

COPY

CITATION: *Robert Roland Burgoyne v Jeremy Ryan* [2004] NTMC 058

PARTIES: ROBERT ROLAND BURGOYNE

v

JEROME RYAN

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Summary Jurisdiction - Alice Springs

FILE NO(s): 20328417

DELIVERED ON: 21 July 2004

DELIVERED AT: Alice Springs

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JUDGMENT OF: M Little

CATCHWORDS:

REPRESENTATION:

Counsel:

Prosecutions:

J Burness

Defendant:

T Sinoch

Solicitors:

Prosecutions:

Police Prosecutions

Defendant:

Collier and Deane

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Judgment ID number:

[2004] NTMC 058

Number of paragraphs:

81

IN THE COURT OF SUMMARY JURISDICTION
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20328417

BETWEEN:

ROBERT ROLAND BURGOYNE
Police

AND:

JEROME RYAN
Defendant

REASONS FOR JUDGMENT

(Delivered 21 July 2004)

Ms M LITTLE SM:

1. The defendant is charged that on the 24th December 2003 at Alice Springs he did resist a member of the police force in the execution of their duty contrary to s.158 of the Police Administration Act, that he behaved in a disorderly manner in a public place namely the Outback Bar and Grill contrary to s.47 (a) of the Summary Offences Act and that he did unlawfully assault a member of the police namely Constable Darren Tottle in the execution of his duty, contrary to s.189A of the Criminal Code. He has pleaded not guilty to all three charges
2. The prosecution bears the onus of proving each of the elements of the offences and should they fail to do so then the defendant is entitled to be found not guilty.
3. The behaviour complained of with respect to the assault and the disorderly behaviour is essentially the same.
4. A video of the Outback Bar and Grill dated the 24th of December 2003 was tendered by consent as exhibit P1. Constable Darren Tottle was then called. He said that on Christmas Eve he attended at approximately 9.45pm at the Outback Bar and Grill for the purposes for detecting offences under the Liquor Act. He and

his partner Constable Bruce McFarlane walked in and said hello to a band member and then went to walk towards the rear of the bar area. The police officer came across a group of people who were near the bar area. There was a partition to the left of the bar area. The defendant was standing up against the partition (which later was described as a ledge).

5. The defendant was not known to the witness at that time. Constable Tottle asked the defendant if he could move so he could get past and said words to the effect of "excuse me, could I get through please". He said that the defendant said "no" with an angry look on his face. The officer then said to the defendant words to the effect "if you step back or move to your right I'll be able to pass through". The defendant then did move to his right and when he moved the Constable saw there was enough room for him to pass so he looked straight ahead and began to pass through the area.
6. The Constable had formed the opinion that the defendant had had a few drinks and was perhaps having a bad day but was not highly intoxicated. As the Constable went passed the defendant he felt a force on his left-hand side and was put off balance. He looked over and he saw the defendant moving back; he could see the defendant's body moving back away from his body. He said that the defendant was the only person standing in the area where he had been pushed. The push had enough effect on him to make him lose his balance and he had to regain his balance. He stumbled to the right a little and then quickly caught his balance. As he caught his balance he turned towards where the defendant was. He said the bump was hard enough to tell it was not an accidental bump. He said that he is 105kg so it takes more then a little bump to knock him off one foot. As soon as he regained balance he turned towards the defendant, placed his right hand on the defendant's arm and said, "you are under arrest". He took this action believing he had just been assaulted.
7. He decided to arrest the defendant because he did not know if there was to be a continuation of the offence or what the defendant's frame of mind was. He decided that was the best course of action at the time. Constable McFarlane was, to the best of the witness's knowledge, behind him the whole time. After Constable Tottle had placed his hand on the defendant and told him he was under

arrest he began to struggle. The Constable asked him to put his beer down (which was in his right hand) and the defendant would not put his beer down. He saw Constable McFarlane come and assist and a bit of a struggle ensued. He said it wasn't very long but it was a struggle to get the beer off of the defendant.

8. He said that the defendant was yelling some swear words but he couldn't recall the words. The Constable said that as soon as he placed his arm on the defendant he immediately tensed up his muscles and started to resist. He said that Constable McFarlane had trouble getting the defendant's hand from the ledge. Constable Tottle had trouble getting the glass away from the defendant. He said the resistance lasted for a short period probably ten seconds to fifteen seconds. They managed to get the defendant walking with them and a person (who he assumed to be a friend of the defendant) was following behind and yelling at the police. He did not tell the defendant immediately as to the reason why he was arrested and assumed from the actions of the defendant he would know why he was under arrest.
9. As it transpired the defendant was not charged at the watch house and later received a summons. Later evidence of Sergeant Ryan will set out what happened at the station. The witness did not give the defendant permission to assault him in any way. The witness then gave some evidence whilst watching the video, P1.
10. Under cross-examination the witness agreed that it was possible that the defendant stepped towards the bench though he confirmed his earlier evidence that the defendant stepped to his right saying he was close to the bench in any event. The officer disputed that there was insufficient room for him to pass without there having to be physical contact between he and the defendant. He was particularly cautious to ensure that he didn't actually touch the defendant because of the dirty look that he had been given after he had made the request for the defendant to move.
11. The witness denied he had asked whether the defendant was inebriated. He said that he believed the top half of the defendant's body to have been on the bench. After the contact he saw the back and lower body of the defendant moving away from him. He said he could not recall seeing whether the defendant's arms were

on the bench but he knew the defendant was close to the bench. At the time of the arrest, the defendant had a drink in his hand but he did not know whether the defendant had a drink in his hand at the time he was assaulted. He said immediately after getting his balance he turned and arrested the defendant.

12. The witness formed the view that the acts by the defendant were intentional as when he looked around he noticed that the defendant had his balance and he did not appear to have tripped and fallen into the witness. He said the defendant's force was directed at him and then removed from him. He accepted that someone could step back into a person's path but he did not think anyone would step back and give him a knock of the type that he received that night as an accident. He disputed that it was an accident. The witness said that the defendant was yelling abusive words and resisting and he believed that it was appropriate to take the defendant out of the bar area.
13. He confirmed that at that time he had not told the defendant why he was being arrested. He was concerned the man may continue the offence, that is assaulting an uniformed police officer in a licensed premises. The witness said that the allegation was that the defendant had hit him with his buttocks using force. The witness said that he formed the view that due to the force of the knock, which he described as a hard knock, it could only have been intentional. He said that the defendant was a sufficient distance away from him that there was no need for contact to be made. He said that the contact was, in his view, deliberate and could have only been that way.
14. He said that once the defendant had been advised he was under arrest he tensed up. He asked the defendant to let go of the glass and come with him and that he would not do that. The defendant had his left arm holding onto the bench and he knew that Constable McFarlane struggled to release the defendant's arm. Whilst removing the defendant from the Outback Bar and Grill he was struggling the whole way. He then said that the defendant did not want to get into the rear of the police car and that force was used to get the defendant into the police vehicle. The defendant was struggling trying to break his arms free, tensing his muscles and shaking his body.

15. The witness informed Senior Sergeant Ryan of the arrest and for reasons which were later revealed the defendant was not charged at the time. A summary infringement notice was written for disorderly behaviour. He said that Sergeant Ryan had instructed him to issue the summary infringement notice and he handed the notice to Sergeant Ryan so he never in fact issued the notice to the defendant. In re-examination he said that it was Senior Sergeant Ryan's decision to release the defendant without charge and to summons him later. I formed the view that this witness was honest and reliable. He was not shaken in cross-examination, which was undertaken in a robust fashion.
16. The next witness to be called was Constable Bruce McFarlane. He said on the 24th of December 2003 he was working with Constable Tottle and that they attended the Outback Bar and Grill at approximately 9.45pm. They went there for the purpose of conducting a liquor licence patrol. After speaking to some band members they made their way through the main bar area towards the staff area of the bar. As they approached a gentleman who was leaning up against the railing with his forearms on a wooden rail, Constable Tottle asked the man to move so he could get through. He thought the words Constable Tottle used were to the effect of "Excuse me, can I get through?" He recalls the man replying "No, there is not enough room". As the man finished his sentence he moved forward but without allowing Constable Tottle to continue through. He recalls Constable Tottle saying excuse me once more and then the man looked at Constable Tottle with a frowning expression on his face and he turned back towards the people who were on the other side of the rail. The man then moved his right leg up against the railing allowing for Constable Tottle to pass through. As Constable Tottle was proceeding to walk through the gentleman lunged backwards knocking Constable Tottle and unbalancing him. He said the man thrust backward with his hips causing Constable Tottle to unbalance. The man had a drink in one hand and his other hand was free. It was a very quick movement and it was definitely a deliberate act. He said the man connected around the waist area of Constable Tottle which caused him to lose balance and to be on one leg before he could brace himself. After Constable Tottle regained balance he placed his hand on the right arm of the defendant and told him he was under arrest.

17. The witness said he was one step from Constable Tottle when he observed the defendant moving backwards. Constable Tottle placed his hand on the defendant and said you are under arrest. The man then began to resist and he saw Constable Tottle remove the beer from the man's hand. At the stage this was happening he grabbed the defendant's left arm and the defendant had his left hand holding onto the bar. The man had a firm grip on the bar so he had to pull his hand away. The witness then indicated the motion of pulling fingers. After they got the man free from the railing they turned around and walked straight towards the main doors. He said the man was trying to pull away from him. He said when they got to approximately the main entrance the man started to drag his feet and making it difficult for them to get out of the premises.
18. The witness was then cross-examined. He said that when he was walking behind Constable Tottle he was looking towards the back of the Constable's head and was looking at whatever was coming up in front of them. He said that the area around the bar area itself was somewhat congested but that it was reasonably clear up until that point. He said when the defendant moved forward he had opened up a reasonable sort of way for Constable Tottle to go through and Constable Tottle was going sideways once the defendant moved forward. The defendant had moved his right leg up, sort of twisted his body to move up against the bench. He agreed that the position the defendant was in was only a position a person would remain in for the purposes of allowing someone to pass behind.
19. Constable McFarlane said he did not hear Constable Tottle say anything to Mr Ryan with respect to Mr Ryan's sobriety, saying there was very little time for a conversation to take place. He said that the defendant had a look of annoyance on his face as if he was annoyed that he was going to have to move to let someone through. Constable McFarlane stated that he believed the actions of the defendant were deliberate. In particular the moving forward of the body and then moving back. He said that the defendant moved his head towards the Constable and then moved it back to look at his colleagues on the other side of the bar prior to movement of the body. The witness was of the view that at the time the defendant moved backwards he would have known someone was coming behind him. Constable McFarlane said it was a deliberate action; a sharp movement and that

the defendant was arching back with his buttocks. He said it was a sharp thrust backwards. He saw the defendant's body move away from the bar knocking the Constable off onto his right foot. He was standing right behind them when this happened.

20. As soon as he heard Constable Tottle say to the defendant that he was under arrest he immediately went to assist him and took hold of the defendant's left arm. The defendant was holding onto the bar with his left arm and Constable McFarlane had to pull his fingers away from the bar. He felt a splash of beer on him and he noticed that the defendant had a glass of beer in his hand. He said the defendant's first reaction upon arrest was to hold onto the bar railing area and he became tense. This made it difficult to remove him from the premises. He said at the time there was a lot of yelling going on. He recalls the defendant asking why am I being arrested, as they were leaving the premises but not at the point of the initial arrest. Constable McFarlane told the defendant he was under arrest for assault police at that point.
21. As they exited the main bar area the defendant was struggling slightly with his arm and when they were outside he started to drag his feet and the Constables were finding it a bit tough going. One of the defendant's companions was behind them making it a bit harder. He said that this person did not physically interfere with them. As they were placing the defendant into the van he was resisting backwards.
22. Once they were at the Police Station there was a short delay in order of minutes, perhaps three or four minutes, until they were able to commence processing the defendant. Constable McFarlane could not recall whether the defendant had a beer in his hand at the time that he noticed the deliberate sharp movement towards Constable Tottle. He said at the time of the sharp movement the defendant's hands were forward on the railing area. That was the end of the evidence of Constable McFarlane. This witness was in a position to witness the alleged incident clearly and was in fact the only witness who could witness it so clearly. He impressed me as a witness and I accept him as an honest and reliable witness.

23. The next witness to be called was Dean Madsen. He is a security guard working with Shane Ride Security and on the relevant date was working at the Outback Bar and Grill. He recalled the defendant walking in at around 9.45 or thereabouts and he said that the man had a happy demeanour. The same person was later escorted out by two police officers. He recalled the police officers coming into the bar and he saw them walk half way into the premises. He looked away then looked back and saw the police officers were having a chat with the defendant. He then turned away again and when he looked back he saw the two police officers were escorting the defendant out of the premises.
24. This whole scenario was probably one minute in length. The police had the defendant by each arm. He said the defendant's arms were sort of folded onto his chest at the front. He said that it appeared to him that the defendant was resisting in a slight way causing the police to be walking in a type of stumbling motion. He saw the man leave the premises and then the officers put him into the back of the van. One of the officers opened the door and the other officer just gently showed him the way into the back of the wagon.
25. Under cross-examination Mr Madsen said that he witnessed a pull/shove sort of action when describing what he meant by slightly resisting. He formed the view that the police were physically in control of the defendant and that there was no way he was going to move from that restraint. He said as the three walked out of the premises there were tables and chairs in the way and with a little bit of resistance there was bumping into the chairs. He saw the defendant step into the police vehicle and did not see him resist while getting into the vehicle. This witness was near to the defendant at certain times during the defendant's arrest. He is an independent witness and struck me as an honest and reliable witness.
26. Senior Sergeant Craig Ryan was then called. He was the Alice Springs Police Station Watch Commander on the 24th of December 2003 from 3pm to 11pm. No other evidence was led by prosecutions.
27. Under cross-examination he gave evidence that he saw the defendant seated in the watch house area and he was surprised to see him there. He said words to the effect of "Jerome what are you doing here?" He said the defendant had explained

that he had been arrested and he felt he had done nothing wrong and he had been treated badly by the police. He said he had known the defendant for 24 years in a business and a professional capacity and while if he saw him socially he would have a chat he did not consider he was a friend of the defendant.

28. Sergeant Ryan then spoke to Constable Tottle and Constable McFarlane was present. He then went back to where the defendant was in the reception area. He told the defendant that he was not going to be placed in custody and took him to his office. He then asked for the defendant's version of events. The defendant maintained his innocence and said he wished to make a complaint against the actions of the police officers. He also saw Mr Richard Harvey on that night. Richard Harvey had arrived at the front counter and Sergeant Ryan took Mr Harvey to the office where the defendant was seated and spoke to them both. After that he placed them in a police car and then drove them to the defendant's home.
29. Senior Sergeant Ryan formed to view that the defendant was moderately intoxicated. He said the defendant was upset but still in control of his faculties and orientated as to where he was and what situation he was in. There was no entry in the PROMIS system as to the fact that this defendant had been in custody and Sergeant Ryan was of the view that there was no entry because the defendant had never come into custody in the watch house. He said that he had taken the defendant out of the watch house before that had occurred.
30. In re-examination he said that he formed the view Mr Harvey would have been slightly affected by alcohol. Given the evidence he has provided there is little need for me to make an assessment as to this witnesses' credit, nevertheless I comment that I have no reason to doubt his evidence. That was the close of the prosecution case.
31. The defendant then gave evidence. He said that he ran a photographic shop and had been in that field for approximately twenty years. On the 24th of December 2003 at about 6pm he went to the Firkin and Hound with work colleagues. He had also invited Richard Harvey to join him. He said they were there for an hour and a half to two hours. He had a couple of drinks and was talking and having a good

time. He said at the time he had four or five Melbourne Bitters. He did not have anything to eat except some nibbles including peanuts and chips.

32. He and Richard Harvey then decided to go to the Outback Bar and Grill in the Todd Mall. As they arrived he met up with Richard Castine. They arrived somewhere between 8.30 and 9.00. He drew a plan as to where he was located on the night and that became exhibit D2. He had one Coopers Ale at that bar. He said he was feeling a bit happy and it was a good night. Richard Castine and Cathy Clifford joined he and Richard Harvey.
33. He then noticed two policemen walk in. They walked to the front of the bar area and they started walking towards his group. He noticed that one of the officers was not happy and that in fact he looked angry. He said that he made a note to move as close as he could to the bench. He was standing at the bench and he said it was busy and there was constant movement of people going to and from the bar area. People were also moving to the bathroom area going past him. He said he was always making movements for other people and he just saw that as hotel and bar life. He said as he noticed people behind him he would move up towards the bench and then move back. He estimated he was there for half an hour.
34. He identified the police officer who did not look happy as Constable Tottle and that he was the police officer who approached him. The police were walking behind each other. Constable Tottle said to him "are you intoxicated?" and he replied "no". Constable Tottle was two metres away from him when he said that. The defendant then turned away and faced back towards where Richard Harvey was. He then moved close towards the bench and in fact stood right up against the bench. He said this because he was aware the police were going to walk behind him. He did not hear the police say any other words to him. He denied saying "no I am not" in answer to a request to move. He said he replied "no" in response to the question with respect to his state of intoxication. He said he felt a bit uncomfortable when he was asked the question with respect to his state of intoxication as he had never been approached in that way before. He did not think he had a frowning expression on his own face.

35. He demonstrated how he moved. Both of his arms were placed out forward at waist level and they were on the bench. He was standing as far forward as he possibly could. He said he stood like that for a few moments and then stepped back as it was uncomfortable and he couldn't continue standing there like that. He estimated the time that he stood like that as two or three seconds and he said that the police had been walking quite rapidly. He then moved back. He said he did feel contact but he did not have any idea who he had contact with as he was facing the opposite direction. He said he was not conscious that it was the police who was behind him at the time of the contact. He said he thought the police had moved behind him and he was not even thinking of the police officer at the stage he moved back.
36. The defendant did rule out the possibility that Constable Tottle had asked him to move. Because he turned his back to where he was standing and facing the other way, he was not even thinking of the police officer at that stage. There was a lot of noise and he was not looking at the police officer and so he may not have heard Constable Tottle.
37. After he stepped back he heard the words "your under arrest" and he got a real shock. The police officer grabbed his arm and twisted his hand up hard behind his back. He said he was stunned and when he asked, "what's going on?" he was told he was under arrest. He said because the police officer had his arm like that and a lot of force was being used unexpectedly he grabbed the bench with his other hand. The second officer then grabbed his arm. He said he asked for the name and number of the police officer and why he was being arrested as they were walking out. He was not given an answer to these questions.
38. He denied that he was swearing at this time; he agreed he may have been shouting. He denied that he was resisting police and said that he was just going with their movements and walking where they were walking. He was shocked and nervous about what was going to happen to him. He was scared as to what would happen next. He recalls Richard Harvey approaching him at the van and asking him if he was ok.

39. The vehicle took him to the back of the police station. He recalled a police officer using a loud voice asking him for his name and date of birth. Prior to the incident with the police he was in a good frame of mind on this night. With respect to his state of intoxication he said he was in a merry mood but was not intoxicated to the state where he didn't know where he was or what he was doing.
40. Once inside the police station he saw Sergeant Ryan and he spoke to him. Sergeant Ryan came back and then said for the defendant to follow him to his office which he did. He then spoke to Sergeant Ryan about the events. Richard Harvey then came to Sergeant Ryan's office and Sergeant Ryan spoke to both of them. They were then taken home.
41. On approximately the 29th of December he lodged a complaint against the police.
42. He defendant was then cross-examined. He agreed that he had four to five Melbourne Bitters whilst at the Firkin and Hound and these were full strength beers. Once at the Outback Bar and Grill he had one beer and a second one had been received but not consumed. He agreed that Sergeant Ryan's description of him as being moderately intoxicated would be a fair description. He agreed that his recollection of events would not be that of a hundred percent sober person. He said he knew what he was doing. He denied he was annoyed by people moving behind him during the evening. He said that the first officer was walking rapidly and he had a scowl on his face; he did not look like he was in a happy mood. He said that when the officer asked him if he was intoxicated, that put him off side. He did not remember the officer asking him to move.
43. When asked "Did you look to see if he'd past you before you moved out?" The defendant answered "I looked to my left I believed but not to my right." Because he was uncomfortable in his stance he moved back to his normal stance. He did not believe he moved back in a sharp manner. He said he might have been a bit more awkward in his action because of the way he had pushed himself right against the counter. He said he was leaning over a bit so when he moved back he may have appeared to be moving in a sharp manner. This leaning over mannerism can be seen briefly in P1.

44. The defendant said he weighed 86 kilograms. He agreed Constable Tottle weighed 105 kilos. He recalled feeling a tap behind him when he moved back. He denied he deliberately pushed his buttocks backward in a quick manner. He said he would not deliberately knock anyone and definitely not a police officer. He denied that it was possible that someone could have been knocked off balance by the touch that he described. He denied he made deliberate contact with the police officer and said the contact he made was only slight and he was not aware that it was a police officer. He denied he pulled against the police officers as he was being escorted from the premises. He agreed that when he and Richard Harvey went home he discussed the incident with him.
45. The Defendant appeared nervous and shy when giving evidence. I have no reason to doubt that the whole experience, including the court process, has been difficult for him. He has had no history of interactions of this type with the police or the court system. I formed the view that all times he was doing his best to tell the truth to the court. He thought carefully about his answers and was not prone to embellishment. However I am of the view that his state of intoxication on the night in question was such as to affect the reliability of his testimony. The defendant agreed his recollection would not be as good as a 100% sober person. This is not to suggest that he has got it all wrong – clearly there is much which is not in dispute. However his evidence of the conversations he had with the police, and in particular the order of the conversations, is at variance with the majority of the witnesses, including witnesses he has called in his defence (to be later summarised). This is not to suggest that he was grossly affected by alcohol. I find he was moderately affected. I do think that his level of intoxication affected him more than he may have realised and that his testimony is somewhat weakened by his state of intoxication.
46. Richard Harvey then gave evidence. On the 24th of December 2003 he went to the Firkin and Hound with his friend, the defendant. He had three or four beers and then they went to the Outback Bar and Grill. They arrived there sometime after 9 o'clock. They met with some friends of the defendant, Richard Castine and Cathy Clifford. He bought some drinks and they were talking at the small bar section of

the premises. He was facing the main bar and the defendant was facing in the opposite direction speaking with him.

47. At about 9.45 he noticed two policemen arriving and coming into the premises. He saw a police officer, who he now believes to be Officer Tottle, come up to the defendant and he was sort of behind him. He heard the police officer say, "I think you are a little inebriated sir" or words to that effect. He heard the defendant reply no. As he was saying that he saw the defendant bend down to go under the ledge area to allow the officer to go past. He heard the officer say I don't think so. He believed that this meant the officer thought that the defendant was intoxicated. The officer then grabbed the defendant by his upper right arm and he was then taken away.
48. The witness was less than a metre away from the defendant at this stage. He cannot recall the officer saying anything. He recalled the defendant looking over his shoulder saying what have I done wrong or what's going on. The defendant had been holding a drink which was spilt. He was not able to see the left side of the defendant. The defendant was not struggling as he was being escorted out. He went outside and the defendant had already been placed in the back of the paddy wagon. He went to the police station and said he wanted to make a complaint about what had happened. He spoke with Sergeant Ryan and was then taken to the room where the defendant was. They talked briefly in Sergeant Ryan's room, then Sergeant Ryan drove them home.
49. In the past he had worked for the Northern Territory Racing and Gaming Commission and he was appointed as a liquor inspector. On the night of this incident he assessed himself as having a low level of intoxication. He assessed the defendant's state of intoxication as similar to his.
50. This witness was then cross examined. He agreed that it was possible that the defendant was moderately intoxicated. He said it could be possible that officer Tottle had said something to the defendant before he got to the left side of the defendant but that he did not hear what was said. He recalled seeing the defendant moving forward and it was his opinion that the defendant was doing this to make a pathway for the officer to go past. He said he did not take his eyes off the police

and the defendant. He said that the defendant remained in the crouch type position behind the bench until officer Tottle grabbed him by the upper right arm. He said he did not see the defendant step back from the bench prior to being taken by the police. He did not see Constable Tottle lose balance at any stage. Whilst he agreed that it was possible that the defendant pushed his buttocks back towards Constable Tottle he said he could not recall any such actions.

51. He recalls at the time of the arrest seeing the defendant with a glass of beer in his right hand. He could not see what was happening on the defendant's left side. He did not hear the police officer say that the defendant was under arrest. He said that it was not until the defendant received a summons that he was aware there was an allegation of an assault. Once again this defendant was somewhat under the influence of alcohol at the time of the incident. He spoke with the defendant about the incident, including when in Sgt Ryan's office. The opportunity for his evidence to have been rendered less reliable because of those two factors can not be discounted. The suggestion that the police raised the question of intoxication with the defendant as the first part of the conversation is not given as evidence by any other witnesses, other than this witness and the defendant. Once again I am satisfied that this witness was doing his best to assist the court. However I find that his reliability was affected by his consumption of alcohol. Further, given his location, he had limited opportunity to witness what was happening on the other side of the ledge. This affected his ability to see and hear what was happening to the left of the defendant. Crucially this was the direction that the police were approaching the defendant.

52. The witness Richard Castine was then called. He said that on the 24th of December he went to the Outback Bar and Grill at about 8.30 to have a few drinks before going out. He had arranged to meet Cathy Clifford there. The defendant and Richard Harvey arrived and he was introduced to Richard Harvey. He went and got a drink and stood with the defendant and Richard Harvey. After about ten minutes Cathy Clifford arrived. He then noticed the police arrive. He was standing and he had Richard Harvey to his left and the defendant was opposite him. Cathy was at the end of the bench area to his right.

53. As the police approached the police officer in front said to the defendant "move out of the way please sir" and he said the defendant then moved forward. He said the police officer then repeated "please move sir". The defendant then pushed his stomach or his chest up against the bench and he recalled the defendant saying I can't move much forward than this mate. He then recalled the police officer saying to the defendant "step to the right please sir". The defendant had resumed talking to Richard Harvey and he did not believe that the defendant heard the officer at this stage. He then heard the officer repeat again "step to the right please sir" but once again he did not believe the defendant heard him. The defendant was talking to Richard Harvey.
54. The police officer then stepped in behind the defendant and said, "are you intoxicated sir" and grabbed his right arm and twisted it up his back. He said the other officer grabbed the defendant's left arm. He noticed the defendant looked shocked and as they started taking him out the police officer on the defendant's left side knocked the witness's beer over. He said he managed to grab it as it was tipping over. He noticed a spray of beer went out of the neck of the bottle and onto the left arm of the officer. He said that the police had come marching into the premises quickly and aggressively.
55. His evidence was that the defendant moved on two separate occasions to be closer up against the bench allowing the police officer to walk behind him. As the defendant moved the second time he saw the police officer shuffling in an attempt to get a clear passage way. He did not see any physical contact between the defendant and the police officer at any stage. He described the movements of the police officer behind the defendant as two side steps. He said as the police officer was shuffling through he asked the second time for the defendant to move and then, as he said that, he then said are you intoxicated sir and took one step and grabbed the defendant's arm pulling it up behind him. The defendant looked shocked and his body stiffened up. He did not hear the defendant or the police say anything at this stage.
56. In cross-examination the witness said that he had one stubbie of Melbourne Bitter at the Outback Bar and Grill and had not been drinking before. He agreed because of the noise in the bar on that night he had to speak a bit louder than he was

speaking in Court when giving evidence. He was standing no more than a metre away from the defendant. He stated that it was not possible that the defendant replied no after the police officer asked him to move on the first occasion. He then considered that it was possible but stated it was very unlikely considering the attention he was giving to a situation.

57. The evidence was that at the point of arresting the defendant the police officer said to him are you intoxicated sir. He said it was not possible that the police officer said to him you're under arrest at that stage. He estimated that the height of the bench as being between the waist and mid-chest area. He could not recall if he could see what was happening below the waist area of the police officers and the defendant. He said he was focused on the police officer's actions. He said the defendant was still leaning up against the bench when he was arrested. He disputed it was possible that the defendant had come out from the bench and he did not see that. He could not recall if the defendant had a beer in his hand. He did not see anything like the defendant pushing his buttocks back into the police officer. This witness impressed me as an honest and reliable witness and gave a very detailed account of what he witnessed. As with the witness Harvey, his view was interrupted by the bench. He was not intoxicated.
58. The witness Catherine Clifford was then called. On the 24th of December 2003 she arrived at the Outback Bar and Grill at about 9.15 and met Richard Castine. She was introduced to the defendant and Richard Harvey. Two police officers arrived in a paddy wagon and they entered the premises and commenced walking towards her group. She was on the same side of the ledge as Richard Castine and Richard Harvey. The defendant was on the opposite side with his back towards the bar.
59. The police officers stopped at the bench and asked the defendant if he could move so they could get through. She heard words to the affect of "can you move forward". She saw the defendant physically move himself up towards the bench. The next thing she noticed was the defendant with a police officer either side of him and something was mentioned about how much he had to drink. She recalls the defendant answering that he was ok, he was sober. She recalls some force being used to remove the defendant's hand from the bench. She recalls the defendant asking the police for their names but there was no response. Once his

hands were removed from the bench they were placed behind his back and the police escorted him out of the premises. She did not see any form of struggle as they were taking him from the premises. She was under the impression that the defendant was intoxicated but was not drunk. She had not consumed any alcohol on that evening.

60. In cross-examination she agreed that it was fairly noisy and that it was possible that there were some things said that she did not hear. She disputed that it was possible that the police had not asked how much he had had to drink. She recalled there was a drink in the defendant's hand at the time he was apprehended. This witness gave an honest and reliable account of what she witnessed. She was a sober witness. Her view was partly obscured by the ledge, and her attention was not as directed to the defendant and the police as some of the other witnesses.
61. During consideration of this decision I viewed exhibit P1 again and replayed several sections of the video. It is clear that the crucial part of the incident is not captured in the video. The end of the video surveillance area of the tape accords with the site of the incident and there is also some type of structure which obstructs much of the view. It is not possible to make any conclusive findings as to any of the charges based upon the video. Nevertheless there are four matters which I can draw conclusions which do assist in some of my findings based upon the video exhibit P1. They are as follows:
 1. When the police enter the premises and speak to the band they are in a happy mood and that is evident from the expressions on their faces. As they walk away from the band their manner does not appear aggressive.
 2. The defendant is talking to his friends in an animated fashion while leaning on the ledge (with his back to the bar area).
 3. Some effort is taken by officer Tottle to remove the defendant's right hand/arm from the ledge area or take a glass from his hand and place it behind his back at the point of arrest.

4. That part of the walk from the point of arrest until nearly outside the premises that is shown on the video does not demonstrate any visible resistance by the defendant.

62. I reiterate that it is not possible to see the occasion when the police officers are walking behind the defendant on this video. There appears to be some time delays and there are significant barriers to seeing that part of the premises.
63. The matters in dispute fall into two separate issues. The first issue relates to the behaviour of the defendant and in particular whether his behaviour was as described by the police. If he did move backwards in the manner described by the police the question is then whether the behaviour falls within the definition of assault police or disorderly manner. The second set of issues relate to the question of whether he resisted the police in the execution of their duty.
64. The charge of assault police will be dealt with first as it is the most serious charge. This charge is pursuant to s.189A of the Criminal Code. A police officer must be in the execution of their duties. On this occasion Constable Tottle was in the execution of his duty and in particular under taking a random check of a licence premises. I find he was acting in the execution of his duties. He was uniformed and there can be no doubt whatsoever the defendant knew he was a police officer. Irrespective of this, there is binding case law that a person does not need to be aware that another person is a police officer for the offence of assault police to be made out.
65. I find that it is proven beyond reasonable doubt that the defendant made physical contact with Constable Tottle and that Constable Tottle did not consent to such contact. I find that there was a direct application of force without the consent of Constable Tottle. In making these findings I rely upon the evidence of Constable McFarlane in particular. He was the only person in a position to witness the alleged incident and was an impressive witness. To a lesser extent I rely upon the evidence of Constable Tottle. His evidence is that he saw the defendant moving backwards after the contact was made – he looked towards the area where the defendant was after he felt the contact. In further support of these findings, the defendant did not dispute that he made contact with someone but stated that he

was not aware who the person was. I do not accept that the contact was as slight as the defendant deposed. His state of intoxication was such that I do not give his evidence on this point any weight. No other witnesses attested to witnessing any contact made by the defendant to the police officer. However the defendants witnesses were on the other side of the ledge (which was approximately waist to mid chest height to an adult). Further they were more focused upon the police officers than the defendant at this stage. Their vision must have been affected by the ledge and I find that their evidence does not cast any doubt on my finding that contact occurred as set out above.

66. The crucial issue with respect to the offence of assault police was whether it was an unlawful assault. Unlawful is defined in s.1 of the Code as meaning without authorisation, justification or excuse. In the circumstances of this case, the only relevant section of the Code with respect to this definition is s.31.
67. I find it is proven beyond reasonable doubt the defendant did move his buttocks back in a sharp manner as described by Constable McFarlane. Constable McFarlane was immediately behind Constable Tottle and he was the only witness called who was in a position to see what was alleged. Indeed the two participants in the action, Constable Tottle and the defendant, were not in the position to see what was occurring. I found Constable McFarlane's evidence credible and given in an honest and frank manner. And at no stage did I form the view that he was exaggerating or embellishing his account of the incident. My only criticism of his evidence was the repeated assertion that the defendant was acting deliberately to come in contact with Constable Tottle. In the circumstances of this case, I can not see how the witness could be so definite about this. Certainly that was one scenario open to him to conclude, but not, in my view, one he could be certain about.
68. I am not persuaded beyond reasonable doubt that it has been proven that the act, namely the direct application of force upon Constable Tottle, was intended or foreseen by the defendant as a consequence of his conduct. I find on the evidence before me the defendant was moderately intoxicated. His actions were certainly reckless and probably committed as a consequence of his state of intoxication. While the defendant must have known the police were passing or about to pass

behind him, I am not satisfied that he could have known how much distance there was between himself and Constable Tottle when he did move backwards or how quickly the officer was moving. In all the circumstances of the case, I find that prosecution have not discharged their onus of proof and I find the defendant not guilty on count three namely assault police.

69. The next issue to consider is whether count two is made out namely that the defendant behaved in a disorderly manner in a public place. That offence is pursuant to s.47 (a) of the Summary Offences Act. The word disorderly is not defined in the Act. Therefore it must have its ordinary English meaning. There is some case law which is relevant to these proceedings. In particular in the case of Watson v Trenerry which is reported in 112 NTR at page 1. That is a Court of Appeal decision which, in my view, as far as is relevant, overrides the case Pregelj v Manison 51 NTR 1, Watson being a more recent Court of Appeal decision.
70. The case of Watson v Trenerry is also more relevant to this case as it relates to an offence of behaving in a disorderly manner as opposed to the offence of offensive behaviour dealt with in Pregelj v Manison. At page 13 of Watson v Trenerry, Justice Mildren states:

“In the case of disorderly behaviour in a public place, no event needs to be proved. The conduct of the appellants either amounted to disorderly behaviour or it did not...

It is not necessary to prove that the behaviour in fact disturbed the peace or in fact interfered with the comfort of others; it is sufficient if it had the tendency so to do ...

In these circumstances, s.31 (1) can only have a limited effect... it means no more than the prosecutor must prove that the “acts” amounting to disorderly behaviour were the result of the free exercise of the appellant’s will.”

71. This interpretation of the offence of disorderly behaviour and the application of s.31 (1) of the Code was also found by Acting Justice Gray. Accordingly that is the majority view with respect to this offence, and binding on this Court.
72. I find that it is proven beyond reasonable doubt that the act of moving backwards and then back towards the bench by defendant was an act as a result of the free exercise of his will. The next issue is whether or not those acts amounted to disorderly behaviour. I find it proven beyond reasonable doubt that the act did interfere with the comfort of Constable Tottle, a person whom the defendant knew to be in his vicinity. The defendant also knew that there were other persons in his vicinity. It is not necessary for me to find that the act disturbed the peace of Constable Tottle given that I have found the other aspect of disorderly manner proven. The actions did result in contact and did result in an interference in the comfort of Constable Tottle. The actions of the defendant were reckless and somewhat foolish and, as already observed, probably committed as a result of his state of intoxication. Nevertheless they were deliberate acts in the sense that they were the result of the exercise of his free will. The movement took place in the context of a relatively crowded bar with the police officers seeking to pass behind the defendant. I find it is proven beyond reasonable doubt that officer Tottle asked on at least two occasions for the defendant to move forward. The evidence of the witness Castine corroborates the evidence of Constable Tottle on this point, and the evidence of the witness Clifford corroborates that at least one request was made.
73. I find that there was a comment with respect to the defendant's sobriety made by Constable Tottle however I find this comment made at the point of apprehension and not at the commencement of the incident as deposed by the defendant. I base this finding upon the evidence of the witnesses Castine and Clifford, and the police officers evidence. The defendant's and Mr Harvey's state of intoxication, and their discussions following the incident, place real doubt as to the recollection of the order of the conversation between Constable Tottle and the defendant.
74. I find count two namely the charge of disorderly manner is made out and I find the defendant guilty of that charge.

75. The next charge to be considered is count one the charge of resist police. Count one is that the defendant did resist a member in the execution of his duty contrary to s.158 of the Police Administration Act. Resist is not defined in the Police Administration Act. I have not been referred to any case law on this section. In my view the offence of resist police can not be made out where minimal resistance takes place – otherwise even the most brief and slight muscle resistance could be seen to be within the meaning of the section. The question of whether acts constitute resistance to police will take account of what the police are seeking to do in the execution of their duties. In this case they were seeking to arrest and take into custody the defendant. It is virtually impossible to prescribe what behaviour will always, or will never, amount to resist police pursuant to section 158 of the Police Administration Act.
76. As to the allegations that there was resistance as the defendant was getting into the police van, I find the evidence of the security officer Dean Madsen persuasive in this regard. I find that there was no resistance when the defendant was getting into the back of the police paddy wagon. The security officer said he saw some minimal acts of the defendant which may be described as resistance.
77. The police deposed to what I regard as limited resistance as they were leading the defendant to the paddy wagon. They were the persons effecting the arrest and were in a position to feel the movement of the defendant. I do not doubt that there was some movement on the part of the defendant which, if it had been more forceful or significant, may have amounted to resistance in the context of s.158 of the Police Administration Act. Questions such as this are always decided in the context of the particular case, as well as upon facts which are able to be determined beyond reasonable doubt. Exhibit P1 shows one part of the walk to the paddy wagon. What I am able to see does not constitute resistance within the meaning of section 158 of the Police Administration Act. I do not accept that the defendant was resisting police so as to come within s.158 of the Police Administration Act at this time.
78. It is clear that at the time of the apprehension the defendant immediately clung onto the ledge with his hands. There is evidence from prosecution and defence witnesses as to the fact that it took some effort for the police officers to dislodge

the defendant's hands from the ledge. On the basis of all the evidence before me I find that this was the only behaviour which may constitute the offence of resisting police. The next matter to be considered is whether the action of gripping onto the ledge in these circumstances amounts to the offence of resisting police in the execution of their duty.

79. A preliminary question is whether or not the police officers were acting in the execution of their duty. The police had entered a licensed premises undertaking their duties pursuant to the Liquor Act. They were proceeding to the back area of the bar, as they were empowered to do, to undertake licence inspections. The actions of the defendant had made the job of the police officers slightly more difficult in that they had to ask several times for him to move forward in order that they pass through. The actions of the defendant in unbalancing Constable Tottle were undertaken in circumstances of a relatively crowded bar area where persons were intoxicated and at that time the police were not to know whether or not any further actions may be committed by the defendant. Licensed premises are notorious for outbreaks of violence. I can not say whether this particular licensed premises is notorious for outbreaks of violence. Nevertheless, in relatively crowded bars, where alcohol is being consumed, glasses can quickly become weapons, fights can ignite extremely quickly. It is often a volatile situation.
80. I have found that the physical acts as deposed by Constable McFarlane and Constable Tottle did in fact occur. I have found the defendant not guilty on the charge of assault police due to a failure to prove beyond reasonable doubt that s.31 of the Code was made out. At the time the police took the action to arrest the defendant they had a reasonable suspicion that the defendant had committed the offence of assault police. There was also an alternative charge of disorderly behaviour which I have found proven. Ultimately the issues as to whether or not they were acting in the execution of their duty does not depend upon a conviction or a finding of guilt. But had I found there was no basis whatsoever to their suspicions that would have been a factor to take into account in deciding whether the police were acting in the execution of their duties. I find that in all the circumstances of this case, the police were acting in the execution of their duties.

81. The defendant had his back to the police. Prior to being taken by the arm that he was to be arrested, he had no warning that he was about to be arrested. I do not mean this to suggest that warning must be given. However in the context of this defendant and in this case, it is a relevant factor in considering whether the behaviour amounted to resistance for the purposes of section 158 of the Police Administration Act. The arrest happened very quickly. His reaction in gripping the ledge was not such as to cause anything other than a minor interruption in the arrest of the defendant. He did hinder the police in the execution of their duties in a very temporary way – however the defendant is not charged with an offence pursuant to section 159 of the Police Administration Act. In all of the circumstances of this case, I find that prosecutions have not proven beyond reasonable doubt that the defendant resisted police in the execution of their duties pursuant to section 158 of the Police Administration Act and I find the defendant not guilty of count 1.

Dated this 21st day of July 2004.

M Little

STIPENDIARY MAGISTRATE