

83. **Conclusion:**

The defendant is found guilty of charges 1 and 3 except she is found not guilty in relation to the alleged victims Charley and Belamy Vyskala.

84. The defendant is found guilty of Charge 5 including the circumstance of aggravation that Calvert was threatened with a pair of metal tin snips.

85. The defendant is found guilty of Charge 6 including the circumstance of aggravation that the damage was greater than \$5,000.

86. The defendant is found guilty of Charges 7 and 9.

87. The defendant is found guilty of Charge 10 but not guilty in relation to the circumstance of aggravation that the damage was greater than \$5,000.

88. I will hear the parties on sentence.

Dated this 30th day of June 2010.

Tanya Fong Lim
STIPENDIARY MAGISTRATE