CITATION: *[2010] NTMC 047*

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| PARTIES: | RICHARD GORDON HOWIE |
| | v |
| | BRIAN ERIC LA COMBE |
| TITLE OF COURT: | Summary Jurisdiction |
| JURISDICTION: | Criminal |
| FILE NO(s): | 20939868 |
| DELIVERED ON: | 12.8.10 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 7.6.10 & 20.7.10 |
| JUDGMENT OF: | Mr Daynor Trigg SM |

**CATCHWORDS:**

*Criminal Code s166* – threats to kill
*Jones v Dunkel* - inference

**REPRESENTATION:**

*Counsel:*

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| Prosecution: | Mr Tierney |
| Defendant: | Ms Bala |

*Solicitors:*

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| Prosecution: | Summary Prosecutions |
| Defendant: | NAAJA |

Judgment category classification: B
Judgment ID number: [2010] NTMC 047
Number of paragraphs: 72

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

No. 20939868

*[2010] NTMC 047*

BETWEEN:

**RICHARD GORDON HOWIE**
Complainant

AND:

**BRIAN ERIC LA COMBE**
Defendant

REASONS FOR DECISION

(Delivered 12 August 2010)

Mr Daynor Trigg SM:

1. This matter commenced before me on 7 June 2010. On that day the defendant pleaded guilty to charges 1 and 3 as read. Those charges were as follows:

> On 23 November 2009
>
> At Darwin in the Northern Territory of Australia
>
> 1. unlawfully damaged property, namely the glass drivers entrance door and main entrance door to Domino's Pizza Store, to the value of $2,500, being the property of Domino's Corporate Pty Ltd
>
> Contrary to *Section 251(1) of the Criminal Code*
>
> AND FURTHER
>
> On 23 November 2009

At Darwin in the Northern Territory of Australia

3. behaved in a disorderly manner in a public place, namely, Domino's Pizza Store, Shop 1, 283 Trower Road

Contrary to *Section 47(a) of the Summary Offences Act*

PARTICULARS OF THE CHARGE

You began to verbally abuse Domino's staff whilst hitting the front glass doors to the store. You left the store and returned a short time later, confronting a member of Domino staff by yelling "Come let's do it right now, come on, come on".

2. The particulars to charge 3 were read out before the defendant entered his plea of guilty. After the pleas of guilt were taken Ms Bala advised that there was a factual dispute as to both charges 1 and 3, but she did not elaborate on this further.

3. The absence of any elaboration made it impossible to know what the "factual dispute" might concern. By entering a plea of guilty to charges 1 and 3 the defendant was making a formal admission of the facts essential to each charge (*Collins (1994) 76 ACrimR 204).*

4. Accordingly, in my view, by his plea to charge 1 the defendant must be taken to have admitted that:

- On 23 November 2009;
- At Darwin;
- He unlawfully damaged the property of another.

5. The other aspects of the charge (namely that it was the glass driver's entrance door and main entrance door; the value of $2,500; and that it was the property of Domino's Corporate Pty Ltd) appear to be particulars, and therefore presumably at large on the evidence.

6. Further, in relation to charge 3, in my view, the defendant must be taken to have admitted that:

- On 23 November 2009;
- At Darwin;
- He behaved in a disorderly manner;
- In a public place.

7. Again the other aspects of the charge, including the "particulars" as read appear to be at large on the evidence.

8. In addition, and at the same time the defendant entered pleas of not guilty to charges 2 and 4 which were in the following terms:

> AND FURTHER
>
> On 23 November 2009
>
> At Darwin in the Northern Territory of Australia
>
> 2. unlawfully damaged property, namely the roof, passenger door and right rear window of a Holden Commodore NT 955-413, to the value of $1,800, being the property of Mohsen Mortadha
>
> Contrary to *Section 251(1) of the Criminal Code*
>
> AND FURTHER
>
> On 23 November 2009
>
> At Darwin in the Northern Territory of Australia
>
> 4. did, with intent to cause fear, make a threat to kill a person, namely Mohsen Mortadha which threat was of such a nature as to cause fear to any person of reasonable firmness and courage
>
> Contrary to *Section 166 of the Criminal Code.*

9. The trial then commenced. The prosecution did not provide any opening, and accordingly the circumstances of the alleged offending were unexplained. Somewhat surprisingly, the first witness called in the prosecution case was Senior Constable Crea ("Crea"), whose only involvement was to conduct an electronic record of interview ("EROI") with the defendant on 23 November 2009. Accordingly, I heard the EROI without having any idea of what the prosecution witnesses alleged had occurred (apart from some portions of a statement from one of the witnesses being put to the defendant later in his EROI). I consider that this was unhelpful to the court.

10. It was apparent from the EROI that the defendant was dressed in white shorts and a singlet which was predominantly black, that had white piping around the neck and arms and a broad white stripe down the side (under where the arms would hang).

11. The EROI went for about an hour, and no transcript was made available to assist the court. I again state that this in unsatisfactory. It appears to be the policy of prosecution to always transcribe an EROI if the matter is to proceed to the Supreme Court. However, it appears also to be the policy of prosecution to never (or very rarely) transcribe an EROI where the matter is to proceed to a summary hearing. I understand that this is for economic and/or resource reasons. Whatever the reason, it is extremely unhelpful, and in my view disrespectful, to this court. It is very important in a summary hearing for the trier of fact to have a fulsome and accurate record of questions and answers that are relevant to the ultimate facts in issue. In addition, there are times when some portions of an EROI need to be excluded from the evidence. Without a transcript this is impossible. Whilst I did my best to take notes whilst the EROI was played in court, it was simply impossible for me to make full and accurate notes of what was said. Accordingly, I was obliged to order that a transcript of

the EROI be prepared for my use. Accordingly, any chance that the matter might have been able to be finalised on 7 June was lost due to this factor.

12. I therefore request that in future the prosecution provide a transcript of any EROI that they intend to play in court, for the assistance of the court. I am sure that this would also be of assistance to prosecution and defence counsel.

13. After the EROI was played it was tendered without objection and became ExP1. I will return to a consideration of what the defendant said in the EROI after I have considered the other evidence in the case herein.

14. During the course of the EROI the defendant was shown various photos by Crea, and a bundle of 15 photos were tendered through Crea without objection and became ExP2.

15. Also during the course of the EROI the defendant was shown a cassette tape (purportedly recording some of what occurred after the defendant was returned to the Domino's area in the back of the police cage). However, this tape did not make it's way into evidence, and this was not directly explained.

16. The next witness called by the prosecution was Paul Mead ("Mead"). He was the store manager for Domino's Pizza, and had been for 12 years. His business operated from shop 1, 283 Trower Road, and was near a Caltex service station.

17. He commenced work at about 1100 hours on 22 November 2009, and closed the business at about 2300 hours. Just after midnight (therefore in the early hours of 23 November 2009) he was still on the premises. He was on the phone talking to his area manager about weekly sales. Also on the premises was one of his staff (Mohsen

Morthada, hereinafter referred to as “Morthada”) who he referred to by a nickname of “Rizzo”.

18. Mead was shown a diagram of the store and surrounds and he marked various points on the diagram. This diagram was tendered and became ExP3. This diagram indicated that Caltex was an adjoining building to Domino’s and they shared a common dividing wall. Looking out towards the front of Domino’s, Caltex was immediately to the left. There was a counter which faced towards the front windows and doors of Domino’s, and which extended across the full width of the public area. The front windows and doors were effectively floor to ceiling glass (see photos 8 and 15 of ExP2). To the left of the counter (as you stood behind it) was a wall which blocked public access (see photo 15 of ExP2). To the left of this wall was a short entry area and a door which was described as the “drivers door”. It is apparent that this door was not for public access but was for delivery drivers to enter and exit through. To the right of the counter (as you stood behind it) was a further window, which had a white security shutter on the outside (see photos 9 and 10 of ExP2). According to the evidence, this window could not be seen through at the time of the incident in question, as the shutter was down. According to the diagram Morthada’s car was parked in front of and close to the front of Domino’s near the glass front windows and the “drivers door”.

19. Mead gave evidence that the following occurred (and the references to “T” are the portion of the transcript where this evidence can be found):

- Two youths came to the front of the store – T4.10;
- The **main person** (and I find that this was the defendant) had lighter coloured skin and was wearing a black singlet and white shorts – T5.1;

- The other person was an aboriginal youth with dark clothing – T5.1;
- They banged on the windows a few times and yelled out stuff like “have you guys got any pizzas” but he ignored them – T5.3;
- They walked to the left, towards Caltex and started banging pretty violently on the “drivers door” – T5.9;
- Morthada went out to tell them to go away, and he called the police, who told him to call Morthada back inside – T6.8;
- There was a lot of yelling and they were saying “come on, come outside”, and he dragged Morthada back inside the store and closed the door behind him – T6.10;
- We walked around to the front area again and the guy with the black singlet and the white shorts (who I find was the defendant) started smacking his right hand up against the front entrance window door (that’s when it broke the first time) – T7.2;
- The aboriginal boy was also forcing it with both hands…and making it go further – T7.5;
- Then they walked around to the side of the building which has a security blockage wall part….and they started hitting into that as well – T7.6;
- After that I noticed the aboriginal guy walk around to the front of the store where Morthada’s car was with a rock and threw the rock through the back driver’s door window – T9.3;
- Morthada went straight outside….and they all ran off…and Morthada jumped in his car and followed – T9.5;

- He couldn't see what happened and he called the police again – T9.6;
- About a minute later he saw Morthada do a U-turn and park back in the Caltex – T9.7;
- The guy in the black singlet (the defendant) went straight up to the car…Morthada got out and they started arguing straight away…Morthada went to the back seat and pulled out a cricket bat – T9.8;
- The guy in the black singlet (the defendant) kept on wanting him to fight him…Morthada took a swing, but missed him….at this stage they both ran to my left out of my view – T9.9;
- He quickly ran around to the "drivers door" and grabbed Morthada and pulled him back into the store – T9.10;
- As he closed the "drivers door" the bottom glass panel of the door got kicked in and smashed, but didn't break, but there was just cracks all through it – T10.2;
- When he closed the "drivers door" there was the guy in the black singlet (the defendant), the aboriginal kid and a female outside – T10.5;
- There was a lot more yelling and swearing from outside – T10.6;
- Both the aboriginal person and the person in the black singlet (the defendant) came over with palm tree branches and started smashing into the front windows again – T10.8;
- Then the lady came over and hit her right hand against the broken glass a few times as well, breaking it even more and looking like she cut herself at the same time – T10.10;

- She did a lot of yelling…called me every name under the sun and then she walked over to our scooter and pushed that over – T11.1;

- Then the police turned up….and they all just disappeared in different locations – T11.6;

- He did not see the man in the singlet (the defendant) do anything to Morthada's car – T 11.10.

20. Mead was asked in cross-examination about whether there might be any cctv footage from his premises, but he advised that there was none as it wasn't working at the time as he had problems with his cameras. That is unfortunate.

21. The next witness called in the prosecution case was Morthada. He worked for Domino's at the time as a pizza delivery driver. He was in the back of the shop cleaning in the kitchen when the incident complained of occurred. His evidence as to what happened was as follows:

- He heard that bang on the security window – T19.6;

- He walked to the front and saw "three guys and a girl walk in the front and start bang – they tried to buy something or I mean they were shaking the door, "open the door" – T19.7;

- The girl and one guy just walked away….but the one who was yelling at him all the time was wearing a black singlet with white shorts (the defendant)….but the two guys stay in the front and start banging the windows and are swearing and stuff like that – T 20.1;

- He told them to go away and they were swearing at him and saying "fucking Arabs, get out of the shop, we bash you" – T19.8;

- They start banging the windows harder and harder saying “wait until I see you in the street, I’ll bash you”, stuff like this “stab you” – T19.9;
- Mead called the police – T19.9;
- “I get out of the shop and they start throwing the (inaudible) and throwing shit at me. I went to the car, grabbed that cricket bat and swing at him….and I didn’t get him” – T20.2 (*although the transcript states that a word was “inaudible” I heard and recorded the word “tyres” in my notes of the evidence at the time, and there were tyres strewn around as could be seen in photos 6 and 7 of ExP2);*
- Mead pulled him inside….and as soon as he closed the “drivers door” the little window on the bottom got smashed – T20.4;
- He saw a big rock smash his car window….but didn’t know who did that – T21.5;
- The defendant hit the left hand side door of his car with a rock (*but it appeared at T22.2 that he was later saying this occurred later in time when he was driving the car)* and hit the roof with “tree”…”wood” – T21.9;
- He “got out of the shop straight away and they run. They run. So, I start my car following them” – T22.4;
- He was driving up and down the street, as he didn’t want to lose them…he drove back to the shop – T22.5;
- When he was driving up and down he did not drive at them – T28.1;

- At one stage the defendant tried to throw a Safeway trolley towards his car – T28.2;
- As he drove slowly past the girl who was on the median strip she tried to swing at him but she hit the broken back window and cut her hand – T28.4;
- "And he (the defendant) in the street, he smashed – he hit the door. So, I saw him twice he hit my car. He hit the roof and he hit the door" – T29.2;
- The defendant and the short one followed him back to the shop…"and yeah, I grabbed my cricket bat, I went for him (the defendant), I hit him. And I hit him a couple of times" – T22.6;
- He hit him (the defendant) "three, four" times in the "elbow, hand, again in same places. I can't remember actually where I hit him, I'm not very sure, but I was angry and hit him" – T28.9;
- Then Mead took him back into the shop – T22.6
- "this time they come two guys and him (*indicating the defendant)* and short guy and the girl(s).....smash it…the front window" – T22.7;
- The defendant was saying "I will stab you" – T22.8;
- "I'll kill you, I'll stab you" – T30.4;

22. In the course of his cross-examination Morthada stated that he was not a liar and said "I mean the petrol station was recording everything. So I'm not lying" – T25.8. It is clear that he was purporting to assert that cctv footage existed which would support his evidence. However, as will appear later in these reasons, no cctv footage was presented into evidence.

23. The next prosecution witness called was First Class Constable Grigg ("Grigg"). At about 0030 hours on 23 November 2009 he was working with Constable Gebardi ("Gebardi"), and received a message to attend an incident at the Caltex in Casuarina. Whilst in transit he received an update and was told to hurry. As a consequence beacons and sirens were activated. As they passed the Casuarina Club they were waved down by a security officer who pointed out 3 people on the median strip of Trower road. As police drove closer Grigg observed a male (who I find was the defendant), from the group of 3, run off through a lane. The police car stopped and Grigg got out and gave chase to the male on foot into a church carpark. He went on to say in his evidence in chief:

- "I was gaining on him and then as I got a bit closer to him he just appeared to turn and challenge me. He yelled something at me similar to the words "come on cunt". In which case I was close enough and just continued moving forward and tackled him to the ground" – T32.3

24. However, in cross-examination the following evidence was given:

Q---And when you were pursuing him the manner that you managed to apprehend him was because Mr LaCombe just simply stopped running and turned around?

A---That is incorrect. I was yelling the whole time at the defendant to stop, At no time did he stop. I had to yell it several times.

Q---So, how, did you eventually---?

A---He was tackled---

Q---You caught up with him because he ---?

A--- He was tackled to the ground.

25. In my view, these two versions are not wholly consistent. In evidence in chief he clearly asserted that the defendant turned and challenged him before he tackled him to the ground. It is difficult to see how the defendant could have done this whilst still running away. Yet in cross-examination when it was suggested to him that the defendant had stopped running and turned around he said this was “incorrect”.

26. Grigg stated that the defendant was wearing white shorts and a black singlet at the time of his apprehension, which evidence I accept.

27. Once the defendant was secured into the rear of the police cage the police vehicle was driven back to Domino’s, where Grigg’s noticed some smashed windows. He also stated that two females attended and they were yelling and screaming. He said one of the females was named Jayley (?) McDonald.

28. Grigg stated that he went to Caltex and viewed some cctv footage this same night. He said the footage that he saw did not show the front of Domino’s, but it did show “the defendant and the driver from Domino’s having an altercation out the front, because they had moved back to where the bowsers---” (T33.1). Accordingly, this cctv evidence apparently would not show who did what to the Domino’s premises or Morthada’s car. But it would give some objective evidence as to what occurred between Morthada and the defendant once Morthada had returned in his car.

29. The defendant is not charged with any offence arising from this period of time. Accordingly, the cctv footage would not afford objective evidence going to any particular charge, but it was clearly relevant as being part of the res gestae, and potentially important objective evidence that may have gone to credit.

30. Grigg made arrangements to collect a copy of the footage, which he apparently did later that morning, and took it back to the police station. It does not appear that Grigg made any attempt to secure the cctv footage in an exhibit room. I do not know where he put it. Subsequently, Grigg moved stations and he said the cctv footage disappeared when he moved along with another tape (which may be the tape that was referred to during the EROI). It does not appear that Grigg has made any attempt to try and obtain another copy.

31. In the course of Grigg's evidence his notes taken at the time were tendered without objection, and these became ExP4. These notes disclosed that Grigg had the name (Ben Wright) and contact details of the security person from the Casuarina Club who pointed police in the direction of the 3 people on the median strip. Accordingly, Wright may have had relevant and material evidence to give. However, I did not hear any evidence from Wright and no explanation for this was forthcoming.

32. Further, ExP4 discloses that the 3 people observed by Grigg were "2 x females and 1 x male". Who this 2nd female was, or when she came onto the scene is unexplained in the evidence before me. The evidence of Mead and Morthada only ever refers to one female being present.

33. Further, ExP4 discloses that police had the name (Scott Neaton) and contact details of the person who was working at the Caltex service station at the time. Accordingly, Neaton may have had relevant and material evidence to give. However, I did not hear any evidence from him and no explanation for this was forthcoming.

34. The final prosecution witness called was Gebardi. He became the OIC of the case when Grigg moved stations. He was aware that the cctv footage could not be located, but appears to have made no inquiries

to see if the original was still available, or whether a further copy could be made.

35. As indicated earlier, an EROI with the defendant later on the day of his arrest was played in court. Having had a transcript of this typed up, I am now in a position to address what the defendant says in more detail.

36. Clearly, the statements made by the defendant in the EROI are evidence in the case, and fall to be considered along with the other evidence. It was clear from the EROI that the defendant referred a number of times to camera footage that should be available, and strongly suggested that any such footage would confirm his version of events. Accordingly, the investigating police and the prosecution were on notice that any cctv footage was potentially crucial evidence. Unfortunately, whatever footage there was has not been introduced into evidence, and no efforts have been made to attempt to obtain another possible copy. I consider this to be a failure by investigating members.

37. Police and prosecution have a positive obligation to present all relevant evidence to the court, including inculpatory and exculpatory evidence. Morthada (when he gave evidence) asserted that cctv footage would support his version. The defendant asserted on the very day of the incident that cctv footage would support his version of events. By the police failure to properly preserve this cctv evidence (or make any attempt to get another copy) the defendant may have been adversely affected in his defence. I cannot assume that the cctv footage would not have supported the defendant's assertions in his EROI. Accordingly, the defendant may have been unfairly disadvantaged in this case.

38. I note that in *Jackson v Slattery [1984] 1 NSWLR 599,* the NSW Court of Appeal considered that a tape recording was a document, thus allowing secondary evidence of it.

39. This was not a case where it was the original of the document (cctv footage) that was lost. Rather the police appear to have made no inquiry as to whether the original of the cctv footage was still in existence. It was a copy of the cctv footage that has apparently been lost. But the evidence of Grigg was not such that I could be satisfied that a "due search" had been made. In any event the prosecution did not seek to lead any evidence as to what was shown on the cctv footage beyond what I have noted earlier.

40. In *Payne v Parker [1976] 1 NSWLR 191 @194* Hutley JA said (referring to the rule in *Jones v Dunkel (1959) 101 CLR 298*):

> The basis of the rule is "plain commonsense", as Windeyer J said in *Jones v Dunkel,* after quoting from *Wigmore on Evidence*, 3rd edition (1940) vol 2, s285, p 162, as follows: "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."

Later in that same judgment at Page 201 Glass JA stated:

> Whether the principle can or should be applied depends upon whether the conditions for it's operation exist. These conditions are three in number: (a) the missing witness would be expected to be called by one party rather than the other, (b) his evidence would elucidate a particular matter, (c) his absence is unexplained.

41. If I were satisfied that the failure to preserve this cctv footage was in any way deliberate or underhand, then that may be grounds to stay the hearing of this matter. Whilst there appears to be an unacceptable lack of concern or action concerning the missing cctv footage by police, I am unable to find that this was deliberate. However, in my view, the only way to deal with the potential unfairness to the defendant is to infer that if the cctv footage had been properly preserved (as it should have been) and played in court it would not have assisted the prosecution case. Not knowing what was on the cctv footage, and not having seen it, I cannot speculate as to what it might have shown. Accordingly, I cannot infer that it would have positively supported the defence case, but I do infer that it would not have assisted the prosecution in this case.

42. I am conscious of the fact that Morthada also asserted the cctv footage would support his evidence. However, Morthada is not the person on trial. He is one of the “victims”, but also a prosecution witness. The blame for the failure to preserve and play the cctv footage lies with the prosecution case, not the defence.

43. In a criminal trial such as this the defendant has no evidential onus. It is incumbent upon the prosecution to introduce all relevant evidence. The police had possession of this relevant evidence. In my view, the requirements of drawing an inference are met in this case.

44. I return to the evidence. In his EROI the defendant gave an initial summary of what he said happened as follows:

> Um, I was walking back from the pay phone and bumped into some younger blokes that I know, some younger blokes and we just having a talk or something and walking past the petrol station. And they – and then something happened, and argument (inaudible). And then I kept walking then they ended up – these kids, they ended up smashing this car window and he jumped in the car and fucking tried to run us over when I

was crossing the road. Went up – went up and down about three times, turned around in the middle of the road and come back. That's when my girlfriend arrived. She was almost hit by the car as well. And when he finally stopped doing that, then I went over and started talking to him or trying to talk to him and he pulled out a cricket bat from his car and he hit me about five times in the arm, because I blocked it, once in the back and that's why I got a big bruise on my arm and that. And then those younger kids come back again with big sticks and everything and he locked himself inside the Dominos and then I was swearing at him, I was banging on the window and – and then the police came.

45. In his EROI the defendant elected to speak to police about the incident. He chose not to answer questions about the male persons that he was with or to identify them. As such, there was nothing to indicate that police would have been able to call any of these persons as witnesses. Using what the defendant said in his EROI I have put together the following time-line or sequence of events:

| MEAD | MORTHADA | LA COMBE |
|---|---|---|
| | | Had 6 Tooheys Dry beers, he drunk but not overly drunk, not wasted |
| | Heard banging on security window and went to front where Mead was | |
| 2 males banged on windows | 2 males and a female (there were 3 males but one walked away and not seen again, and the | He was walking past the petrol station…and then something happened, an |

| | | |
|---|---|---|
| | female initially walked away, but she came back) walk to front of store and saying “open the door”, and calling him an “Arab”, they banging harder and harder | argument. And then I kept walking |
| 2 males walked off to the left | | |
| Pretty loud/violent banging on “drivers door” | | |
| Morthada went outside | Morthada went outside | |
| A lot of yelling | They threw tyres at Morthada, and he went to his car and got cricket bat out and swung bat at Def | He didn’t touch the tyres…argument with Morthada |
| Mead walked to “drivers door” and pulled Morthada back inside | Mead pulled him inside the shop | |
| | The little window at bottom of “drivers door” got smashed straight away…he kicked it (he | |

| | | |
|---|---|---|
| | didn't see but looked like kick) | |
| A lot of yelling "come on, come outside" | | |
| Def started smashing his hand against the front window glass, breaking it | | |
| 2nd male forcing the glass with both hands | | |
| 2 males walked around side of building | | |
| Pretty violent banging to security shutter | | Q---damage to window shutter what can you tell me?<br><br>A---nothing. |
| 2nd male walked to front with rock and threw rock through back driver's side window of Morthada's car | A big rock thrown by one of them and smashed right rear door window of Morthada's car | Those kids smashed his car window....I was walking away from "this cunt" talking shit...I didn't smash the car window |
| He didn't see Def do anything to the car | Def hit roof of car with tree branch | "I didn't smash his fucking car, I didn't do it" |
| Morthada went outside, | Morthada went outside | Morthada was standing |

| | | |
|---|---|---|
| his car is “his pride and joy” | (with the cricket bat), he was angry and lost his temper….he liked that car | out front out front when it got smashed and he jumped straight in the car |
| They ran off | They ran off | Kids ran off, he kept walking and that’s when his girlfriend walked across the road |
| Morthada got into his car and followed | Morthada got into his car and drove up and down (3 or 4 times) as he didn’t want to lose them | Morthada jumped into car and chased them and tried to run them over…went flying past 3 times |
| | When driving past Def threw rock at door of car (and came at the car with a shopping trolley….and female tried to swing at him but hit the back window, the one that smashed and she cut herself) | “No” |
| Morthada returned and parked his car and got out | Morthada returned and parked his car and got out | |
| Def went up to where | They followed him and went up to where | He went up to Morthada and said |

| | | |
|---|---|---|
| Morthada was | Morthada was | “what the fuck you doing, you nearly hit me, and you hit my girlfriend”, she had a cut on her hand |
| Def and Morthada started arguing | | |
| Morthada pulled out a cricket bat from car | Morthada grabbed cricket bat (and hit Def 3 or 4 times on the elbow, hand…..”I was angry and I hit him”) | Morthada got cricket bat from his car and hit him 5 times and once in back….he had bruised wrist |
| Def wanted Morthada to fight him | | |
| Morthada swung the cricket bat at Def but missed | Morthada hit Def with the cricket bat (I defending myself, they have sticks, rocks, I don’t know if he has a knife, I not taking the chance) | |
| Morthada and Def ran to the left out of his view | | He picked up little stones and threw it |
| Mead ran around to “driver door” and pulled Morthada back inside | Mead grabbed Morthada and pulled him back inside | |

| | | |
|---|---|---|
| and shut door | | |
| Bottom panel of "drivers door" kicked and damaged | | |
| Def, 2nd male and female there | | |
| Def and 2nd male came to front windows and started smashing with branches | 2 males and female come back and smash front window (all 3 were banging on front windows) | Kids came back with sticks. He was banging on the window…once it cracked he didn't want to keep hitting it…it a crack like a spider web, it spread out…he smashed the Domino's window as Morthada was inside |
| | Def/s "I will stab you" | He said nothing about stabbing…he telling him "kill him" and said "you are a fucking dead man" (*and made a throat cutting action with his hand)* |
| He pulled out his mobile to try and take pictures and Def and 2nd male went to the | | |

| | | |
|---|---|---|
| side | | |
| Female hit her right hand against the broken glass a few times and it looked like she cut herself | | Girlfriend threw a rock |
| Female yelling and calling names | Banging on windows and swearing | |
| Female walked over and pushed scooter over | | |
| Police turned up | | Police came |
| They disappeared in different locations | | He ran |
| | | I angry at Grigg for standing on my neck…I "talking shit" |

46. It is clear from this that there are inconsistencies between the versions of each. This does not necessarily mean anything sinister. People who observe the same events do so from their own perspective. They are in different positions, and therefore some aspects may be partly obscured to some or all of the witnesses. Also, some events are significant in the mind of one witness (and therefore prominent in their evidence) where it might be given only minor significance in the mind of another witness. In a situation such as the one in question where there are multiple players a witness might be

concentrating on a particular scene at one point in time and therefore might miss what occurred off to the side. In a fluid incident the actual time-line of events may not be important to a witness, who might remember the general events, but be uncertain as to the order in which they occurred. Also, some witnesses may be disadvantaged by visual or hearing problems, language difficulties, or the consumption of alcohol or drugs. Further, some witnesses just naturally have a better memory than others.

47. Hence, in my view, the court needs to make allowance for human foibles and not reduce the matter down to a scientific analysis.

48. There are a number of times that the evidence of Mead and Morthada diverge both in subject and sequence. Hence there are a number of matters on which I feel unable to make specific findings beyond all reasonable doubt. The sequence of events can be very important when dealing with more than one person who is involved. Because depending upon the timing the likelihood that it is the defendant who has done something may be significantly altered. Examples are as follows:

- Morthada said he had the cricket bat and swung it at the defendant on each of the 2 occasions that he went outside, but Mead only refers to a bat on the last occasion, as does the defendant…and accordingly I am unable to conclude whether Morthada did or did not use the bat twice;

- In relation to the banging on the side security shutter Morthada said this was what he first heard and why he went to the front of the shop, but Mead had this occurring after he had pulled Morthada back inside the first time, and the defendant said he couldn’t tell the police anything about that….so accordingly I am

unable to decide when the damage to the security shutter occurred or that the defendant was in the area or involved;

- In relation to the damage to the bottom of the “drivers door” Morthada said that occurred “straight away” after he was pulled back inside the first time, but Mead said this occurred after he pulled Morthada inside the second time, and the defendant said nothing about this.....so accordingly, whilst I can find that the bottom of the driver’s door was damaged I am unable to say at what point in time, and therefore I can’t be sure of the whereabouts of the defendant;

- In relation to the defendant allegedly hitting the roof of Morthada’s car with any tree/branch the only evidence of this comes from Morthada, and there was no evidence of any damage in that area...so I am unable to find that that in fact occurred;

- Morthada said the defendant said “I will stab you”, but there was no evidence from Mead to support that these words were said, and the defendant made no admission of using those words....so I am unable to find that those words were said;

- In his EROI the defendant said he told Morthada “you are a fucking dead man” (and made a throat cutting action with his hand) but neither Morthada or Mead gave any evidence of having heard any such words, or seen any such action...so even if the words or actions were said or made I am unable to find that Morthada heard or saw either;

- It is unclear where the defendant was when the car window of Morthada’s car was smashed, and in particular whether he was in close proximity or not, but what is clear (from the Mead and the EROI) is that the defendant did not do this;

- The defendant asserts in his EROI that Morthada was trying to run him and his girlfriend over, but that is a conclusion and, in my view, no facts are put forward (apart from an assertion that he was aiming at them to swerve away at the last minute) such that I could find that was or was reasonably possibly the case.

49. Doing the best that I can with the evidence as a whole, and bearing in mind that what the defendant said in the EROI (even though not said on oath, and not subject to cross-examination) is evidence in the case, as it has been introduced into evidence by the prosecution, I make the following factual findings:

- On 22 November 2009 the defendant had been drinking beer and considered himself to be drunk;
- On 22 November 2009 Mead and Morthada had been working at Domino's pizza and closed the business at 2300;
- There was no evidence to suggest that either Mead or Morthada were under the influence of any substance that might effect their powers of observation or memory;
- Just after midnight (so early on 23 November 2009) Morthada was cleaning at the back of the shop and Mead was at the front of the shop on the phone;
- The defendant, and at least one aboriginal male and a female appeared out the front of the closed shop;
- These persons (including the defendant) were banging on the windows etc to get attention and asking for food, but Mead did not reply and ignored them (whether events may have turned out differently if Mead had explained that they were closed and there was no food is unknown);

- The persons (including the defendant) did not move away, but began to bang louder;
- Morthada went outside to tell them to go away (whether events may have turned out differently if Morthada had not gone outside is unknown);
- There was a lot of yelling between Morthada and the group (but I am unable to find to what extent the defendant was involved, or what specifically was said apart from taunting Morthada to “come on, come outside”) and Mead called the police;
- Mead opened the “drivers door” and pulled Morthada back inside;
- The actions of Morthada did not assist the situation and seem to have inflamed it;
- Somebody picked up a rock and threw it at Morthada’s car smashing the rear driver’s side window;
- It was not the defendant who did this;
- Morthada got very angry and immediately went outside;
- The persons outside (whether it be 1 or 2 or 3) left the immediate vicinity….but whether the defendant was already leaving the area before this is unclear;
- Morthada got into his car and commenced to drive;
- The defendant was on or near the median strip of the roadway with his girlfriend (who had arrived at some time);
- Morthada wanted to stop persons leaving before police arrived so he drove back and forth around the defendant about 3 or more times;

- Morthada would have driven in close proximity to the defendant at times;
- As Morthada was driving past where the defendant was the defendant threw a rock (there was nothing in the EROI to deny that this occurred and I accept the evidence of Morthada in this regard, as this evidence went unchallenged in cross-examination at T29) at the car and thereby caused damage to a door of the car;
- As Morthada drove he came sufficiently close to the defendant and his girlfriend to enable the girlfriend to swing at the car, whereby she hit the car and cut a hand in the process;
- I find that the suggestion raised by the defendant in his EROI that Morthada had attempted to run the defendant and/or his girlfriend over had been negatived beyond all reasonable doubt on the evidence of Morthada;
- Morthada returned to park in the area near his place of work;
- The defendant believed that Morthada had tried to run himself and/or his girlfriend over so went back to the area to confront Morthada;
- When Morthada got out of his car the defendant angrily confronted him;
- Morthada took a cricket bat out of his car and swung it several times at the defendant who tried to block the blows and was struck at least 3 times;
- Mead again pulled Morthada back inside the shop premises;

- The defendant was enraged and he, a female and at least one other male (who had returned with some branches) all began banging and smashing on the front windows of the shop premises thereby causing further cracking and damage;
- This action was a “common purpose” between the defendant and the others present;
- The female was yelling and swearing;
- The defendant hit the roof of Morthada’s car a number of times with some branches, but I am unable to find that any damage was thereby caused;
- There was a lot of swearing from the people outside, including telling Morthada to come outside and finish what he had started;
- The defendant was telling Morthada “I’ll kill you” (as this comes from Morthada @ T30.4; and from an admission by the defendant in his EROI);
- Morthada was yelling back at the people outside, and Mead told him to go into the back of the shop;
- The female pushed a scooter over;
- The police arrived and those persons outside ran away;
- The defendant was pursued by Grigg and apprehended, placed into the back of the police cage and returned to the scene before being taken to the police station for questioning and processing;
- As a result of this incident Morthada was scared, he sold his car for less than he thought it was worth and moved interstate.

50. Based on those factual findings I now turn to consider each charge in turn.

51. In relation to charge 1, as noted earlier the defendant pleaded guilty. However there was no evidence introduced as to who owned the damaged property, or that any such entity named “Domino’s Corporate Pty Ltd” even existed. However, *section 251(1) of the Criminal Code* states “Any person who unlawfully damages any property is guilty of an offence and is liable to imprisonment for 2 years.” The actual ownership of the property in question is a matter of particular. Clearly by his plea of guilty the defendant is acknowledging that he knew it was not his property and he had no right to damage it.

52. Nor was there any evidence as to the value of any damage caused. Again, in my view, this is a particular.

53. On the evidence I find the defendant guilty of charge 1, by unlawfully (without authorisation, justification or excuse) damaging the main glass entrance door of Domino’s pizza store at shop 1, 283 Trower Road of an unknown value.

54. In relation to charge 2 there was no evidence of any actual damage caused to the roof of the motor vehicle in question. Further, the evidence in relation to the damage to the right rear window was that this was not done by the defendant. Further, as this occurred very early in the incident the evidence was not such I could be satisfied that at that stage there was any common purpose (see *section 8 of the Criminal Code*).

55. However, as noted earlier I am satisfied that the defendant did damage Morthada’s car by throwing a rock at it. Was this damage unlawful? In my view, the defendant in his EROI has raised the

possible defence of "defensive conduct". *Section 29 of the Criminal Code* states (excluding the irrelevant parts):

> (1) Defensive conduct is justified and a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event.
>
> (2) A person engages in defensive conduct only if:
>
> (a) the person believes that the conduct is necessary:
>
> (i) to defend himself or herself or another person……..
>
> and
>
> (b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.

56. In his EROI the defendant has stated that he believed Morthada was trying to run him and/or his girlfriend over. However, the defendant says nothing about throwing a rock at the car, or why he might have done so. Accordingly there is no evidence as to why the defendant threw the rock. Specifically there is no evidence that he believed it was necessary to throw it to defend himself or his girlfriend. I therefore find that the prosecution has negatived this possible defence beyond all reasonable doubt.

57. I find the defendant guilty of charge 2, by throwing a rock at Morthada's passing car and damaging his passenger door, with the value of such damage being unknown.

58. The defendant pleaded guilty to charge 3. On the evidence I find the defendant guilty of charge 3 by challenging Morthada to "come on, come outside" and "let's finish it". I find this occurred in a public place, namely outside the Domino's shop and adjacent to the service station which was at the time open to be used by the public.

59. Charge 4 relates to *section 166 of the Criminal Code* which states as follows:

> (1) Any person who, with intent to cause fear, makes, or causes any person to receive, a threat to kill any person which threat is of such a nature as to cause fear to any person of reasonable firmness and courage, is guilty of a crime and liable to imprisonment for 7 years.
>
> (2) It is a defence to a charge of a crime defined by this section to prove that making such a threat or causing it to be received was reasonable by the standards of an ordinary person similarly circumstanced to the accused person.

60. In *Bunting v Gokel [2001] NTSC 24* at paragraph 12 Mildren J stated:

> The words used by the appellant cannot be looked at in isolation, but must be construed in the context of all the words spoken, as well in the context of his actions, and posturing: see Leece (1995) 78 A. Crim R 531 at 536 per Higgins J; Leece (1996) 86 A Crim R 494 at 498 per Gallop and Hill JJ. In R v Rich (unreported, Court of Appeal, Supreme Court of Victoria, 17 December 1997, per Winneke P. and Brooking and Buchanan JJA at p 9) their Honours said:
>
> But where, as in this case, it is alleged that a series of statements, made repetitively to the one person at the one place, constitutes a threat to kill made with a particular intent, common sense dictates that the whole of the conduct of the accused, including the nature of the statements and the context and manner in which they were spoken, must be considered by the tribunal before it can be determined whether a threat to kill within the meaning of s 20 of the Crimes Act 1958 has been made. It would be a barren exercise for the jury to consider each utterance in isolation and out of context of the others. So regarded each of the utterances might lose the impact and meaning which, in proper context, the totality of the conduct might otherwise bear. Indeed, it is difficult to conceive, in the circumstances of this case, how the jury could have made any adequate assessment of the intent with which the accused made the threat unless they were to look at the entirety of his conduct, as distinct from "snap-shots" of it, during what was clearly a continuous episode.

61. His Honour went on in that case to state in paragraph 20:

> In the context of the whole of the circumstances, I do not consider that it can be safely concluded that a threat to kill with intent to cause fear, of the kind envisaged by the section, had been made. The overriding impression is that the appellant was agitated and upset because the diesel engine had not been cut immediately causing the fumes from the exhaust to foul the air in his vicinity, and that he became abusive and loud mouthed, over a protracted period. The words constituting the alleged threat to kill were merely a part of this general abuse. The appellant did not have a weapon to hand, and made no effort to leave the rear of his vessel as if to get one, although he paced and appeared agitated. The initial threat to use a weapon was not directed to anyone in particular, although the later threat was directed at Campbell. I find that the learned Magistrate failed to properly consider the whole of the context and surrounding circumstances, and relied too much on the words he found constituted the threat to kill, without putting them in their proper context.

62. In the instant case some of the words (and actions) that the defendant admitted in his EROI were not part of the evidence of Morthada or Mead. So either the defendant was making a false admission, or Mead and Morthada are both wrong, or neither of them heard or remembered such words or actions. Mead's evidence as to words used was limited to general abuse and words encouraging Morthada outside. It is only Morthada who gave any evidence about any words using the word "stab". Towards the end of his cross-examination he also said that the defendant used the word "kill" as well. In his evidence in chief the defendant had only suggested that the words "bash" and "stab" had been used.

63. Clearly there had been an extended heated exchange between Morthada, the defendant, other males present and a female later in the episode. Morthada had gone outside to confront the defendant and his companions on two separate occasions. Clearly there was a lot of verbal abuse and taunts being directed at Morthada, but also reciprocal words coming back from him as well.

64. The evidence generally lacks precision as to what was said by the defendant (as opposed to others). In my view, even if the defendant did say the words (and make the gesture) as indicated by him in his EROI then unless it was "received" by Morthada the defendant could not be guilty of an offence under *s166(1).* In my view, unless the defendant "causes any person **to receive** a threat, to kill any person" then no offence is committed. Neither Morthada nor Mead gave any evidence of hearing or seeing any such words or actions. Therefore, some of the defendant's admissions in his EROI are irrelevant to the determination.

65. Mead's evidence is of no assistance. Accordingly, the only relevant evidence of any threats comes from Morthada and the extent of that is the words "bash you" (which in my view is not a threat to kill), and "stab you" (which may or may not be a threat to kill as opposed to a threat to harm). But there is no other evidence in the case to support Morthada's evidence that these words were in fact used. With respect to the words "kill you" (which speaks for itself) there is evidence from both Mortada and the defendant (in his EROI) that the defendant said these words. I therefore find that these words were said by the defendant, and that these words were directed at Morthada.

66. However, Morthada was not a passive victim who was hiding inside in fear while he was being threatened and his property damaged. Clearly his car should never have been damaged initially, but it was not the defendant who did this. Morthada confronted the persons outside twice; he drove his vehicle in close proximity to the defendant and his girlfriend on one of those occasions; he hit the defendant with a cricket bat several times on one of those occasions; he returned the verbal taunts and abuse willingly; he had to be physically pulled inside twice by Mead; and he had to be ordered to the back of the shop by

Mead. His actions were not designed to defuse the situation, and appear to have had the opposite effect.

67. On the evidence before me as a whole I cannot be satisfied beyond all reasonable doubt that the words complained of by Morthada ("bash" and "stab") were actually said. Mead was in a good position to hear, and he gave no evidence of any such words.

68. As for the threat to "kill", which was made I bear in mind that the test in *section 166* is purely objective. As Mildren J said in *Bunting v Gokel (supra) @ para 20:*

> Strictly speaking, whether Campbell was put in fear was not relevant, as the test was entirely objective, the question being – was the threat of such a nature as to cause fear to any person of reasonable firmness and courage?

69. I would not be satisfied given the reciprocal nature of the incident that the words used (in the overall context of mutual abuse) were "of such a nature as to cause fear to any person of reasonable firmness and courage".

70. Whilst Morthada would have had cause for some apprehension as to the groups return, in my view this would have been due to the physical actions rather than any angry words.

71. I find the defendant not guilty of charge 4.

72. I advised the parties that I would publish these reasons on 12 August 2010 at 0930. Ms Bala advised that she would be unable to proceed to make submissions at that time. Accordingly, this matter will now be adjourned (at the request of Ms Bala) to 18 August 2010 at 0930 to hear submissions on sentence. I now publish these reasons.

Dated this 12th day of August 2010.

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**Daynor Trigg**
STIPENDIARY MAGISTRATE