

CITATION: *Police v Gardiner* [2008] NTMC 045

PARTIES: POLICE
v
SHANE GARDINER

TITLE OF COURT: YOUTH JUSTICE COURT

JURISDICTION: DARWIN

FILE NO(s): 20732041

DELIVERED ON: 4 July 2008

DELIVERED AT: Darwin

HEARING DATE(s): 25 January 2008, 29 February 2008, 8 May
2008, 23 June 2008 & 1 July 2008

JUDGMENT OF: Ms Melanie Little SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Prosecution: Mr M Fisher
Defendant: Ms J Franz

Solicitors:

Prosecution: ODPP
Defendant: NTLAC

Judgment category classification: C
Judgment ID number: [2008] NTMC 045
Number of paragraphs: 49

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20732041

[2008] NTMC 045

BETWEEN:

POLICE
Prosecution

AND:

SHANE GARDINER
Defendant

REASONS FOR DECISION

(Delivered 4 July 2008)

Ms Melanie Little SM:

1. The defendant is charged that on 27 November 2007 he assaulted a Police Officer in the execution of his duty (s 189A of the *Criminal Code* - count 7), he resisted Police (s 158 of the *Police Administration Act* – counts 8 and 9) and drove in a manner dangerous (s 30(1) of the *Traffic Act*). He has pleaded guilty to the charge of driving in a manner dangerous and one count of resist Police (count 9). There is a disputed facts hearing on that later charge. He has pleaded not guilty to one count of resisting Police and to the charge of assault Police. There was some initial confusion as to the plea on count 9. Counts one – five have yet to be finalised and are not the subject of any findings. Prosecution bears the onus of proof beyond reasonable doubt. If they do not discharge the onus, the defendant is entitled to be found not guilty. Prosecution also bears the burden of proof with respect to the disputed facts. A hearing was conducted, evidence taken and documents tendered. The evidence is summarised as follows.

2. Larry Stimson gave evidence that his motor vehicle was stolen on 27 November 2007. The car is photographed at the wreckers after the accident which occurred whilst it was stolen (P1). When he received the vehicle back, he did not notice any blood inside the motor vehicle.
3. The next witness was Jason Bradbury. He was the Officer in charge of the case and conducted a record of interview with the defendant. He was then cross-examined. He interviewed witnesses in the case. He had understood the defendant was injured by Police in the course of the incident and he was aware that the defendant had injuries to the top of his head. He was shown some photographs and he agreed that the photographs were consistent with the injuries he had seen. Three photographs of the defendant became MFI D2. He could not recall if he asked for photographs to be taken of the defendant's head. He believed that the alleged co-offender, Keith Mills has been investigated but not charged.
4. The next witness was Kim Hollander. She was a resident at 69 Jingili Road, Jingili. She woke up to the noise of dogs barking and thought someone had broken into the next door house. She ran to the door. She saw Police walking around and Police taking a young boy to the front gate. They had the young boy cuffed and were holding him by the arms. The young boy was abusing the Police. Her daughter opened the gate for the Police. Police put the young person in the paddy wagon. The boy in the paddy wagon was screaming and yelling. It was 3.00am and it was pretty dark. Both street lights were on.
5. She was then cross-examined. She was awoken by dogs barking and heard someone climbing a fence in her yard and then she saw two people in her yard. She drew an extremely detailed diagram which became Exhibit D3. She heard the sounds of tin being hit and someone running through her yard. She went to the lounge area and heard noises from number 71, her next door neighbour's house. She saw approximately eight Police there and four

Police cars. There was no one at number 71, as the owners were away. She was house-sitting the house. It was dark in the yard of number 71. She did not hear anything before she heard the words "we've got him". Sometimes her hearing is no good, although on that night it was okay. She agreed she had heard the words said by the young boy "you are a bunch of wusses, picking on me". She agreed she had heard a Police Officer say "you shouldn't steal someone's car". She did not see Police talking to the young person in the back of the Police van. She saw two Police come out of the yard with the boy cuffed. Exhibit D4 is a photograph of outside house number 7. She marked where she saw the Police standing in front of number 71. Her daughter Simone and brother-in-law Robert were outside with her when this was happening. She saw blood coming from the head of the young person and he was handcuffed from behind. There was blood on the driveway to number 71 and she directed her daughter to clean the blood up the next day. She had not seen into the yard of number 71. It was dark and in shadow. In re-examination, she indicated that she had heard the Police Officers moving around. The tone of the young boy when he was calling out was loud and angry.

6. The next witness was Simone Corney, the daughter of Ms Hollander. She was asleep and was woken by the sound of sirens and a car speeding past. She looked out and saw someone jump into their yard. She woke her mother and her uncle up. They were house-sitting next door and heard the dogs from next door barking. They went to check if the house next door was okay. She went to get keys to open the gate for next door so they could let someone out. She heard rustling in trees, dogs barking and the sound like a struggle. She heard people moving, but did not hear any words. She gave them the keys and they took the person to the vehicle. When they opened the gate, about four people came out. One guy was caught in the yard and he was in handcuffs. He was cursing and aggressive. He had blood on him and he was taken to the paddy wagon. He was washed off at the fire

hydrant. In cross-examination, she agreed that she had spoken to a Police lady on 31 December 2007. She was shown a transcript of a recorded interview. She agreed what she said on 31 December 2007 was true and correct. In her statement, she said that she had heard the Police say words to the effect of “go on the ground”, then she heard the person on top and she could hear people jumping on him. She did not hear the words “stop resisting”. She had heard a struggle. She was turning to the Police, turned around and then she saw the person at the fire hydrant. There were lights from their house and lights from the street lights. Number 71 was not lit up in the front garden area. She agreed she had heard the boy say “you guys shouldn’t treat kids like this”. He was cursing. She did not hear him complain about his eyes. She heard the Police say “you should not steal other people’s cars”. The transcript of her statement made to Police became Exhibit MFI D5 and by a separate ruling, I declined to admit the statement into evidence.

7. The next witness was Constable Rodney Hayman. On 26-27 November 2007 he was on night shift undertaking general duties in a marked Police van. He heard on the Police radio that Sergeant O’Hara was involved in a pursuit. He and his partner went to the Jingili area to help. There was a crash and they arrived in Jingili Terrace to assist. The witness went to help with the apprehension of the defendant. Constable Hayman went to an area where Constable Higgins was apprehending the defendant and the witness was on the footpath side of a six foot chain fence. He saw the defendant and Constable Higgins. Constable Hayman went over the fence to help in a confined space of thick vegetation and he was backed up to the fence. He helped Constable Higgins cuff the person, placing his knee into the person’s shoulder. He grabbed the left arm of the person up their back to get the cuffs on. The person was thrashing around and yelling abuse with words such as “you dog cunts”. The Officer was saying to stop resisting. He noticed blood to the head of the person. He identified the person as the

defendant. He moved away so that Sergeant O'Hara and Constable Higgins could escort the person out of the yard. When the person was on the ground, he was moving his arms around to break free of Constable Higgins and was resisting Police. He was also moving his legs around a lot. Constable Higgins was struggling to restrain the person. Constable Higgins was not able to get handcuffs out and was having problems ground stabilising the person. The witness had one arm and Constable Higgins had the other arm. In the yard the witness could not see the house. It was scrubby vegetation, overgrown and not maintained. He had not realised that Sergeant O'Hara was in the area until later. Sergeant O'Hara came through the bushes. He identified one of the photos from a bundle as being the area where he had climbed over the fence (P6). It was after the person was cuffed that he noticed blood to the head of the person and that Sergeant O'Hara was at the location next to him. He moved and let Constable Higgins and Sergeant O'Hara take care of the person, as it was their arrest. There was some delay whilst a key was being obtained to the gate. He then went to the crash site.

8. In cross-examination, it was put that he had seen Sergeant O'Hara and he denied that. It was put that Sergeant O'Hara was right there with Constable Higgins with the defendant on the ground. The witness recalled that Constable Higgins was by himself and he had not seen Sergeant O'Hara in the immediate location. He saw Constable Kidney in front of number 71 and Constable Higgins with the defendant. He did not see Sergeant O'Hara with a torch and did not recall seeing a torch light. He could smell OC spray but did not see anyone being sprayed. It was put that Constable Higgins was standing over the defendant, pulling his arms back. The witness did not recall seeing that. He stated that Officers were not trained to do that and that it was not an effective movement as a person can roll out of it. Constable Higgins was standing on the defendant's right side. The defendant was face down. It was put that the defendant was not struggling and resisting and the witness denied that. He could not recall the defendant

saying “here, take my hands”. It was put that the defendant never said “fucking dog cunts” and the witness said he remembered that. It was put that the defendant was cursing the Police after the incident and he said he had left the yard by that stage. He heard yelling, screaming and swearing. It was put that he had kicked the defendant through a fence and he replied “no I did not”. He did not see any other Police Officers doing that. The defendant was yelling loud enough “for the neighbourhood to hear”. The witness went over to help Constable Higgins, as he believed he needed help. The defendant was moving his arms around erratically and at one stage, had his arms under his body. The defendant was moving his legs in a kicking motion, with his knees bent. The defendant was thrashing his arms around to prevent being handcuffed.

9. It was put that Sergeant O’Hara hit the defendant three times with a torch. The witness replied “I did not see that, I did not see Sergeant O’Hara until after he was over the fence and the cuffs were on”. He had seen Constable Higgins on his own. It was put that Sergeant O’Hara had sprayed the defendant whilst he was on the ground and the witness replied “I did not see that, but I could smell the after effects of OC spray”. He did not know who had sprayed the defendant. He could see blood on the defendant’s head. The witness was there when Constable Higgins put the handcuffs on and the defendant was face down when this occurred. He did not recall any Police carrying torches. When he first saw the defendant, the defendant and Constable Higgins were on the ground. He did not recall hearing Sergeant O’Hara saying “stop resisting”. He did not see Sergeant O’Hara with a torch inside the yard of number 71. In re-examination, he said he could see Constable Higgins and the defendant through the fence inside the yard. Constable Higgins was standing to the right of the defendant before kneeling down trying to ground stabilise him.
10. By consent, the following material was tendered. P7 - Statement by Dr Fleet 20 January 2008, P8 - Emergency Medical Records 27 November 2007, P9 -

Emergency Clinical Notes 27 November 2007 and P10 - Medical Notes longhand by Dr Fleet relating to 27 November 2007 dated 6 May 2008.

11. The injuries to the defendant's head were reported as being 5cm, 4cm and 4cm respectively. A total of 16 sutures were used to close the wounds. No other injuries to the rest of the defendant's body were identified.
12. The next witness was Constable Benjamin Higgins. He is 170-175 centimetres tall and 80 kilos. On 26 November 2007, he was on night shift and at about 3.00am he was with his partner, Constable Kidney. They came to the assistance of Sergeant O'Hara who had called in a pursuit. They went onto Jingili Terrace and heard that there had been a crash. They saw two males running from a laneway and jump a fence. He followed into one of the yards, looking for the people, but did not locate anyone. Constable Higgins went back to the yard at the corner of Jingili and McKeddie Street and met Sergeant O'Hara. He advised that two males had been running and jumped a fence and that he had been looking through the yard. The garden was so thick he was on his hands and knees to search. From a distance of one and a half metres away, he saw a male stand up. Constable Higgins stood up himself, identified himself as a Police Officer and said to the person to get on the ground. The male turned to him and it was then he recognised the person as the defendant. The defendant had an aggressive stance with his fists raised in a boxing fashion. He appeared intent to fight the witness. The defendant appeared to lurch forward at him, as if he was to strike him. The witness stepped forward and took the defendant in a front head take down hold. This was whilst the witness had his arm around the defendant's neck. It is a hold which is part of Police training. There was a wrestle and Constable Higgins felt a strike to the right side of his jaw. It was a 'decent blow' and later there was swelling and bruising to the right jaw area. He was not sure if it was a fist or elbow that was used to make the contact, but it was a strong blow. Wrestling started and he struggled to gain control of the defendant. They ended up on the ground with the defendant

on top of him and the wrestle continued. The witness tried to gain control using all the force he had. It was a high stress situation. He estimated the struggle lasted 20 seconds. He called on the defendant to stop resisting and he got out from under the defendant. Another Officer, Sergeant O'Hara, called on the defendant to stop resisting. Sergeant O'Hara tried to hold the defendant's arm while the witness was also trying to do that. They were aiming to get him in a three point hold. The aim of a three point hold is to get the subject on their stomach with one or two Officers on the side. An Officer would have a knee on the person's back and the other knee to the side of the rib area. This pushes the elbow in. On this occasion, this manoeuvre was unsuccessful as the defendant got his hands free.

13. Both Constable Higgins and Sergeant O'Hara called on the defendant to stop resisting. They got him into a position where his hands were behind his back. Constable Higgins went to get some cuffs and the defendant continued to thrash about. The defendant got his arms free and Sergeant O'Hara used his OC spray. The defendant was still thrashing. The witness then got the defendant's arm and then he noticed another member who came to assist, namely Constable Hayman. Constable Hayman helped cuff the defendant and stood him up. They walked around the garden to the gate area and the defendant was still being abusive, using swear words. P11 was four photographs of Constable Higgins' injuries taken on 27 November 2007. Photograph one was bruising and swelling to the right jaw area, photograph two was bruising and a slight laceration to the right elbow, photograph three was lacerations to the left shin and photograph four was a laceration to the left ear. Photograph one was relevant to the assault Police charge. Photographs two to four were relevant to the resisting Police charges. Ten photographs of the scene were shown to the witness and these were marked from letters A – J. They eventually became Exhibit P12. These photographs show the dense foliage in the area of the arrest and a laneway between houses 69 and 71. One is a close-up which shows blood.

14. It was approximately 3.00am and there was poor visibility in the garden. It was very dark with thick vegetation. He was not able to stand up properly. The defendant was searched and then placed into the Police cage. Sergeant O'Hara and Constable Kidney moved the vehicle up to a fire hydrant and decontaminated the defendant. Whilst he had bruising and swelling, he did not see a doctor for treatment.

15. This witness was then cross-examined. The foot chase lasted under one minute. He jumped the fence in the area about two metres from the fire hydrant. He agreed that it was dense bush and there were obstacles in his way. He saw Sergeant O'Hara in the yard, but not in the garden area. Whilst searching for the male, he was in a crouched position and there was thick vegetation. He agreed that he did not know what he would be encountering. He did not recall Sergeant O'Hara shining the torch into the garden. Whilst it was not total darkness, it was dark with very poor lighting. He first saw a person crouched down in the bush. That person then stood and faced him. It was then he was able to see the defendant's face and identify him. The defendant had his fists up facing the witness. It was put that the defendant had his palms open and arms in front of his body. That was denied. He said "stop, Police, get on the ground now". He ordered this for safety for all involved, including the defendant. It was put that the witness grabbed the defendant by the left wrist and then put his right arm around the defendant in a choke hold and that he tried to pull the defendant back. This was denied. It was put that only at this stage had the defendant resisted and this was denied. It was put that once the witness took hold of the defendant, he tried to pull him to the ground and this was agreed. He agreed that the defendant then tried to get out of this hold. The defendant was resisting and thrashing. It was put that the defendant turned his body to the right to get out of the hold and the witness replied that he recalled him thrashing, not turning. He agreed that they fell to the ground. It was put that the witness fell on top of the defendant and this was denied.

After the witness gained control, he put his knee in the back of the defendant. He denied he was standing over the defendant when he had got the defendant on the ground. He denied that the defendant was offering up his hands. He agreed that he had placed his knee into the back of the defendant, trying to do a three point hold. He was on the right side of the defendant, with his right knee on the defendant. His left knee was in the rib cage area. The defendant continued to struggle and his head was moving about.

16. He did not see Sergeant O'Hara strike the defendant, though there was talk about that later. He did not hear the noise of the defendant being hit. It was put that the defendant did not lunge forward and that was disputed. It was put that there was no way the defendant could get away and the witness said he did not know Sergeant O'Hara was behind him, although he knew he was in the yard. He denied he had put the cuffs on the defendant straightaway. It was put that the defendant was not struggling and he had not got his arms free. This was disputed. After the three point hold, they were able to get the defendant's arms behind his back. The witness went to get his cuffs and let go of one hand. As this occurred, the defendant thrashed about again and the witness lost grip. He disputed that the defendant was offering up his hands. It was put that the defendant was sprayed after his hands were cuffed and this was disputed. It was disputed that the defendant was sprayed on both sides of his face. He agreed that there was blood on one of the photographs exhibited. It was put that the defendant said the Police were "fuckin wusses for picking on a kid" and he denied that. It was put that the witness said "that serves you right for stealing other people's property" and he disputed that was said. The witness noticed Constable Hayman after the OC spray. He agreed Constable Hayman was there before the defendant was handcuffed, but disputed that he was there before the defendant was sprayed. It was put that when the defendant was in the paddy wagon, Sergeant O'Hara said that he would let the defendant out to wash his eyes after he had

told Police who the other person was. This was disputed. He had taken the defendant to the Royal Darwin Hospital. He agreed that the defendant had injuries to the top of his head. It was put that the defendant was hit repeatedly by Sergeant O'Hara's torch while the defendant was face down on the ground and the witness replied that "he did not know he had not seen that". He estimated that from the time the wrestle started to when the defendant was handcuffed, to be approximately 20 seconds. He did not recall a Police Officer from the other side of the fence kicking at the defendant. In re-examination, he was asked why he was saying "stop resisting" to the defendant. The witness replied that the defendant was thrashing about and being uncooperative, trying to get free.

17. The next witness was Constable Christopher Fairgrieve. He was with Constable Hayman on 26 November 2007 on late shift. They heard a pursuit called in by Sergeant O'Hara and heard that there had been a crash. They pulled into Jingili Terrace and heard someone yell "they went that way". He heard dogs and ran approximately 200 metres. Nothing more was heard and so he went back to the car that had crashed on Kilian Crescent. Two photographs were tendered of the damaged vehicle, P15. Sergeant O'Hara said to him that he had used his torch in the incident and requested that the witness exhibit the torch. He identified the torch in Court. In cross-examination, the torch was exhibited and became Exhibit D16. He was at the crashed vehicle when Sergeant O'Hara spoke to him. The light was reasonable at that point. He could see Sergeant O'Hara and did not notice any blood on Sergeant O'Hara's shirt.
18. The next witness was Constable Kidney. He was on night shift on 26 and 27 November 2007. At approximately 3.00am they were travelling to a job and then a call came through about a pursuit. At the corner of Kilian Street and Jingili Terrace, the witness saw two males in a vehicle on Jingili Terrace and the vehicle braked heavily. The Officer got out of his vehicle and one male went over a fence. The witness had a torch and was trying to locate

the males. Other Police units arrived. He heard his partner yelling “get on the ground” several times. He went back to the fence area. It was dark and he heard rustling in the bushes along the fence line. He saw Sergeant O’Hara part some bushes and come into the area. There was rustling and wrestling. He heard the words “stop resisting” and a male yelling “fuck you”, or words to that effect. There was verbalisation and noise. He could hear bodies wrestling in amongst the bushes. He was not able to make out who the bodies were. He heard both Officer Higgins and Sergeant O’Hara saying “stop resisting”. Other Police units arrived and Constable Hayman went over the fence. He then smelt OC spray and he stepped back. The yelling and wrestling stopped. Neighbours came out and they said they were looking after the house. Those people arranged to get the key for the gate. He saw Officer Higgins and Sergeant O’Hara escorting a male out. The male was then decontaminated. The witness walked up the laneway and saw a white vehicle which appeared to have hit a pole. He took the defendant to hospital and requested blood tests. He knows the defendant and identified him in Court.

19. He was then cross-examined. He was partnered with Constable Higgins on this night. He recognised the injuries to Constable Higgins which were photographed in P11. When he heard the words “get on the ground” he identified the voice as Constable Higgins, but he did not know where Constable Higgins was. He disputed that Sergeant O’Hara was not in the area where the words had come from. His notebook entry recorded that he had observed Constable Higgins wrestling with the offender, that Sergeant O’Hara had arrived to help and was yelling “stop resisting” and the wrestling continued. Notebook entries continued that the offender was swearing and he heard Constable Higgins saying “pull your arm out” and Sergeant O’Hara saying “stop resisting”. It was put to him that Sergeant O’Hara hit the defendant to the head and he replied “I didn’t see that happen”. He could see some torch light from Sergeant O’Hara’s torch. He

agreed that he had stated earlier in Court that he had not been able to make out which body was which. He was asked whether he had kicked the defendant through the chain fence and he denied that. There were about seven Police Officers in attendance. He agreed he had seen Sergeant O'Hara part the bushes and come into the area where Constable Higgins and the defendant were. It was put that the defendant was not swearing until later and he denied that, saying there was constant verbal abuse. He did not know who used the OC spray. He did not recall the defendant being called a monkey in a cage. The defendant was let out to wash his face. The defendant's eyes were being decontaminated from the OC spray. He had heard words "get on the ground". He did not see the defendant stand up, he did not see him turn to Constable Higgins or how his hands were placed. He did not see the actions of Constable Higgins and did not see Constable Higgins and the defendant fall to the ground. It was night time and there were bushes in the area. There were some torches on and there was movement around. He did not see the defendant get handcuffed or the OC spray being used. He could smell the spray. His notebook pages 92 and 93 became Exhibit D17. In re-examination, he said that he could recognise Constable Higgins' voice and that he had run to the fence area. He saw two bodies wrestling and then he saw Sergeant O'Hara come in, parted the foliage and then he saw three people wrestling.

20. The next witness was Sergeant O'Hara. At 3.00am on 27 November 2007, he was patrolling the Marrara area and a vehicle driving towards him turned without indication. He followed the vehicle, engaged his beacons and indicated for the driver to pull over. The driver did not pull over and a pursuit occurred. Details of that pursuit are not being summarised in this evidence. Upon impact with a pole, the vehicle being driven by the defendant came to a stop and persons alighted from the vehicle. The witness chased the persons who had gotten out of the vehicle. He recognised the defendant and chased the defendant up an alleyway to Jingili Terrace.

Sergeant O'Hara called for him to stop but the defendant kept going. He met with Constable Kidney and they could hear the noise of someone jumping a cyclone fence. The witness jumped a fence into number 71 Jingili Terrace. He had heard Constable Higgins jump the fence. Constable Higgins had said that both of the persons had gone into that yard. The witness stopped for a while and listened. He could hear Constable Higgins in the garden bed area. He heard Constable Higgins shout "get down" and identify himself. He heard two people engaged in wrestling. They sounded like they were slapping up against the fence. There was an altercation and the witness went and shouted "stop".

21. The witness tried to get to the people, but he could not get to them as there were plants in the way. He had to crawl through until he got to the area where the defendant and Constable Higgins were. He had tried to run but he had fallen over. It was quite dark and Constable Higgins and the other person were rolling around. They then were standing up fully engaged in an altercation. He was trying to reach the defendant. He had a torch in his right hand and he was bent over in the canopy area. In a reconstruction, he demonstrated that he was holding the torch at the globe end and he had his right arm up with his hand in front of his face to push shrubs away. The defendant was in a dominant position with respect to Constable Higgins and Constable Higgins was hanging off the front of the shirt of the defendant, trying to drag him down. They were not upright, due to the canopy and the witness called to the defendant to stop. There was a flurry of punches and yelling and the witness went to give the defendant a backhand with the torch. He intended to hit the muscle area around the shoulder of the defendant, but hit him to the head. His hand came back down and he was pretty sure that he struck the defendant, backhanding the defendant with the torch. He recalled three times that he moved his hand in and out and the defendant fell to the ground. He acted to subdue the defendant and rescue Constable Higgins, as he believed Constable Higgins may get hurt or

seriously injured. The defendant was swinging at Constable Higgins and engaging in an altercation. On the third occasion that he swung his torch, the defendant fell. Sergeant O'Hara lost his torch in that action. He was on his knees crawling towards the defendant and he pinned the defendant to the ground by placing his weight on the upper part of the defendant's body. Constable Higgins was going to the defendant's legs. The defendant was struggling and yelling obscenities. The defendant put his arms under his body and they continued to call to him to stop resisting. Constable Higgins tried to take the OC spray out of Sergeant O'Hara's holster and the defendant was still struggling. Sergeant O'Hara got his hand to his OC spray and released a short burst of spray into the defendant's face. The defendant continued using obscenities and the Officers were able to apply the handcuffs. At that point, the defendant settled down and was not fighting so much, although there was still abuse. Constable Hayman had jumped the fence, but the witness could not recall him being involved in the altercation. He went to go towards the front gate and someone unlocked the gate. They placed him in the van and the defendant was still swearing and he was bleeding. After he settled, they backed the van up to a fire hydrant and decontaminated the defendant.

22. The witness gave his torch to Constable Hayman, stating that Constable Hayman was to exhibit the torch. He directed that the defendant be conveyed to hospital for treatment of his injuries. At a later stage, he directed forensics to take photographs of the scene and he identified the photographs (P6 and P12). He identified Exhibit P6 as the area of engagement. A tape of a recording of the pursuit was then played and that became Exhibit P19. The witness is heard to say that the males had gone on foot into an alleyway and one was a Gardiner boy. The plan drawn by Sergeant O'Hara became Exhibit P20.
23. The witness was then cross-examined. He is a Police Officer of 11 years experience and was the Senior Officer on duty at the scene. He was shown

MFI D2 and he identified the injuries as those to the defendant's head. He saw those injuries after he had decontaminated the defendant, under street lighting. He made a statutory declaration on 27 November 2007 and he agreed that it was a true and correct account of the night. He agreed that in the statutory declaration he had said he had struck the defendant two times with the torch. He agreed that he now says that it is possibly three times that he hit the defendant. He replied that he was not sure if one occasion had missed the defendant, but he was positive at least two had hit the defendant. He had completed a Use of Force Report with respect to this incident. That is an internal Police document to explain why force had been used. He agreed that in that document he said that he had hit the defendant on two occasions with his torch (in fact the document says the subject was struck – front swing and back hand swing, inferring there were two occasions). There was also a case note summary from the PROMIS system where he agreed that it had been recorded that he had hit the defendant twice. He had also typed onto the bottom of another report that he had hit the defendant on two occasions. On the next day, he had gone to the scene to obtain details of three witnesses. Photograph J from Exhibit P1 was shown to him. He agreed that this was the area where he had come across the defendant and Constable Higgins. He himself had shown forensics where the incident had taken place and where to take photographs relevant to the case.

24. At the time he used force, Constables Higgins and Kidney were in the vicinity. Constable Kidney was on the outside of the fence and footpath area. The garden had heavy vegetation and it was pretty dark. There was a low lying canopy of plants. The witness deposed that the defendant was using physical force against Police. Multiple punches and kicking were occurring. He agreed that he did not say that in his statutory declaration, but rather said that the defendant was “engaging in a fight and a violent struggle”. He agreed his torch would have been turned on when he entered

the yard of number 71. He was searching for the people who had left the car. He knew Constable Higgins was in the yard, as he had heard him climbing over the fence, but he had not seen him. Sergeant O'Hara then heard Constable Higgins from a point in the garden – he could hear that he was engaged. He heard the words “get down, get down, stop resisting” being said by Constable Higgins. He ran towards the area and fell over after he hit a branch. He then saw the other person bobbing up and down near the fence, engaged in a wrestle. He could hear bodies gliding together, leaves and branches breaking and people hitting the cyclone fence. They were on the ground and then on their feet by the fence, moving around and up and down. It was put that the defendant was face down on the garden when the witness came across him and he denied that. He said that Constable Higgins was facing the witness and between them was the defendant. Constable Higgins was trying to pull the defendant down from the chest area. Everyone was crouched down. The witness was about an arm's length, plus the length of the torch, away from the defendant. He was shining the torch on them. He agreed there was a loud noise when he hit the defendant with the torch. On the third occasion the torch vibrated out of his hand and hit the ground.

25. It was a junior member who was involved in the struggle and wrestle. He made his decision quickly. It was put that he hit the defendant three times on the head and he agreed. He was calling out to the defendant at the same time and said “stop it”. He had no idea if Constable Kidney was shining his torch into the area or not. It was put that the defendant was on the ground face down and Constable Higgins was on top of him when the witness hit the defendant. He denied this, saying they were involved in an engagement at the time he hit the defendant. It was put that the defendant was putting his hands up saying “take my hands”. The witness denied that. Sergeant O'Hara agreed that after he had hit the defendant, he went to assist Constable Higgins and tried to pin the defendant to the ground. The

defendant was moving his head and body. He agreed the defendant's head was bleeding a lot. He saw blood on the ground the next day. He denied he hit the defendant from above. It was put that the defendant did not put his arms under his body and this was denied. He denied that the defendant was sprayed with OC spray after he was handcuffed. The witness only recalled spraying the defendant once. He agreed that his body was on the defendant's at that time. Constable Higgins was also on top of the defendant, trying to gain control. After they sprayed the defendant with OC spray they had gained control, but not before that. It was put that Constable Hayman was present when the defendant was handcuffed and the witness could not recall him there until afterwards, but he was not sure. He could recall Constable Hayman being present after they had the defendant under control. It was put that the defendant was not screaming abuse and this was denied. It was put that whilst on the ground in the garden area, someone had tried to kick the defendant through the fence area and this was denied. When the defendant was taken to the paddy wagon, he was still handcuffed and bleeding. The witness spoke to the defendant when he was in the back of the wagon and also when he was decontaminating him at the fire hydrant. He denied saying to the defendant that if the defendant told him who the other person was in the motor vehicle, they would let him wash his eyes. The witness said that the defendant had stated "it wasn't even me, it was fuckin Keith Mills who was the driver". This was said by the defendant without questioning by the witness. The witness had gone back to the scene next door to show forensics where to take the photographs.

26. He was then re-examined. He did not think that he had hit anyone or anything else and it was more than probable that he had made contact with the defendant three times. He definitely hit him two times. He agreed that he had not mentioned kicking and punching in his statutory declaration, but that was what he had meant when he had used the expression "engaged in a fight". The defendant was going off, multiple elbow, kicks and punches.

Without the torch light it was pitch black. He could make out silhouettes. The Use of Force document became Exhibit P21. The statutory declaration of Sergeant O'Hara dated 27 November 2007 is admitted in part and paragraphs 27 – 49 inclusive become Exhibit P22(A). The copy of the notebook pages from Sergeant O'Hara became Exhibit P23. That was the close of the prosecution case. There was a case to answer.

27. The defendant then gave evidence. He is 17 years old and early in the morning of 27 November 2007 he was in a white vehicle driving in the Marrara area. A Police car was behind him, he put his foot down and he then gave evidence as to his driving. As that is not part of the matters currently before the Court, that will not be summarised. He jumped out of the motor vehicle while it was still moving and it rolled into a light pole. He heard a Police Officer call out that he was one of the Gardiners and he ran down the alley. The Officer was 30 – 50 metres behind him. There were Police vans and sirens. The defendant jumped into number 71 and went over the fence. It was bushy and he hid by one of the bushes. He was crouching, side on to Jingili Terrace. He had not received any injuries from getting out of the car. He was wearing board shorts, thongs and a white shirt. He heard Officers moving outside the fence area. He heard his surname being mentioned and he knew he was going to get done for what he did. He sat there for a few minutes. There was an Officer in the yard. He saw a torch light on the other side of the bushes. He heard voices, but could not understand what was being said. He heard a man's voice from outside the bushes. He was sitting crouching and an Officer came through the bushes from his left side. He heard the person coming through. He heard the sound of branches and leaves from behind. The person got to the area and spotted him. The person was a metre or two away from him and the person ran towards him, saying "get down, get down". The defendant jumped up and had his hands up with his fingers curled up. His hands were at shoulder height. He turned and faced the man. The man grabbed him by

the left hand wrist area and swung his arm around the defendant's neck. It was like a choke hold from the left side of his body. The man was using his right arm and hand around the defendant's neck. The defendant struggled and turned towards the man. The man put him down.

28. The defendant and the Police Officer fell together onto the defendant's right side. The Police Officer was then on top of the defendant while he was on the ground. Another Officer came. The Officer who had grabbed him was saying "stop resisting". As they had gone down, he was saying "stop resisting". That Officer was on his back and another Officer came and ran in and said "stop resisting". The defendant was on the ground lying on his gut and he was laying face first. His hands and arms were beside his body. Another Police Officer came and placed his knees into the defendant's back, saying "stop resisting". The defendant was not resisting at that point. He agreed that he had been resisting earlier. The other Police Officer had come from his left side, through the bushes. He knew this man was a Police Officer as he had a torch and he said "stop resisting". One was on his lower body and the other Officer was on his top part of his body. An Officer had knees in his back. Another Officer had come and was on the other side of the fence. That Officer had a torch and he started kicking through the fence, getting the right side of the defendant's body. The defendant offered his hands saying "here, take my hands". He was lying face first and lifting both arms upwards. The Police kept saying "stop resisting". He felt a bang on his head and he saw stars. He felt it again and again. He did not black out. It was really dark and he did not see what he was hit with or who had hit him. He had a fair idea it was the Police Officer who was on the upper part of his body. The Police continued to say "stop resisting". He pulled his hands up to try and feel his head, pulling his hands up underneath. The Police then pulled his hands back behind his back and put handcuffs on his wrists. The defendant thought it was all over and then an Officer sprayed him on the left side of the head, three centimetres away from his face. He

was pretty sure it was the same one who had hit him. He was sprayed on the right side of the face. It felt horrible and was burning. He was screaming and yelling and was very upset and angry. He was pulled up by the Officer from behind. There were two Officers there at that stage and one had him from behind. He was guided through the garden and he could not see anything. His eyes stung too much and he kept them shut. He stood there while someone got a key for the fence. He was verbally abusing the Police at that stage, saying “you mob are gutless doing that to little kids”. One Officer said “that’s what you get for stealing cars”. He was taken out of the yard and placed in the van. He was sitting in the van crying out for water for his face. It seemed like five minutes that it was happening. An Officer came back to the cage and said “you’ll get water if you say who you were with” and he said “it was Keith Mills. His eyes were still burning and he was screaming and yelling. One Officer said “shut up monkey in the cage”. They washed his face and he did not want them to wash his shirt, as he wanted the blood left on the shirt.

29. An Officer looked at his head to see if he needed to go to hospital. He was dizzy and his eyes were blurry. They went to the Royal Darwin Hospital and at Emergency he was let out of the Police cage. He received three gashes to his head and MFI D2 was shown to him. He identified the photographs as injuries to his head and in particular, photo one showed a small cut to his head near the top to the left area. He now has a two/three centimetre scar. Photograph two shows stiches above the left eye area behind the hair line. A four centimetre scar is left. Photograph three shows stiches to the back of his head area near the top middle area of his head, leaving a six centimetre scar. The photographs were taken two days after the incident. The photographs became Exhibit D2. He received the following other injuries - bruises to his left arm, bruises to the middle elbow and shoulder area and swelling and bruising to his right side rib area. The diagram drawn by the defendant became Exhibit D24.

30. He was then cross-examined. He is 172 centimetres tall. He weights 82 kilos. There were three people in the car. He agreed that he does not have a high opinion of Police. He feels the Police do not like him. He thinks the Police have got something against him. When asked whether he considered he was treated unfairly by the Police, he said “yes, on occasions I’ve been treated unfairly”. He demonstrated how he had held his hands when Constable Higgins first saw him. He described it as his “surrender pose”. He was showing his hands had nothing in them and he agreed his hands were not open completely. He agreed that he had been crouching and then he stood up. He said nothing to the Police, believing he did not need to say anything. The Police had seen him and were coming towards him. The Officer and he fell down together. The Officer fell on top of him. He agreed that he was quite strong. He plays Rugby League. As they fell, the Officer still had the defendant’s left hand and he fell onto his right side. He did not see what the Officer did behind him. He turned. There were knees in his back. He was not struggling as soon as he got to the ground. He was struggling before he got to the ground when he was in the choke hold. He disputed that one of his elbows or fists connected with the face of Constable Higgins. He did not hit Constable Higgins when he was in the neck hold, even by accident. He was shown Exhibit P11, the photographs of Constable Higgins and he said that he did not cause the bruising seen on photograph number one.
31. Someone kicked the cyclone fence whilst he was only centimetres away from the fence. The kick got the defendant and it hurt. It was enough to give him a bruise. He denied he had made up this incident. He agreed that he was verbally abusing Police. He agreed that he had been calm and then had become very upset. He disputed that he was very angry. It was put to him that he was not bigger than the Police Officer and he disputed this. His evidence was that he was smaller than the Police Officer. It was put to him that the Police had known his name and he knew he would get done, why

hadn't he given up? He replied that he "did give up in a way". When the cop grabbed him by the neck, he wanted to get away. The Police Officer didn't have to do what he did, he could have solved things in a better way. He could not recall moving towards the Police Officer, although he could see that he could have made a step towards the Police Officer when he first saw him. His evidence was that the Police Officer rushed at him. Sergeant O'Hara had not tried to pull him down by the shirt. The only time he had gone down was when he and Constable Higgins fell and he stayed down. He denied that he struggled on the ground and denied that he resisted when he went down. After the Police Officer's knees were in his back, he said "take my hands". They were still saying "stop resisting", but he was not struggling. He was lying on his face and pushed his hands up his back and said "take my hands". It was suggested he was making this up and he denied that. He agreed that he was struggling before he went to the ground. He said that he struggled against the choke, turned towards the Officer, moved his arms and they both went down. It was then that the defendant stopped struggling. He knew he was stuffed, he had heard his name on the radio and there was no point struggling. Then another Police Officer came and had his knees on him and that's when it all started. The defendant said "take my hands. Then there was a bang to the head. I put my hands up to try and feel my head". He had fallen sideways and was then on his stomach and then put his hands to his side. An Officer was kneeling him to the back. He did not know if he turned or if the Officer had turned him. He was not struggling at that stage. He put his hands up to see what had happened to his head. After he was hit on the head, he felt his head and then they grabbed his arms and put them into handcuffs. He was not struggling then. The only struggle was when he was in the choke hold. As soon as he hit the ground, he did not struggle. He had slipped out of the choke hold by the time he was on the ground. It was put that he had struggled out of the choke hold and hit Constable Higgins and he denied that. He did not hit Constable Higgins. He was not sure if he slipped out of the choke hold or how he got

out of the choke hold. The Officer still had hold of him until back-up arrived. There was no need to hold him down, he would have stayed down. That was the end of cross-examination and the close of the defence case. Submissions were made and the decision was reserved.

32. The Court was made aware that a complaint had been made against Police (and in particular Sergeant O'Hara) concerning the use of force and the arrest of the defendant. The outcome of the complaint is not known. Those aspects of the complaint which are not directly related to the charges before the court are not the subject of findings in this decision.
33. Before making findings of fact I will consider issues of credit. Constable Higgins gave his evidence in a professional and credible fashion. He was able to recall the incident in a great detail. He was cross-examined in a methodical way and did not resile from his position. He made some appropriate concessions based upon all of the circumstances of the case, including the speed of the incident, the difficulty of the terrain and the lighting. He was an honest and credible witness. I accept his evidence as reliable.
34. The defendant gave evidence in a calm and logical fashion for most of the time. At times his demeanour was somewhat belligerent, but on the whole, he remained respectful of the Court processes. He candidly admitted that he did not have a high opinion of Police. He indicated that he felt he was picked on by Police. This can hardly be said to be relevant on the night in question, given the circumstances of the pursuit and the Police operation seeking to arrest those involved in the pursuit. Police have not targeted a particular person. His attitude towards the police coloured his evidence to some extent.
35. Sergeant O'Hara's response to his use of force on the defendant on the night of 28 November 2007 cannot be criticised. I am not aware of any professional standard or responsibility that was not complied with by

Sergeant O'Hara subsequent to the use of force. He retrieved the torch used and immediately handed the torch to a Constable on duty. He told the Constable that the torch had been used in the incident and directed that it was to be exhibited. The torch became an exhibit in the Court case. In his statutory declaration prepared on 27 November 2007, he outlined blows to the defendant. It is accepted there is an issue as to the number of blows. In court he admitted that he most likely hit the defendant three times. He prepared a Use of Force Report – an internal document – which outlined that blows were inflicted and OC spray used. Sergeant O'Hara was the Officer in Charge at the scene and ordered the transfer of the defendant to hospital for treatment after he inspected the injuries to the defendant's head. The defendant was taken immediately to the Royal Darwin Hospital for treatment. Sergeant O'Hara arranged for forensic photographs to be taken at the scene and met on site with the Police photographer the next day. He directed the photographer to the area of the incident, ensuring relevant photographs were taken of the area, including where the defendant's blood was still in situ in the garden bed. Sergeant O'Hara entered into the PROMIS documentation the fact that he had used his torch in this incident. There can be no criticism of Sergeant O'Hara's response to the blows he inflicted on the defendant in these circumstances. I have yet to encounter a more frank, immediate and open disclosure following an incident where force has been used by a Police Officer as against a person being arrested. That can do nothing but reflect highly on Sergeant O'Hara. Any suggestion of a cover up can be dismissed. Indeed the majority of the material defence had to cross-examine upon was either created by Sergeant O'Hara or he facilitated the creation of the material.

36. Consistent with his open disclosure prior to Court, Sergeant O'Hara's demeanour in Court was exemplary. He was frank with the Court as to the actions he undertook on the night and gave evidence in a manner consistent with someone who had nothing to hide. He was attentive to questions, gave

each question appropriate consideration and answered responsively. He was an extremely impressive witness. I decline to find that the question of how many times the torch came into contact with the defendant undermines the credit of Sergeant O'Hara. I accept him as an honest and credible witness. I accept his evidence as reliable.

37. The other prosecution witnesses did not give evidence in such detail. Those accused of unprofessional conduct denied the allegations. Constable Hayman's evidence was solid and cross examination did not alter that. He is an important witness as he saw the defendant while the defendant was still in the garden area. His evidence can be relied upon. Constable Fairgrieve's evidence was not challenged and does not go to any matters in dispute. His evidence is relied upon. Constable Kidney's evidence was challenged by his notebook entries. There is some doubt as to precisely what he was able to see. He was not at the scene of the arrest. Kim Hollander was very nervous in the witness box, as was her daughter Simone Corney. Their evidence suffered from this nervousness.
38. The charge of unlawful assault of a Police Officer will be considered first (count 7). The prosecution case is that the unlawful assault occurred in the context of the defendant resisting Police. This raises the prospect of a blow being sustained during the struggle. The struggle was occurring at night in a dark overgrown garden area. It was difficult to move around in the garden and there were overhanging branches and logs on the ground. There were times when people could not stand up completely in this area. The photographs show the ground cover and thick foliage. The photographs are taken in the day time and so do not completely replicate the conditions when the alleged assault occurred. They do provide the Court with evidence as to the density of the foliage. There was very limited light in the area and the blow is alleged to have occurred before Sergeant O'Hara arrived with his torch. There is evidence that persons had been tripping over. Constable Higgins had to crawl into parts of the area.

39. I accept that there are circumstances where, in the context of struggling and resisting arrest, a person can unlawfully assault a Police Officer. I accept the evidence of Constable Higgins that he received a blow to the right side of his lower jaw. He sustained a minor injury as a consequence of that blow. He was acting in the execution of his duty. Nevertheless, I find that an unlawful assault is not proven beyond reasonable doubt. The defendant has denied that he specifically laid a blow on the right side of the jaw of Constable Higgins. The defendant has ruled out the possibility of accidentally coming in contact with the Police Officer's jaw and that does not reflect well upon him. In these circumstances, an accidental blow was entirely possible. Constable Higgins frankly stated that he did not know what came in contact with his jaw. That is not surprising in all the circumstances. It is even possible that he came in contact with a tree branch or some other object in the overgrown garden. I accept that his evidence does tend towards a finding that a blow came from the defendant's fist or elbow. I do not find that is proven beyond reasonable doubt. Further, it cannot be ruled out that the blow was accidental. I cannot be satisfied beyond reasonable doubt that the defendant unlawfully assaulted Constable Higgins. I record a verdict of not guilty to count seven.
40. I will now consider the two charges of resisting a Police Officer in the execution of his duty. Counts eight and nine arise on the same date and the same set of circumstances. As I understand the particulars of the charges, these charges both relate to Constable Higgins and are separated in time by the blow he sustained to the jaw. That is the explanation for the two charges being laid in what would otherwise be one charge relating to a series of actions. The defendant has pleaded guilty to count nine with the facts being disputed. The defendant has pleaded not guilty to count eight.
41. There is considerable dispute as to the actions of the defendant when Constable Higgins first encountered the defendant and the ongoing contact between the defendant and the Police up until the point he arrived at the gate

of number 71 Jingili Terrace. Based upon the evidence before the Court and the findings as to credit I make the following findings of fact. At all times Constable Higgins was a member of the Police force acting in the execution of his duty. The defendant was crouching in the garden area. Constable Higgins was searching for a person who had exited from a motor vehicle after a pursuit. He did not know who he was searching for. As Constable Higgins was approximately one to one and a half metres from the person, the person stood up and turned towards Constable Higgins.

42. Constable Higgins says that the defendant then had his hands in a boxing stance and that the defendant moved towards him in a lunging motion with his hands in that position. The defendant says that while he had his hands up, his fingers were only slightly curled and he was not in a boxing stance. Having arms up at shoulder height with hands slightly curled is very close to a boxing stance. He agrees he may have moved towards the Police Officer.
43. The defendant was aware that Police were pursuing him. At the time he turned towards the Officer in the garden area, the defendant was aware that the person in his immediate vicinity was a Police Officer. Constable Higgins made a direction to the defendant to “go to the ground”. This direction was not complied with. The defendant moved approximately one step towards the Police Officer. The defendant moved relatively quickly. This movement was made in the context of his non-compliance of the direction to go to the ground. The defendant is a 17 year old youth. The defendant is not a large person, although it cannot be said that he is slightly built. There is not a great deal of difference in size between the defendant and Constable Higgins. The defendant had been actively avoiding the Police first in a motor vehicle and then by running into a darkened garden area. He had been hiding from the Police and when the Police were approximately one metre from him, he disobeyed a direction and moved towards the Police. The defendant’s evidence is that he had his hands out and fingers slightly curled in what he described as his “surrender pose”. Based on the evidence

before the Court, I find that the defendant's hands were in a boxing style stance with his fists closed. I accept the evidence of Officer Higgins that he was confronted with a reasonably well built youth who moved towards him with his hands up in a boxing type stance. I reject the evidence of the defendant that he was in a surrender pose. I find that the defendant's ongoing actions were consistent with those of a person who was not cooperating with Police (who in turn were acting in the execution of their duty) and that the defendant's actions were a continuation of the defendant's attempts to get away from the Police.

44. Constable Higgins placed the defendant in a front head take down hold. This was in response to the threat which Constable Higgins perceived as a consequence of the defendant moving towards him, as if he were to strike him, together with the defendant's failure to comply with his direction. Constable Higgins was had no back up at this stage. The defendant then struggled with Constable Higgins. Constable Higgins had not gained control of the situation. Constable Higgins felt a blow to his right jaw area. The blow to the jaw has not been proven beyond reasonable doubt to be an unlawful assault of a Police Officer, nevertheless, a blow of some type did occur. I do not find it is proven that the defendant inflicted the blow. Constable Higgins continued to attempt to gain control of the defendant, but was not able to gain control. The defendant and Constable Higgins ended up on the ground. I find that the defendant ended up on top of Constable Higgins for a very short period of time. The parties were wrestling. Despite using all the force he had, Constable Higgins was not able to gain control of the defendant. The struggle lasted a very short period of time, only a matter of seconds.
45. Sergeant O'Hara then entered the scene. At that time, the defendant was seeking to get away from Constable Higgins and the parties were neither standing nor lying on the ground. Constable Higgins was not in control of the situation and the defendant was using his force to seek to extricate

himself from the Police Officer. Constable Higgins was saying “stop resisting” to the defendant as the defendant was thrashing around and being uncooperative. The defendant was trying to thwart the attempts of Constable Higgins to arrest him. As Sergeant O’Hara arrived, he also yelled “stop resisting” to the defendant. Sergeant O’Hara observed that Constable Higgins was wrestling with the defendant and to use Sergeant O’Hara’s expression, Constable Higgins and the defendant “were fully engaged in an altercation”. Sergeant O’Hara formed the view that the defendant was in a dominant position at that stage. Constable Higgins was trying to pull the defendant back down. The parties were not completely upright due to the foliage in the garden. Sergeant O’Hara called out to the defendant to stop his actions. At this stage, Sergeant O’Hara used his torch to hit the defendant three times to the head area. I find that three blows connected with the defendant’s head, consistent with the photographic evidence in P1. Evidence of Sergeant O’Hara was that he intended to hit the muscle around the shoulder area of the defendant, but the blows connected with the head of the defendant. The evidence does not support a finding that Sergeant O’Hara intended to hit the defendant on the head area. The defendant was struggling with Constable Higgins at the time. Constable Higgins was not aware that the defendant was hit. It was almost completely dark, and the very difficult terrain to effect an arrest.

46. The defendant’s evidence is that he was laying face down on the ground when the blows connected with his head. It was put to witnesses that the defendant was handcuffed when he was hit. This was not the defendant’s evidence. He said he put his hands to his head after he was hit. His evidence is also that he was holding his arms up asking the Police to take his hands. I reject the evidence of the defendant with respect to these issues. I find that at all time prior to the handcuffs actually being placed on the defendant, the defendant was struggling and resisting the efforts of the Police to take him into lawful custody.

47. As the defendant continued to struggle, Sergeant O'Hara used OC spray to seek to subdue the defendant. I find there was one use of OC spray. The defendant was on the ground at this stage. OC spray was used after the defendant had broken free from Constable Higgins' grip as Police were seeking to place handcuffs on him. Constable Higgins had been trying to unclip the cuffs and as he released one of his hands from the defendant to complete that task, the defendant was able to continue struggling and wrestling. This constituted a re-escalation of the incident and the OC spray was used as a consequence. Sergeant O'Hara moved slightly away from the defendant at this stage. It was then that Constable Hayman had entered the garden area and became involved in the second attempt at handcuffing the defendant. Sergeant O'Hara was slightly back from the scene at that stage and in fact Constable Hayman had not even noticed him. I accept that Constable Hayman did not see Sergeant O'Hara. Given the conditions and in particular the darkness and the foliage, this finding is open on the evidence. At this stage it is likely that Sergeant O'Hara retrieved his torch. The focus of attention of Constable Hayman was upon the defendant. The defendant was still resisting Police. There was a brief moment of engagement between Constable Hayman and the defendant as he was finalising the handcuffing of the defendant. Constable Hayman then handed the defendant over to Constable Higgins and Sergeant O'Hara, who were the arresting Officers. The defendant was then walked to the front gate of the property. After placing the defendant in the paddy wagon, Sergeant O'Hara handed his torch onto a Constable for exhibiting.
48. I find that the defendant resisted Constable Higgins in the execution of his duty from the time he first came into contact with Constable Higgins, until the defendant was handcuffed. Once handcuffed, the defendant ceased resisting Police. There are two charges of resist Police before the court. I have found that the assault Police charge is not made out. That is said to be the intervening act justifying the two counts of resist Police. I find that the

resist Police was one continuous course of conduct. The defendant has pleaded guilty to one count of resist Police (count 9). The facts of the resist Police in count 9 are as found in this decision. I find that charge 8 (resist Police) is duplicitous and there is a finding of not guilty on that charge.

49. I publish these reasons.

Dated this 4th day of July 2008.

Melanie Little
STIPENDIARY MAGISTRATE