Drew v Rigby [2008] NTSC 52

PARTIES:	DREW, Keith Patrick v RIGBY, Kerry Leanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
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APPEAL FROM:	MS FONG LIM SM

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Disorderly conduct – findings of fact – sentence – conviction – appeal dismissed

Police Administration Act 1978 (NT), s 128.

Bunning v Cross (1978) 141 CLR 54, referred.

REPRESENTATION:

Counsel:

Appellant:	Self Represented
Respondent:	C Martin

Solicitors:

Respondent:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Drew v Rigby [2008] NTSC 52
No. JA 49 of 2008 (20712880)

BETWEEN:

KEITH PATRICK DREW
Appellant

AND:

KERRY LEANNE RIGBY
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 12 December 2008)

Introduction

[1] This is an appeal against convictions following a trial before a Magistrate for two offences of disorderly conduct. The grounds of appeal focus on the approach of the learned Magistrate to the evidence and, in substance, amount to an attack upon the findings of her Honour as being unreasonable.

[2] The Magistrate recorded a conviction and fined the appellant an aggregate amount of $600. The appellant appeals against the sentence on the basis that the learned Magistrate "erred in failing or substantially failing to adequately take into account the impact of recording a conviction on the employment prospects of the appellant".

Evidence

[3] The events occurred during the evening of Wednesday 7 February 2007. It was common ground that the appellant had spent the afternoon at the Karama Tavern. Mr Lewis, a security guard at the Tavern and the chef, Mr Shaikh, who was also the duty manager, both gave evidence of the events leading to the removal of the appellant from the Tavern. The Magistrate summarised their evidence in the following terms:

> "8. The Evidence – Mr Lewis' evidence is he came onto shift and observed the Defendant staggering and missing the cue ball while playing pool. He assessed the Defendant as too intoxicated to continue being served alcohol and advised him that he was on his last beer. The Defendant became belligerent about being told he was on his last beer and started to abuse Mr Lewis. It was then Mr Lewis decided that the Defendant should be asked to leave straight away. Mr Lewis' evidence is that the Defendant then became loud and aggressive, demanding that he be refunded for his beer and refusing to leave. While Mr Lewis was continuing to attempt to get the Defendant to leave, Mr Shaikh then joined him and attempted to find out the problem.
>
> 9. After Mr Shaikh intervened, Mr Lewis says that they managed to get the Defendant out of the Tavern. Once outside the Tavern the Defendant continued to be abusive and continued to ask for his beer refund.
>
> 10. Mr Shaikh confirms Mr Lewis' evidence that he went out into the bar to hear a loud argument ensuing between Mr Lewis and the Defendant. When Mr Shaikh intervened, the Defendant was demanding a refund and after being told he was to leave and when told he would not get a refund, he continued to abuse and swear at both Mr Lewis and Mr Shaikh. At one stage the Defendant referred to Mr Shaikh's race in a derogatory manner."

[4] The first charge of disorderly conduct in a public place, namely, the Karama Tavern was particularised as the yelling of "offensive language whilst being escorted from the Karama Tavern". Mr Lewis said that as he pushed the appellant out the door of the Tavern, the appellant started swearing at him and wanting to fight. He said the appellant was very aggressive and, after he pushed the appellant through the door, the appellant was yelling and swearing using words like "fuck you". Outside the Tavern the appellant continued to argue and, according to Mr Lewis, abused Mr Shaikh saying "fuck you" and "oh, fuck you Indian cunt". Mr Lewis described the appellant as very aggressive, clear and loud.

[5] Mr Shaikh said the appellant "went ballistic" inside the Tavern and swore loudly using the 'f' and 'c' words. He confirmed the racial abuse described by Mr Lewis and said that when they managed to get the appellant outside the appellant "went really off, like, even more than what he was inside the pub". Mr Shaikh said the appellant was swearing and yelling using the same swear words and racial abuse.

[6] The Magistrate correctly found that if the appellant behaved outside the Tavern in the manner described by Mr Lewis and Mr Shaikh, he was clearly guilty of the first offence of disorderly conduct.

[7] The second charge alleged disorderly conduct in the Darwin Watchhouse and was particularised as abusing police members and throwing a boot at police members. The background to the second charge began with the

arrival of the police at the Karama Tavern. Both Mr Lewis and Mr Shaikh said that when the police first arrived they could not hear what was being said between the appellant and one of the officers, but when a second police vehicle arrived and an officer got out of his car, the appellant again became aggressive. Both witnesses recalled the appellant saying something like "fucking member" towards the officer who alighted from the second police vehicle.

[8] The two officers who first arrived at the Tavern were Constables Frame and Wethers. Constable Frame said on arrival she could see the appellant who appeared to be very agitated and very aggressive. He was shouting and waving his arms in the air. Constable Frame spoke to one of the security guards while Constable Wethers was approached by the appellant. Constable Wethers noticed that as the appellant approached he was stumbling and could not walk in a straight line. He described the appellant as going from side to side and said it was obvious that the appellant was severely intoxicated.

[9] Both officers gave evidence that when the second police vehicle arrived and Sergeant Astridge alighted from the vehicle, the appellant immediately started yelling loudly towards Sergeant Astridge. It is unnecessary to repeat their evidence concerning the appellant's abuse.

[10] Constable Wethers gave evidence that he determined the appellant was intoxicated and should be detained pursuant to s 128 of the Police

Administration Act. Against his resistance, the appellant was placed in the police vehicle and conveyed to the Watchhouse where he was put into a holding cell. Later the appellant was directed to move from the cell and he took up a position approximately one metre back from a counter for the purposes of being processed before being placed in the cells. Both Constables Frame and Wethers gave evidence that the appellant yelled at Sergeant Astridge. Constable Frame said the appellant "just kept going on about 'Astridge, fucking member'" while Constable Wethers said he heard the following:

> "Just 'fucking member Astridge, you cunt'. Basic conversation I can't remember the words but along the lines of 'you can't do your job properly and you're not a police officer'."

[11] Sergeant Astridge gave evidence that when the appellant was taken from the holding cell to be processed, he continued his abuse towards the Sergeant.

[12] All three officers gave evidence that the appellant was not cooperating with the processing procedures. I have viewed CCTV footage taken in the Watchhouse from two different angles. This footage must be treated with caution because it is not accompanied by audio and it is not a continuous recording of all movement. It is a frame by frame recording and, between frames, movement occurs that is not recorded. However, the footage conveys the clear impression that the appellant was, at the least, uncooperative and, at times, his stance is suggestive of aggression. Confirmation of an aggressive attitude is found in the action of the appellant

in removing his belt with what might reasonably and conservatively be described as a flourish. A short time later the appellant is seen to bend over to remove his boot. In the following frames the boot flies away from the appellant and slightly to his left, striking the face of the counter about half way up before bouncing to the floor. Shortly after that action, police take hold of the appellant and force him against the counter where he is searched.

[13] Constable Wethers gave evidence that after the incident with the boot, the appellant began yelling at an auxiliary officer who had been standing in the general direction in which the boot flew before hitting the counter. Constable Wethers was alarmed by something said by the appellant and this caused him to take the physical action of forcing the appellant against the counter.

[14] The police auxiliary in whose general direction the boot flew, Mr Dash, gave evidence that when the appellant was asked to move from the holding cell he was yelling and swearing. He said he was making gestures towards Sergeant Astridge and yelling generally towards everybody who was in the Watchhouse. He said that as the appellant took his boot off, he "sort of squared us up and chucked the boot straight in my direction". Mr Dash said the appellant looked at him and "made a conscious decision to throw his boot at me". He said the boot missed him, but hit the counter "pretty hard".

[15] A second police auxiliary, Ms Freshwater, described the appellant as "a bit agitated" towards the police officers who brought him into the Watchhouse.

She said he was yelling and waving his arms around. She formed the view that he was intoxicated and "not very happy". According to Ms Freshwater, when the appellant moved out from the holding cell she recalled him yelling out to most of the members that were present. During the processing the appellant argued with the members and was non compliant with requests. Ms Freshwater described the appellant as removing his boot and "throwing it in the direction" of Mr Dash.

[16] The Magistrate found that the appellant "continued to rant and rave at Sergeant Astridge at the watch house", but her Honour was not satisfied beyond reasonable doubt that the appellant intentionally threw his boot at the police auxiliary. On the evidence accepted by the Magistrate, the appellant was guilty of disorderly conduct in the police station by abusing police members and, in particular, Sergeant Astridge.

[17] The appellant gave evidence. He said that just after lunch he went to the Karama Tavern, met friends and, during the afternoon, won about $700 over a period of two and a half hours playing Keno. The appellant said he consumed approximately five to six beers of XXXX Gold and described the events leading to his removal from the premises in the following terms:

> "Later on that afternoon I won another $220 and just a bit of a yee-ha and the next thing I know a tap on my shoulder and I looked around and it was a rather large security guard standing there and he said, 'You've had enough'. And I said, 'Fine mate'. I said, 'I've won enough and I'll just finished me beer and go'. Me beer was on the bar near the Keno and I reached to grab the beer and he said, 'No, you're not'. Then he grabbed me wrist and tried to wrestle the beer out of me hand and in the wrestle the beer fell to the floor and I said,

> ‘Well, that’s – good on you mate’. I said, ‘Now (inaudible) that was my property. You owe me my beer and you just assaulted me’ and I said, ‘I want the police and or I want my money back’ and he says, ‘You’re not getting your money back, get out’ and I said, ‘Fine. I want you to call the police’ and he says, ‘I will’ and he marched off. And I walked outside and stood – stood outside near the pole out the front of the ---”

[18] The appellant said he lent against the pole and waited for the police. He denied abusing the security guard. The appellant’s evidence as to the events that occurred after the police arrived was as follows:

> “Then the police car pulled up – the paddy wagon – and two young constables alighted and I stayed where I was and the female constable disappeared but the young blonde fellow – I know now as Wethers – came up and asked what the problem was. And I explained to him that I’d just been assaulted by the security guard and he stole my property and either – not either – I just want my money back. And he says, ‘Well, I can’t do that’ and then the next thing the sedan pulls up. Would’ve been less than a minute that we’d been talking to Constable Wethers and then the member Astridge alights from the vehicle and inside I thought, here we go, but I just turned around and looked at him and said, ‘G’day member Astridge, how are you old mate?’ and he looked at me and said to Wethers, ‘Lock him up’. And Wethers grabbed me by the left arm and I just looked at him and I said, ‘I can walk meself old mate’, and I just walked to the van and jumped in. The vehicle pulled away and I pulled me mobile phone out of me top pocket, rang Robert Welfare – a very good friend of mine I went to uni with – and said, ‘Robert, Astridge has done it again’. And he says, ‘What’s he done this time?’. I said, ‘He’s locked me up for being assaulted and robbed’. And he said, ‘I’ll get down there as quick as I can’. We got to the watchhouse and immediately after I finished the phone call, I looked and they were looking in the revision mirror and I thought, ‘Hello, they’ve seen me make the phone call’ so I stuck me mobile phone just inside me belt and when I got out at the watchhouse I just walked into the holding room and waited and then Dash came and got me and I have no recollection of him telling me to sit down on the bench but I just walked straight up to the black line – the black feet marks and stood there. And Astridge was yelling, ‘Where is it? Where is it?’. I’m going, ‘Where’s what?’. I have no time for the man that’s why I call him member. I’m a policeman. I’m an ex-policeman and ex-officer in the armed forces and the sergeant is a

> respected rank for me and he doesn't receive any respect from me. So that's why I call him member. I have cross-examined him. I've called him member. And he's standing there big smile on his face and Dash says, 'Take your belt off'. I took me belt off and he says, 'Take your boot off – boots off'. Stood up and they are rather hard to get on and get off and I tried to get it off and it slipped out of me hand and I looked at him, 'Sorry, mate', walked over, picked it up and put it in the bucket and it got kicked away. And Astridge is saying, 'Where is it?'. Someone else is saying, 'Where is it?' and I'm going, 'Where's what? Where's what?' and then the next thing I know bang. And the next thing I know they're undoing me pants, ripped me jeans open and sticking their hands in me – under me underpants have found me phone which was over here anyway under the belt and one's got me by the hair and they're all bloody having a great time and then they stripped me and put me in the cell. They stripped me of me property."

[19] The appellant denied being intoxicated. He said he had no hesitation in asking for police attendance and that he waited "quietly" for them outside. He denied telling the security officer to "fuck off" and said he was not pushed out the door. The appellant denied seeing Mr Shaikh on any occasion prior to Mr Shaikh giving evidence in court. The appellant said he did not swear at Mr Shaikh with four letter words or racially abuse him in the manner described by Mr Lewis and Mr Shaikh.

[20] The appellant denied all the evidence suggesting that he behaved in an aggressive or abusive manner either at or outside the Karama Tavern or at the Watchhouse.

[21] Having read the appellant's evidence, I was left with an unfavourable view of the appellant's credibility. Numerous passages of the appellant's evidence are singularly unimpressive and his claim that his boot slipped out of his hand is completely devoid of credit. The CCTV footage strongly

supports the conclusion that the appellant deliberately threw his boot in the direction of the counter.

Magistrate's Findings

[22] The Magistrate gave written reasons in which she examined in some detail the evidence of the various witnesses. In the course of her Honour's reasons, she considered a number of matters raised by counsel for the appellant when challenging the reliability of the prosecution evidence. These matters included inconsistencies between the witnesses and the use to be made of the CCTV footage. Her Honour addressed the possibility of collusion between the witnesses from the Tavern and between the police officers, with particular reference to similarities between the statements prepared by each officer. In essence, the Magistrate accepted the evidence of the witnesses from the Tavern and the police officers concerning the appellant's intoxication and his aggressive and abusive behaviour both inside and outside the Tavern and in the Watchhouse. Her Honour rejected the appellant's evidence. These findings were open to her Honour and, further, in my view her Honour reached the correct conclusions.

Specific Complaints

[23] Ground 1 complains of an error by the Magistrate in finding that a witness, Mr Robert Welfare, gave evidence that having seen the appellant drunk on many occasions at university, the appellant "had a tendency to become aggressive when drunk". Her Honour added that this assessment of the

appellant's behaviour while intoxicated "certainly accords with the witness's observations of him that night at the Tavern". Later in her reasons when discussing the evidence of Mr Welfare as to his observations of the appellant when he attended at the Watchhouse, her Honour observed that Mr Welfare gave evidence of previous observations of the appellant when intoxicated and that the appellant "usually got angry", but was not in such a state on this occasion.

[24] Mr Welfare was a solicitor and friend of the appellant who attended at the Watchhouse in response to a telephone call by the appellant made from the rear of the police vehicle. In examination Mr Welfare was asked about his observations of the appellant at the Watchhouse and while the appellant was being conveyed from the Watchhouse to his home via a bottle shop where beer was purchased. Asked to describe the appellant's demeanour, Mr Welfare gave the following evidence:

> "A. He didn't appear drunk. He wanted to get drunk and we bought more beers, or he did, I didn't. But no, he wasn't unsteady on his feet; his eyes weren't bloodshot; the usual things. *I've known Mr Drew for well since we were at uni together in about '98 so he didn't appear drunk to me.*
>
> Q. And his speech – recall his speech?
>
> A. Well, he – yeah, he wasn't even upset – you know. His speech was normal Keith speech. He didn't appear to be upset. *Normally, I've – you know – he gets upset but he didn't appear to be upset particularly*." (my emphasis)

[25] Mr Welfare did not give evidence that the appellant has a "tendency to become aggressive" or "usually got angry" when intoxicated. Although Mr Welfare said that the appellant normally "gets upset", he was not asked what he meant by that answer. Given the context in which the answer was given, namely, whether the appellant appeared to be intoxicated, it was open to the Magistrate to conclude that Mr Welfare was saying that normally, when intoxicated, the appellant "gets upset", but as he was not upset on this occasion this was a sign that he was not drunk. However, her Honour did not accurately repeat the evidence because Mr Welfare did not say that, when intoxicated, the appellant "usually got angry".

[26] In my opinion, the errors by the Magistrate were not significant. Her Honour did not use her view of Mr Welfare's evidence as a basis for concluding that, because he was intoxicated, the appellant was likely to have become aggressive and abusive. Her Honour concluded that the appellant became aggressive and abusive when he saw Sergeant Astridge at the Tavern and again at the Watchhouse from evidence of other witnesses that her Honour accepted beyond reasonable doubt. In addition, her Honour relied upon the appellant's evidence and his demeanour when giving evidence to draw conclusions as to the appellant's attitude towards Sergeant Astridge:

> "[The appellant] admits he has a real dislike of Astridge and it was clearly evident that even just the thought of Sergeant Astridge made the Defendant angry when giving his evidence."

[27] The Magistrate found that the appellant "does not hold Astridge in high regard as a police officer". Her Honour's reasons continue in the following terms:

> "The Defendant boasted in his evidence in chief about having 'beaten Astridge in Court before and going to do it again'. He confirmed he called Astridge a 'member' because he does not believe Sergeant Astridge is a fit person to be a police officer.
>
> Given the Defendant's vehement dislike of Sergeant Astridge displayed when he was giving his evidence, I am satisfied beyond a reasonable doubt that he did act in the way described by the witnesses calling Sergeant Astridge a 'fucking member' and similar terms and that it is highly unlikely that he would have addressed him as 'Astridge me old mate'".

[28] Any error with respect to the evidence of Mr Welfare was a minor matter of no significance to the Magistrate's processes of reasoning and findings. Her Honour did not misapprehend the evidence of the witnesses from whose evidence she drew the relevant conclusions that were open to her.

[29] Ground 2 complains that in considering the reliability of Mr Welfare's evidence, the Magistrate "placed undue weight on the fact that Mr Welfare's firm represented the appellant". This complaint arises out of an observation made by her Honour when discussing the evidence of Mr Welfare:

> "[71] On that day, Mr Welfare said that he had been drinking at home and that when he received the call he decided it was not prudent to drive so he enlisted the help of Mr McMaster to drive him to the watch house to help Mr Drew out. It is not clear from the evidence of either Mr Drew or Mr Welfare the capacity in which Mr Welfare attended on that day. What is clear is that Mr Welfare's practice is presently retained by Mr Drew to represent him in his defence of this matter and that Mr Welfare has had some conferences with his employee,

> Mr Matthews about the defence of these charges strategies in that defence as well as what witnesses to require and call. *I have to take Mr Welfare's evidence in light of his role in Mr Drew's defence and also in light of the fact that he himself had been drinking on that night*". (My emphasis)

[30] It was not inappropriate for the Magistrate to have regard to Mr Welfare's position in the manner described. It was part of the matrix of facts to which her Honour was entitled to have regard in deciding what weight she would place upon Mr Welfare's evidence. Ultimately, however, her Honour did not make any finding as to the reliability of Mr Welfare's evidence. Her Honour found that his evidence did not cast doubt upon the evidence of the other witnesses concerning the appellant's intoxication because approximately an hour to an hour and a half had elapsed between the appellant being asked to leave the Tavern and Mr Welfare first seeing the appellant. In that period the appellant had not consumed any alcohol. This ground of complaint is not made out.

[31] Allied with the complaint in ground 2 is a complaint in ground 3 that the Magistrate "erred in fact in failing to make equivalent observations as to the reliability and credibility of the evidence of the police members and Karama Tavern employees". It is sufficient to observe that this complaint is without substance. As I have said, her Honour considered the criticisms of the evidence of these witnesses at some length.

[32] Similarly, there is no substance in ground 4 which complains that the Magistrate erred in failing to take into account inconsistencies in the

evidence and notes or statements of the various witnesses, "particularly where those inconsistencies corroborated the evidence of the appellant". It is not necessary to canvass the specific matters upon which the appellant relied. Her Honour took into account the inconsistencies and other criticisms made by counsel for the appellant.

[33] Ground 5 is a complaint that the Magistrate erred in taking into account a statutory declaration by Sergeant Astridge when that declaration had not been tendered into evidence. Although the written submissions of the Crown assert that counsel for the appellant at trial tendered the statement of Sergeant Astridge in submissions to the court, the transcript records that it was only marked for identification. These reasons proceed on the basis that the statement was marked for identification only.

[34] In his written submissions on the appeal, the appellant referred to the observation by the Magistrate that in oral evidence Sergeant Astridge said the appellant was not searched in the vicinity of the Karama Tavern, but in his written statement said he searched the appellant at that locality.

[35] During cross-examination, in conflict with evidence given by Constables Wethers and Frame, Sergeant Astridge said the appellant was not searched outside the Karama Tavern. He was asked whether he knew of any reason why other officers would say that he conducted a search at that locality and he responded that a search was not conducted.

[36] It is correct, as the appellant stated in his written submissions, that the statement of Sergeant Astridge was not tendered into evidence and, strictly speaking, the Magistrate erred in referring to the content of the Sergeant's written statement. However, the error was of no significance other than to highlight an inconsistency between the Sergeant's oral evidence and his written statement. The Magistrate did not use the written statement by Sergeant Astridge as confirmation of the oral evidence of the other officers that a search took place.

[37] It is not surprising that the Magistrate had regard to the written statement of Sergeant Astridge. Some of the content of that written statement had been elicited by counsel for the appellant during cross-examination of Constable Wethers which was aimed at establishing that the police witnesses had collaborated in preparing their statements and evidence. Counsel drew attention to similarities between the police statements which he suggested demonstrated that collaboration.

[38] In discussing this question, the Magistrate stated the "Defence tendered the statements of the police officer Wethers, Frame and Astridge as evidence of the collaboration". Her Honour noted that there were "similarities as to some of the content of some of those statements".

[39] The statement of Sergeant Astridge and Ms Frame were not tendered in evidence. During cross-examination of Constable Wethers, who gave evidence before Sergeant Astridge, the statement of Constable Wethers was

tendered by counsel for the appellant and the statements by Sergeant Astridge and Constable Frame were marked for identification. During cross-examination of Constable Wethers, it was put to the Magistrate that it was very difficult for her Honour to consider whether there was a striking similarity between the statements unless the actual documents were in front of her Honour. Counsel indicated it was the intention of the defence to tender the statements and her Honour permitted the statements to be marked for identification.

[40] During cross-examination of Constable Wethers, passages from the statement by Sergeant Astridge were put to the witness for the purpose of establishing similarities between that statement and statements of other police witnesses. When Sergeant Astridge gave evidence, counsel did not take the matter further and tender the statement. Presumably counsel decided not to tender the statement because the content had been elicited through the evidence of Constable Wethers.

[41] It was against this background that the Magistrate erred in referring to the content of the statement by Sergeant Astridge and in observing that the statement had been tendered. However, these errors were of no significance in the context of a trial conducted on the basis that the relevant passages from the statement were before the court. In addition, the only use made by the Magistrate of the content of the statement by Sergeant Astridge was to consider the similarities to which counsel for the appellant had drawn attention and to highlight the inconsistency concerning a search of the

appellant. In these circumstances, the error by the Magistrate is understandable and of no consequence.

[42] Ground 7 asserts that the Magistrate erred "in ignoring the fact that the appellant was taken into custody unlawfully and refused to exercise the discretion established by *Bunning v Cross* (1978) 141 CLR 54". In substance, the appellant maintained he was not intoxicated and relied upon the evidence of Mr Welfare and Mr Masters concerning their observations of the appellant upon his release from the Watchhouse. The appellant also sought to derive support from the CCTV footage.

[43] The Magistrate took into account all the evidence, including the CCTV footage, and found that Constable Wethers had "reasonable grounds to believe that the Defendant was seriously affected by alcohol, necessitating the apprehension under section 128". Her Honour found that the continued bad behaviour of the appellant outside the Tavern also gave Constable Wethers reasonable grounds to believe that the defendant was intoxicated. In these circumstances, her Honour rejected the submission that the police had acted unlawfully and made a specific finding that the apprehension was lawful.

[44] These findings were open to the Magistrate. Further, having read the evidence and viewed the CCTV footage, I am of the view that her Honour reached the correct conclusion. In this context, I do not agree with the submission that the CCTV footage casts doubt upon the evidence of the

officers that the appellant was intoxicated. As the Magistrate observed, a significant period had elapsed between the incidents at the Tavern and the events at the Watchhouse. In addition, there are movements of an exaggerated nature by the appellant shown on the CCTV footage which tend to support the view that the appellant was not entirely steady on his feet. This ground of complaint is not made out.

[45] Ground 8 complains that the Magistrate erred in ignoring the evidence of a lack of sobriety when arrested "and the evident lack of intoxication only 15 minutes later in the cells". This ground also asserts that the evidence did not support a "presumption" made by the Magistrate as to the appellant's condition.

[46] For the reasons given, in my view the CCTV footage does not support the assertion that there was an "evident lack of intoxication" in the cells. The Magistrate did not ignore any evidence. Her Honour properly had regard to all of the evidence and drew conclusions that were open to her.

[47] There is an additional matter to which I should refer that was not raised by the appellant who was unrepresented on the appeal. In her Honour's reasons, the Magistrate discussed features of the evidence given by the appellant which her Honour found were unlikely to be true. In the course of that discussion her Honour used the expression "I am unable to believe the defendant was calm and rational the whole time ..." and spoke of whether

she could “accept” the appellant’s evidence. Her Honour said she did “not accept” the appellant’s explanation of his behaviour in the Watchhouse.

[48] The use of these expressions was unfortunate. The question was not whether her Honour should accept or believe the evidence of the appellant. The appellant did not have to prove anything. The critical question was whether the Magistrate accepted the evidence of the prosecution witnesses beyond reasonable doubt and rejected the evidence of the appellant. It was only if the Magistrate rejected the evidence of the appellant as a reasonable possibility that her Honour could find that the prosecution had proved its case beyond reasonable doubt.

[49] Notwithstanding the use of these expressions, from a reading of her Honour’s reasons in their entirety I am satisfied that her Honour accepted the evidence of the prosecution witnesses beyond reasonable doubt and rejected the evidence of the appellant thereby rejecting his version as a reasonable possibility. I am satisfied her Honour did not misdirect herself or err in her approach to these fundamental issues.

[50] The prosecution produced a very strong case against the appellant in respect of both charges. I am left in no doubt about the appellant’s guilt. The appeal against the convictions is dismissed.

Sentence

[51] As to sentence, the appellant complains that the Magistrate erred in recording convictions. In substance, the appellant submitted that the

recording of the conviction is an excessive penalty because of the impact that a conviction will have upon the appellant's prospects of employment.

[52] Section 8 of the Sentencing Act directs that in deciding whether or not to record a conviction, the court shall have regard to the "circumstances of the case" including:

> "(a) the character, antecedence, age, health or mental condition of the offender;
>
> (b) the extent, if any, to which the offence is of a trivial nature; or
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances."

[53] The appellant has an impressive work record, having been employed in the armed services and both the New South Wales corrective and police services. From January 1996 until October 1998, the appellant was employed as a parole officer with the Northern Territory Correctional Services. In 2000 the appellant commenced studies in law at Charles Darwin University.

[54] Counsel for the appellant informed the Magistrate that in 2004 the appellant was involved in a motor vehicle accident in which he sustained an "acquired brain injury", as a consequence of which the appellant had a "diminished capacity to regulate his emotional responses to certain situations". Asked if there was any medical evidence to support that submission, counsel replied "not touching on these charges". Counsel put to her Honour that by reason

of the injury the appellant was a person at risk of coming before the courts, that is, at risk of further re-offending. The appellant being at a disadvantage with respect to employment prospects, counsel urged that the appellant not suffer the additional disadvantage of being convicted.

[55] The Magistrate accepted the submissions as to the appellant's medical condition. Her Honour also accepted that "perhaps" the medical condition contributed to his "totally unacceptable behaviour". After referring to previous offending, her Honour recorded a conviction on each offence.

[56] As to the question of prior offending against the law, the prosecutor put to the Magistrate that it appeared that the appellant "had no regard for the leniency and opportunities afforded to him by the court on previous occasions in relation to his identical offending and the no conviction status that the courts granted him on those occasions". The prosecutor was referring to offences of disorderly behaviour committed on 15 March 2006 and 18 January 2007. However, in respect of the offence of 15 March 2006, the appellant had contested the charge and it was not until 6 June 2007, after the offences under consideration, that the charge was found proven. As to the offence committed on 18 January 2007, the appellant pleaded guilty, but that plea was not entered until 1 May 2008, over 12 months after the appellant committed the offences under consideration.

[57] It is apparent from the Magistrate's sentencing remarks that her Honour took into account the other offences of disorderly behaviour as prior offending. Her Honour said:

> "You have previously been found guilty of two such like offences and I have to take that into account".

[58] Although the other offences of disorderly behaviour, both of which occurred in a police station, were committed before February 2007, the court did not deal with those matters until after February 2007. In these circumstances, the prosecutor was in error in putting to the Magistrate that, prior to the offending under consideration, the appellant had paid "no regard" to the leniency and opportunities afforded to him by the court in respect of the other offending. It was relevant for the Magistrate to be aware that the offending for which she was required to sentence was not the first occasion on which the appellant had offended against the law. It could not be said, however, that the appellant had previously shown any disregard for orders of the court or had failed to respond to leniency previously extended by the court.

[59] It is not clear how the Magistrate took the other offences into account and the possibility of error exists. On the assumption that the Magistrate fell into error in this regard, I am required to exercise my independent discretion. I do not regard the offences as of a trivial nature and they were not committed under any extenuating circumstances. While possessing a good work record, the appellant is not able to claim the benefit of a prior

exemplary character. In the context of assessing the appellant's character, the appellant cannot claim the benefit of a plea of guilty accompanied by true remorse which, in some circumstances, can be demonstrative of the underlying good character of the appellant. There is no sign of contrition. The evidence demonstrates quite the opposite, namely, defiance.

[60] The mental state of the appellant is a relevant factor, but there is no evidence other than the general submissions to which I have referred. Even if it can be said that the mental condition was a contributing cause to the appellant's behaviour, there remains the competing consideration of personal deterrence. If the mental condition was a contributing cause, it also indicates an increased risk of re-offending. Further, there is no suggestion that the mental state of the appellant has contributed to his failure to accept responsibility for his unacceptable conduct.

[61] Exercising my own independent discretion, I would record convictions on both offences. In these circumstances, the appeal against sentence is dismissed.
