*Ellis v Balchin* [2009] NTSC 17

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| PARTIES: | ELLIS, Martin Anthony |
| | v |
| | BALCHIN, Vivien Lynette |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA18 of 2008 (20710545) |
| DELIVERED: | 29 April 2009 |
| HEARING DATES: | 26, 27 February and 24 March 2009 |
| JUDGMENT OF: | MARTIN (BR) CJ |
| APPEAL FROM: | Mr M Carey SM |

**CATCHWORDS:**

CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION – APPEAL AGAINST SENTENCE

Simple offence – information – complaint – whether information a nullity.

Stalking – admission of evidence outside period not erroneous – evidence relevant in relation to other charges – error in manner in which evidence used – no miscarriage of justice – appeal against conviction dismissed – appeal against sentence allowed.

Threat to kill – summary trial – absence of consent – whether trial a nullity – appeal allowed – remitted to Magistrate.

*Criminal Code* (NT) ss 3, 166, 188, 189, 295; *Interpretation Act* (NT); *Justices Act* (NT) ss 49A, 50, 51, 57, 58, 101, 101A, 102, 181, 182, 183, 183A; *Sentencing Act* (NT) ss 52, 78BA; *Summary Offences Act*

s 47; *Traffic Act* (NT) s 30; *Traffic Regulations* (NT) reg 18; *Youth Justice Act* (NT).

*Birkeland-Corro v Tudor-Stack* (2005) 15 NTLR 208; *Moore v Haynes* [2008] NTCA 9, followed.

*Bounds v The Queen* [2005] WASCA 1; *Paciente v The Queen* (Unreported, Western Australian Court of Criminal Appeal, Franklyn, Nicholson and Ipp JJ, 10 November 2008); *Pioch v Lauder* (1976) 27 FLR 79, discussed.

*Bounds v The Queen* (2006) 228 ALR 190, referred.

*R v Nemer* (2003) 87 SASR 168 at 171

**REPRESENTATION:**

*Counsel:*

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| Appellant: | M Abbott QC |
| Respondent: | P Usher |

*Solicitors:*

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| Appellant: | Withnalls, Barristers & Solicitors |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B |
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Ellis v Balchin* [2009] NTSC 17
No. JA 18 of 2008 (20710545)

BETWEEN:

**MARTIN ANTHONY ELLIS**
Appellant

AND:

**VIVIEN LYNETTE BALCHIN**
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 29 April 2009)

**Introduction**

[1] This is an appeal against convictions in the Court of Summary Jurisdiction for a number of offences, all involving the same victim, including stalking, threatening to kill and assault. The grounds of appeal raise the issue of duplicity and assert a number of errors, including procedural errors of a fundamental nature going to jurisdiction. The appellant also complains that some of the convictions were against the weight of the evidence.

[2] The combination of sentences imposed by the learned Magistrate resulted in an effective sentence of 14 months imprisonment which was suspended after the appellant had served five months. The appellant appeals against

the sentences primarily on the ground that the total sentence was manifestly excessive.

**Charges**

[3] The charges were laid on both complaint and information. In summary the matters that went to trial were charged as follows:

| Count | Particulars | Findings |
|---|---|---|
| Count 1 (information 22 August 2007) | Between 12 August 2006 and 17 April 2007 at Katherine did stalk Grant Dickens (s 189(2) *Criminal Code*) | Guilty |
| Count 2 (complaint 22 August 2007) | On 16 April 2007 drove a vehicle on Holtze Crescent and Callistemon Drive at Katherine in a manner dangerous to the public (s 30(1) *Traffic Act*). | Not Guilty |
| Count 3 (complaint 22 August 2007) | On 16 April 2007 in the same locality drove without due care (reg 18 *Traffic Regulations*). | Guilty |
| Count 4 (complaint 22 August 2007) | On 16 April 2007 behaved in an offensive manner in a public place, namely, outside 37 Holtze Crescent Katherine (s 47(a) *Summary Offences Act*). | Guilty |
| Count 5 (information 22 August 2007) | On 16 April 2007, with intent to cause fear, made a threat to kill Grant Dickens and Neroli Dickens which threat was of such a nature as to cause fear to any person of reasonable firmness and courage (s 166 *Criminal Code*). | Guilty |
| Count 6 (complaint 29 August 2007) | On 16 April 2007 unlawfully assaulted Grant Dickens (s 188(1) *Criminal Code*). | Guilty |
| Count 7 (complaint 22 August 2007) | On 17 April 2007 drove a vehicle on Chambers Drive, Maluka Drive and Callistemon Drive at Katherine in a | Guilty |

| | | |
|---|---|---|
| | manner dangerous to the public (s 30(1) *Traffic Act*). | |
| Count 8 (complaint 22 August 2007) (alternative to count 7) | On 17 April 2007 in the same locality drove without due care (reg 18 *Traffic Regulations*). | Not Guilty |

**Factual Basis**

[4] The appellant's son had been employed by Woolworths in Katherine, but that employment was terminated. The primary victim ("the victim") was employed by Woolworths and it was the Crown case that the appellant's conduct was motivated by anger toward the appellant and Woolworths in connection with his son's loss of employment.

**Count 1 - Stalking**

[5] The prosecution case on the charge of stalking in count 1 was based upon conduct of the appellant which can be summarised as follows:

(a) Commencing in the latter half of 2006 at a time when the victim had not met the appellant, on a number of occasions the appellant paced up and down outside the checkout area of the Woolworths store in Katherine with the intention of intimidating the victim.

(b) On a Sunday in the latter half of 2006 the appellant drove slowly past the victim's house while staring at the victim.

(c) Toward the end of 2006, as the victim and a fellow employee were leaving the Woolworths store, the appellant approached them and, in a

threatening manner with his left hand clenched beside him, said "I hold you two personally responsible for what happened to my son". The appellant also said that the two men had to get his son's job back.

(d) A series of incidents occurred on 9 December 2006, an overview of which is found in the Magistrate's summary of the victim's evidence:

> "The next occasion on which he saw the defendant was 9 December 2006, the day of the Woolworths staff Christmas party. He was in his front driveway at 37 Holtze Crescent when he heard a car bottom out on the gutter. He looked up and saw a white Commodore station wagon going into his neighbour's driveway at 35 Holtze Crescent. Some 30 seconds to a minute later he heard country music playing loudly and when he looked up he saw the white Commodore directly in front of his driveway facing Callistemon Drive. The defendant was driving and he was starting [sic] in Dickens' direction at Dickens. The defendant then did a burn out and drove off down the street and as he did so, he continued to look at Dickens. He said that he felt very scared at that time.
>
> About 20 to 30 minutes later, Dickens had to go to Woolworths to obtain supplied [sic] for the staff Christmas party. He reversed out of his yard and, as he went to shut the gate, he heard a care [sic] accelerate down the street. He looked up and saw the same Commodore station wagon approaching him under acceleration but then braked and slowed and went past him very, very slowly. The defendant was driving. He said the defendant just stared and went past slowly. Dickens waited a minute and then drove off towards Callistemon Drive on his way to Woolworths. When he reached Callistemon Drive, he looked to his left and saw the same Commodore parked facing him on the opposite side of the road in front of a block of flats. He turned right and the Commodore came up behind him and was stationary behind him at the first intersection. He looked in his rear vision mirror and saw the defendant was driving the Commodore and that it was a metre or less behind his vehicle. He proceeded towards Chambers Drive and said the Commodore followed and it was rather close behind him. He felt worried and intimidated by this and he said that he felt this way because of previous incidents and wasn't sure what sort of confrontation was going to come of it. He pulled up at the Woolworths car park adjacent to the Max(?) Liquor entrance. The Commodore continued past him and he saw in his mirror that the

defendant appeared to be looking in his direction as he went past. He felt shaken and worried. He entered Max Liquor and was called by a fellow employee to assist with a cash register that was malfunctioning.

At this time, the defendant walked past the Max Liquor entrance, looked out towards Dickens' vehicle and then walked through Max Liquor into Woolworths. A short time later the defendant came back to Max Liquor and purchased some washing powder, paying at the Max Liquor cash register. Although it was later conceded by the witness that people sometimes pay for grocery items at that register, he said it was not a general check out for grocery items and that there were other check outs open in Woolworths. He ensured that he did not make eye contact with the defendant because he didn't want any confrontation."

(e) An incident occurred on 16 April 2007 in respect of which the Magistrate summarised the evidence of the victim in the following terms:

"He stated that on 16 April 2007 and between 5 and 5.30pm, he and his wife took their dogs for a walk for approximately half an hour. A neighbour, Ivan Bryant(?) stopped them on their way home and spoke to them. As a result they went straight home. He was in his yard changing sprinklers around and when he went towards the sprinkler that was on the median strip, he heard a car accelerate. He looked up and saw a white Commodore heading in his direction at speed. He said that he froze, standing behind his gates which were closed. The Commodore drove onto his driveway nose on and pulled up. The defendant got out of the Commodore and said, 'I told you I'd be back, the paperwork is over.' Dickens replied to the effect of 'What's wrong Martin?' He stated [sic] the defendant then said, 'You've ruined my son's life now I'm going to ruin yours.' He said the defendant had a phone number written on his hand and he kept telling him to ring that number and get his son's job back. He replied, 'I can't ring anyone. I'm trying to stay out of it.' The defendant said, 'Unfortunately you're the weakest one' and kept saying to get his son's job back.

He said the defendant then produced a knuckleduster, a large metal ball bearing thing on a hinge. The defendant said, 'See this, see this' and started banging on the pole beside Dickens on the gate saying, 'I

can kill you, your mum and your dad. Do you love your mum' and things like that. And then, 'I going to kill you, someone is going to die and it's going to be in this house.' Dickens said that he was freaking, he was just scared. He was fearing the worst. He was expecting definitely violence resulting in physical harm to himself. He described the knuckleduster as 'A large stainless steel ball bearing the size of an 8 ball.' He said that 'It was on a (inaudible) hinge mechanism with the ball bearing attached to the hinge. The hinge mechanism thing was like a plastic of ivory colour, off white colour. The defendant was sort of holding it clenched in his fist above Dickens' head and was flicking it onto the gate so that it made the gate go bang, bang, bang and threatened to split his head open.' The [sic] he said, 'I'm going to kill you, I'm going to kill your wife, your mother and your father.' And then he said, 'Do you love your mother?' At that stage the defendant was within 50 cm to a metre of Dickens.

At the time the witness's father-in-law, John Berger arrived. He had been called by Ivan Bryant. Dickens said that the defendant was yelling at him and when Burger [sic] got out of the car, the defendant looked around and said who the fuck are you, or words to that effect. He described the defendant's demeanour as 'very intimidating.' He said the defendant has quite a presence, that he's sort of a large man and certainly got confrontational. When the defendant spoke to Berger, he was irate, yelling and definitely loud. Berger asked what was going on and the defendant went on about getting his son's job back. Berger asked what that had to do with Dickens and the defendant said, 'Nothing but he's a weak person.' He said that Berger was the calmest person there. The defendant then sort of threw his arms in the air and said, 'Good, maybe you'll throw the first punch.' At that stage the witness opened the gate and went outside (the witness, being Dickens). He said he did this just to do the best he could to help John Berger if it went that way. He said that Berger was still very calm and just trying to make the best of it, then the police arrived. After some initial discussion, the police allowed the defendant to leave and as he left the defendant said, 'This isn't over' and got into his car. He said that when the defendant was making the threats to him he felt petrified and very scared."

[6] In connection with the incident described in subpara (e), the threat by the appellant to kill the victim was the subject of count 5 being the charge of

threat to kill. The Magistrate specifically excluded that threat from the evidence to be considered in connection with the charge of stalking.

[7] Also in subpara (e) is reference to the appellant's actions with a knuckleduster. Those actions were the subject of the charge of assault in count 6 and the Magistrate specifically excluded those actions from the evidence relevant to the charge of stalking.

(f) An incident occurred on 17 April 2007 in respect of which the Magistrate summarised the victim's evidence as follows:

> "The following day, 17 April 2007, he was in his vehicle on Chambers Drive going to the court house when the defendant went past travelling in the opposite direction. He kept an eye on the defendant but didn't see him turn around. He pulled up in a car park in First Street outside the court house. He found that the court house was closed and he was walking back to his vehicle when the defendant drove past and turned into the same car park a few metres from his parked vehicle. The defendant was driving a small white Suzuki 4 wheel drive. He said the defendant was laughing out rather loud and said something but he didn't recall the words used. He then drove down First Street and said he turned left into Lindsay Street heading back towards Katherine East to where he lives. He said that he saw the defendant drive from First Street on to Chambers Drive. Chambers Drive runs approximately parallel to Lindsay Street until Lindsay Street veers towards and meets in an intersection with Chambers Drive. He said that when he reached the intersection with Chambers Drive, the defendant drove slowly past and he slowed to get some space between them and then followed the defendant down Chambers Drive.
>
> He said that as the defendant went past him at the intersection the defendant was looking at him again. He said he tried to stay a long way away from the defendant's vehicle but there's a sharp turn at the end of Chambers Drive and the defendant had slowed down a lot there and he had another car behind him and he sort of got pushed and was reasonably close to the defendant's vehicle about a car length away as

> they approached the intersection of Chamber's [D]rive and Maluka Road. Just then, he said, the defendant slammed on his brakes and he had to swerve to avoid running into the rear end of the Suzuki. He said there was no vehicle, pedestrian or animal in front of the defendant. He took evasive action and went past the defendant's vehicle and continued up the Callistemon Drive intersection with the defendant now behind him. He said the defendant followed him about a metre behind him and onto Callistemon Drive. He said the defendant continued to follow him very closely until he turned into Holtze Crescent, whereupon the defendant continued down Callistemon Drive. He said at that stage he felt very worried as if this wasn't going to go away."

**Count 2 – Dangerous Driving**

[8] Count 2 related to the early stages of the events on 16 April 2007. The victim's neighbour saw the appellant driving his motor vehicle at a fast speed on Holtze Crescent. The witness described the speed as excessive and the driving as reckless. Her concern about the reckless nature of the driving led her to push her pram off the bitumen roadway onto the grass verge. While accepting the evidence of the witness, in the absence of other evidence from which a conclusion could be drawn about the speed and manner of the driving, the Magistrate was not satisfied that the offence had been proven and found the appellant not guilty.

**Count 3 – Driving Without Due Care**

[9] Count 3 related to driving on 16 April 2007 a short time before the driving that was the subject of count 2. On this occasion the neighbour observed the appellant reverse out of the victim's driveway and accelerate quickly causing his tyres to screech and the vehicle to fishtail up the road. The

Magistrate found that the offence of driving without due care had been proven.

**Count 4 – Offensive Behaviour**

[10] Count 4, the charge of behaving in an offensive manner on 16 April 2007, concerned the behaviour of the appellant before he reversed out of the victim's driveway and fishtailed up the road. The neighbour described the appellant as standing outside his vehicle yelling loudly, "Come on out Grant, if you don't come out, I'm going to keep coming back and I'm going to get angrier …" The witness said the appellant called Grant "a fucking cunt." The Magistrate found that the offence had been proven.

**Count 5 – Threat to Kill**

[11] Count 5, the charge of threatening to kill the victim and his wife, was based upon the evidence of the victim and other witnesses that during the incident outside the victim's house on 16 April 2007 the appellant threatened to kill the victim, his wife and parents. The Magistrate accepted the evidence of the victim that the appellant said, "I can kill you, your mum and your dad" and, "I'm going to kill you, someone is going to die and it's going to be in this house." His Honour found that the appellant was very angry, aggressive and intimidating. Further, his Honour was satisfied that the threat was of such a nature as to cause fear to any person of reasonable firmness and courage and that at the time of making the threat, the appellant intended to cause fear to the victim.

**Count 6 - Assault**

[12] Count 6 was based upon the evidence of the victim that during the incident on 16 April 2007 outside the home of the victim, the appellant produced a "knuckleduster" which was described as a large metal ball on a hinge. The appellant banged the knuckleduster on a pole saying, "See this, see this". The Magistrate accepted the evidence of the victim which he summarised on this aspect as follows:

> "'… The defendant was sort of holding it [the knuckleduster] clenched in his fist above [the victim's] head and was flicking it onto the gate so that it made the gate go bang, bang, bang and threatened to split his head open'. Then he said, 'I'm going to kill you, I'm going to kill your wife, your mother and your father.' And then he said 'Do you love your mother?' At that stage the defendant was within 50 cm to a metre of [the victim]."

[13] Having accepted the evidence of the victim and rejected the appellant's denial of having a knuckleduster, the Magistrate found the offence of assault proven. As I have said, the Magistrate separated the facts relating to the assault involving the knuckleduster and the threat to split open the head of the victim with the knuckleduster from the facts related to the stalking and those relating to the threat to kill.

**Counts 7 and 8 – Dangerous Driving/Driving Without Due Care**

[14] Counts 7 and 8 were charged in the alternative. The driving under consideration occurred on 17 April 2007 and it related to the occasion when, according to the victim, he was driving behind the appellant's vehicle and the appellant applied his brakes suddenly and with force

causing the victim to take evasive action in order to avoid running into the rear end of the appellant's vehicle. The Magistrate found that the "act of slamming on the brakes without warning" when the appellant knew there was a vehicle close behind him, and in circumstances where there was no occasion for such an action, constituted driving in a manner dangerous to the public. His Honour rejected the appellant's evidence that he applied his brakes lightly merely to let the appellant know that he was too close.

[15] After finding the appellant guilty of count 7, the Magistrate returned a verdict of not guilty with respect to the alternative charge in count 8 of driving without due care. His Honour said:

> "I find the defendant guilty on count 7 and, because it is charged in the alternative, not guilty on count 8."

[16] It was inappropriate to find the appellant not guilty of the lesser alternative. The finding of guilt on count 7 necessarily involved a conclusion that the appellant had committed the less serious offence, but a finding to that effect was subsumed by the finding of guilt of the more serious driving offence. In these circumstances the appropriate course was to return the verdict of guilty of the more serious offence and to record that the finding subsumes the alternative charge. The alternative charge remains on file without any finding or order being recorded. In this way, should the finding of guilt with respect to the more serious driving offence later be set aside, the charge of the less serious offence remains alive.

**"Previous "Dismissal"**

[17] During the hearing of the appeal the history of the proceedings in the Katherine Court of Summary Jurisdiction was the subject of consideration by way of background. While examining the court file I observed an entry on the file on 28 August 2007 to the effect that a number of counts had been "dismissed". As a consequence the appellant was granted leave to add a ground of appeal asserting that because counts 1 and 6 had been "dismissed", in the absence of a new complaint or information having been laid in respect of those charges, the Magistrate did not possess jurisdiction to hear those charges and the trial on those charges was, therefore, a nullity.

[18] The issue of withdrawal and dismissal of a number of counts arose in the context of pleas of guilty that were subsequently withdrawn. On 28 August 2007 the prosecutor and counsel for the appellant were involved in extensive discussions concerning possible pleas of guilty. Agreement was reached between counsel that if the appellant pleaded guilty to counts 3, 4, 5 and 8, the prosecution would not proceed with counts 1, 2, 6 and 7.

[19] When the matter was called on before the Magistrate, the prosecutor informed the Magistrate that pleas of guilty would be entered to counts 3, 4, 5 and 8 and the remaining counts would be withdrawn. The prosecution read out counts 3, 4 and 5 and the appellant entered pleas of guilty to each of those counts. However, when the prosecutor read out count 8, the appellant refused to plead guilty because the description of the motor

vehicle was incorrect. According to an affidavit of the prosecutor tendered on the appeal, the content of which is not challenged, after refusing to plead guilty to count 8 the appellant said words to the effect that he was "not doing this anymore" and would no longer be pleading guilty. The pleas of guilty were then withdrawn and the appellant informed the court that he wanted to obtain the services of another lawyer.

[20] After the appellant withdrew his pleas of guilty, the Magistrate noted that the pleas of guilty to counts 3, 4, 5 and 8 were withdrawn and the matter was re-listed for a summary hearing in January 2008. Aware that amendments were required to charges in order to avoid a time problem in January 2008, the prosecutor requested amendments to counts 4, 7 and 8 which were made by the Magistrate. The hearing was then adjourned to January 2008 for a summary trial.

[21] I am satisfied that the prosecutor did not "withdraw" counts 1, 2, 6 and 7. Aware that agreements as to pleas can easily fall apart, the prosecutor was careful not to withdraw the charges at that time. In addition, as the prosecutor has said, she would have been well aware that she would not have been able to request amendments to the charges if those charges had already been withdrawn.

[22] The difficulty with which I am confronted is a notation on the court file made by the Magistrate to the effect that counts 1, 2, 6 and 7 were "dismissed". Beneath the stamp of 28 August 2007 in which the Magistrate

has written in the surnames of the prosecutor and counsel for the appellant, his Honour wrote the following:

> "PG 3, 4, 5 ~~& 8~~. Counts 1, 2, 6 & 7 dismissed.
> Plea not guilty count 8.
> ~~Facts admitted. Found proved~~.
> Change of plea indicated.
> NAAJA granted leave to withdraw.
> Pleas vacated. ~~Pleas~~
> D requires new legal representation
> Vacate hearing this week.
> Adjd 21-23 January 08 for hearing
> CMI 10.12.07
> B/E to 10.12.07."

[23] The Magistrate signed immediately below the last entry.

[24] The reproduction of the entry in type written form does not convey the full picture. A photocopy is attached to these reasons. It is apparent from the photocopy that the Magistrate made entries of events that he anticipated occurring before they had occurred. For example, his Honour wrote that a plea of guilty had been entered to count 8 and that facts had been admitted and found proved. The proceedings did not reach the point of facts being read out or admitted. It is obvious that his Honour made that particular entry in anticipation of facts being admitted and making a finding that the offences were proved. It is apparent that the words, "Plea not guilty count 8" were inserted after the entry concerning the admission of facts and following the plea of not guilty to count 8 which was not anticipated.

[25] I am satisfied that the Magistrate recorded that counts 1, 2, 6 and 7 were dismissed in anticipation of making an order to that effect once the pleas of guilty had been entered. However, pleas to each of the counts to which pleas were anticipated did not eventuate. The occasion did not arise for his Honour to make an order dismissing the remaining counts because the anticipated plea to count 8 did not occur.

[26] My view in this regard is reinforced by notations made by the Magistrate on the information and complaint which were both dated 22 August 2007. First, the Magistrate wrote the letters "PG" alongside counts 3, 4 and 5, but subsequently drew lines through those entries by way of deletion. These were obviously entries reflecting the pleas of guilty and the subsequent withdrawal of those pleas. In conjunction with those entries, his Honour also wrote the letter "PG" alongside count 8 and subsequently deleted that entry. Again, this was an entry made in anticipation of a plea which never occurred.

[27] Secondly, the Magistrate drew a line through each of counts 1, 2, 6 and 7 and wrote alongside each of those counts the word "W/drawn". Subsequently his Honour drew lines through those entries with respect to all but count 6, again suggesting that his Honour made the entries in anticipation of those counts being withdrawn following the pleas of guilty.

[28] Identifying the procedure followed with respect to count 6 is more problematic. The way in which the entries "w/drawn" were written

alongside counts 1, 2, 6 and 7 strongly suggest that those entries were made at the same time. However, the Magistrate did not draw lines through the entry "w/drawn" alongside count 6. In addition, the transcript at the commencement of the trial on 22 January 2008 records that the prosecutor withdrew the charge of assault in count 6 on the information dated 22 August 2007.

[29] The charge of assault in count 6 on the information of 22 August 2007 later became the subject of a separate complaint dated 29 August 2007. It appears likely that on 28 August 2007, the day of the failed plea arrangements, the prosecutor realised that the charge of the simple offence of assault should not have been on information and informed the Magistrate that the charge would be withdrawn and replaced by a charge on complaint. As I have said, the complaint of assault, laid as count 6, was made the following day. This appears to be a reasonable explanation because the deletions of the other entries of "w/drawn" were undoubtedly made on 28 August 2007 as the events of the unsuccessful plea arrangements unfolded.

[30] The subsequent conduct of the proceedings supports the conclusions I have reached. On 28 August 2007, after the pleas of guilty had been vacated, the Magistrate entertained and acceded to an application for amendments to counts 1 and 7. If his Honour had, in fact, dismissed those counts, he would not have permitted the amendments to be made. Nor would his Honour have permitted the trial to subsequently proceed on those counts.

[31] Counsel for the appellant is correct that the critical question is whether the Magistrate made an order of dismissal and not what the prosecutor did or did not ask the Magistrate to do. There is force in counsel's submission that the court record made by the Magistrate on the court file speaks for itself, but the notations are not finally determinative of the question to be answered. For the reasons I have given, in all the circumstances I am satisfied that the Magistrate did not make an order dismissing counts 1, 2, 6 and 7.

[32] Before leaving this ground of appeal, I observe that the circumstances of this case provide a good example of the care that is needed in circumstances where a court is presented with a "plea agreement" that involves the entry of pleas of guilty to some counts on the basis that the prosecution will not proceed with other counts. Plea agreements of this nature commonly occur and, within well recognised limits, this practice is to be encouraged. However, when matters are charged on complaint, care needs to be taken in respect of orders as to the counts upon which the prosecution does not proceed because time limits for laying those counts may have expired. As the circumstances of this case demonstrate, if the pleas of guilty are subsequently vacated or set aside, the six month time limitation for laying a complaint is likely to have expired. It should be borne in mind that it is not unknown for pleas of guilty to be set aside on appeal.

[33] While there may be proceedings available to rectify the problem created by the withdrawal or dismissal of charges in these circumstances, such as a late appeal or review based on an abuse of process, it would appear that the preferable course is for the court to note that the prosecution accepts the pleas of guilty in satisfaction of all counts before the court, without making any orders as to the remaining counts, thereby leaving the remaining counts to lie on the file. Those remaining counts should not be withdrawn or dismissed. This is the practice followed in the Supreme Court when pleas of guilty to a particular count or counts are accepted in satisfaction of all counts on the Indictment.

**Information – Validity on its Face**

[34] At the hearing of the appeal, leave was granted to add an additional ground complaining that the information was invalid for the following reasons:

> "(i) because it did not indicate the authority by which the respondent signed the Indictment; and
>
> (ii) because on its face it failed to state whether the Indictment was on oath or affirmation; and
>
> (iii) because the respondent failed to swear or affirm the Indictment before a Justice of the Peace."

[35] In my opinion there is no substance in this ground. The general power to lay an information is found in s 101 of the *Justices Act*. Section 102(1) specifically limits the requirement that an information be in writing and

substantiated on oath to circumstances where it is intended to issue a warrant in the first instance:

> "(1) If it is intended to issue a warrant in the first instance, as hereinafter provided, the information shall be in writing, and the matter thereof shall be substantiated by the oath of the informant or a witness."

[36] The information dated 22 August 2007 is expressed to be taken "upon oath or affirmation". It is signed by a Justice of the Peace. If there is any irregularity, it is of no moment.

[37] In this context, if it was necessary to rely upon a statutory provision, s 182 of the *Justices Act* provides that no objection "shall be taken or allowed to any information" in respect of "any alleged defect therein, in substance or in form …". In addition, as was pointed out in *Moore v Haynes*,[1] although the legislature "always intends that procedural stipulations will be complied with", it does not necessarily follow that the legislature "intends that every failure to comply with such a stipulation has the consequence that a failure to so comply renders the proceedings invalid".[2] The requirements of the *Justices Act* with respect to the laying of informations is far removed from the requirements of the Youth Justice Act discussed in *Moore and Haynes* where not only was the consent of an authorised officer to the charging of an offence required, the *Youth Justice Act* specifically

[1] [2008] NTCA 9.
[2] *Moore v* Haynes [2008] NTCA 9 at [31].

required that the document charging a youth must indicate that the charges have been consented to by an authorised officer and identify that officer.

**Grounds 1 and 2 – Information/Complaint**

[38] Grounds 1 and 2 concern the charging on information of counts 1 (unlawful stalking) and 6 (assault), rather than on complaint. The appellant contended that these charges were wrongly included on the information with the consequence that the information was a nullity and the Magistrate had no jurisdiction to embark on a hearing of these charges.

[39] The matter is complicated by the existence of two informations and three complaints. The charge of stalking found in count 1 was the first charge on informations dated 19 April and 22 August 2007. There is, therefore, no doubt that the Magistrate proceeded with the trial of the charge of stalking on information.

[40] The charge of assault first appeared as count 4 on a complaint dated 19 April 2007. Next it appeared as count 6 on an information dated 22 August 2007. Finally it was charged as count 6 on a complaint dated 29 August 2007.

[41] The appellant's contention concerning count 6 on the information dated 22 August 2007 was based upon a version of the transcript that was incomplete. The full transcript obtained during the hearing of the appeal records that the prosecutor withdrew the charge of assault on the information and proceeded on count 6 as charged on the complaint dated

29 August 2007. Counsel for the appellant accepted that the charge of assault proceeded properly on complaint. That leaves the question of the validity of the charge of stalking in count 1 on the information dated 22 August 2007.

**Information/Complaint – Statutory Scheme**

[42] The statutory scheme for the charging of offences and their determination is primarily found in a combination of the *Justices Act* and the *Criminal Code* (the "Code"). Section 295 of the Code provides that the jurisdiction of courts with respect to the trial of offenders "is set forth in the laws relating to the constitution and jurisdiction of those courts …".

[43] Section 3(1) of the Code specifies that offences "are of 3 kinds, namely, crimes, simple offences and regulatory offences." There is no definition of "crime", but s 38E of the *Interpretation Act* provides that where the penalty for an offence is a period of imprisonment of more than two years, the offence is a crime. Section 3(4) of the Code states that an offence "not otherwise designated" is a "simple offence".

[44] Section 3(2) of the Code specifically directs that, "A person charged with a crime cannot, unless otherwise stated, be prosecuted or found guilty except upon indictment". Subsection (3) provides that unless otherwise stated, "a person guilty of a simple offence or a regulatory offence may be found guilty summarily". Unlike the direction in the Code that a person charged with a crime cannot be prosecuted except upon indictment, there is no

specific statutory direction that a person charged with a simple offence must be charged on complaint and cannot be charged on indictment.

[45] The charge of stalking contrary to s 189(2) of the Code carries a maximum penalty of two years imprisonment and is, therefore, a simple offence. The appellant submitted that a simple offence cannot be prosecuted on indictment and must be prosecuted on complaint. In these circumstances it was said that count 1 on the information of 22 August 2007 was a nullity.

**Simple Offence**

[46] Part IV of the *Justices Act* concerns Courts of Summary Jurisdiction and the exercise of the summary jurisdiction. The provisions in Pt IV are supplemented by provisions in Div 2 of Pt V which, in defined circumstances and subject to specified conditions, permit the Court of Summary Jurisdiction to hear and determine in a summary manner charges of specified indictable offences. Those provisions are discussed later in these reasons.

[47] As to the commencement of proceedings with respect to simple offences, s 49(a) of the *Justices Act* provides that a complaint may be laid where a person has committed or is suspected of having committed "any simple offence". Section 50(1) permits a complaint to be made by the complainant in person or by any person so authorised by the complainant. Although it is the practice that a complaint is made in writing and a specific form headed "**COMPLAINT**" is available for that purpose, s 50(2) of the

*Justices Act* specifically states that, "No complaint need be in writing unless it is required to be so by some Special Act". The complaint need not be on oath unless required by a Special Act or where the Justice is to issue a warrant at first instance: s 50(3).

[48] Section 57(1) provides that whenever a complaint is made, a Justice may issue a summons for the appearance of any person charged by the complaint. A Justice is empowered to issue a warrant of apprehension if the matter of complaint is substantiated to the satisfaction of the Justice upon oath: s 58(1). If a defendant fails to appear in obedience to a summons, provided the matter of the complaint is substantiated on oath and it is proved that the summons was served, a Justice may issue a warrant for the apprehension of the defendant: s 58(3).

[49] The balance of the provisions in Pt IV are concerned with accepting pleas of guilty and procedural matters in connection with summary trials together with findings of guilt and judgment. Provision is made for the awarding of costs.

[50] Parts V and VI of the *Justices Act* are concerned with indictable offences and appeals from Courts of Summary Jurisdiction respectively. Part VII contains supplementary provisions applicable to both informations and complaints.

[51] Division 1 of Pt VII of the *Justices Act* is headed "Irregularities and Amendment". As to the adequacy of the content of an information or

complaint, s 181 provides that in any information or complaint it shall be sufficient if the information or complaint "gives the defendant a reasonably clear and intelligible statement of the offence or matter with which he is charged".

[52] Irregularities in informations or complaints are dealt with in s 182:

> "**182 Information or complaint not to be objected to for irregularity**
>
> No objection shall be taken or allowed to any information or complaint in respect of –
>
> (a) any alleged defect therein, in substance or in form; or
>
> (b) any variance between it and the evidence adduced in its support at the preliminary examination or at the hearing (as the case may be):
>
> Provided that the Court shall dismiss the information or complaint, unless it is amended as provided by section 183, if it appears to him or to it –
>
> (a) that the defendant has been prejudiced by the defect or variance; or
>
> (b) that the information or complaint fails to disclose any offence or matter of complaint."

[53] Amendment of a defective information or complaint is permitted in accordance with s 183:

**"183 Amendment of information or complaint**

If it appears to the Court before whom any defendant comes or is brought to answer any information or complaint that the information or complaint –

(a) fails to disclose any offence or matter of complaint, or is otherwise defective; and

(b) ought to be amended so as to disclose an offence or matter of complaint, or otherwise to cure the defect,

the Court may amend the information or complaint upon such terms as may be just."

**Indictable Offences**

[54] The jurisdiction of a Court of Summary Jurisdiction to deal with a charge of an indictable offence is found in Pt V of the *Justices Act* which is headed "**INDICTABLE OFFENCES**". Against the background of the provisions of the Code to which I have referred, in *Birkeland-Corro v Tudor-Stack*,[3] I concluded that where the *Justices Ac*t speaks of an indictable offence it is referring to a crime which, unless otherwise stated, must be prosecuted on indictment.

[55] Part V begins with s 101 which provides that an information may be laid before a Justice where a person is suspected of having committed "any treason, felony, or indictable misdemeanour, or other indictable offence whatsoever, within the Territory …". Provisions follow for the disposition of charges of indictable offences on information which allow for both

[3] (2005) 15 NTLR 208 at 227.

preliminary examination and committal for trial on indictment before the Supreme Court and, in specified circumstances, for a summary disposition by way of trial or sentence. These provisions are discussed later in these reasons when dealing with the appellant's complaint that the Magistrate failed to comply with the requirements of the *Justices Act* in respect of the summary hearing of the charge of threatening to kill (count 5).

**Joinder**

[56] As to the joinder of multiple charges in a complaint or information, s 51 states that charges for any number of offences may be joined in the same complaint "if the charges arise out of the same set of circumstances". Section 101A provides that charges for "any offences, whether felonies or misdemeanours, may be joined in the same information if the charges are founded on the same facts or form or are part of a series of offences of the same or a similar character".

[57] As to a single summary hearing of charges on both complaint and information, s 183A provides that notwithstanding any other provision of the *Justices Act*, where a court has jurisdiction to deal with both a charge specified in a complaint and a charge specified in an information relating to the same defendant and "arising from the same or associated circumstances", the court may deal with both the complaint and information together.

**Statutory Scheme - Summary**

[58] For present purposes, the scheme may be summarised as follows:

- Proceedings in respect of a crime must be commenced on information and, if a committal for trial or sentence in the Supreme Court occurs, the charge must be laid on indictment. If a charge of a crime is dealt with in the Court of Summary Jurisdiction, that charge must proceed on information.

- Unless a Special Act requires otherwise or a warrant is to be issued at the first instance, a complaint of a simple offence may be made to a Justice either orally or in writing and without the support of an oath.

- In contrast to the statutory direction that a charge of a crime may only be prosecuted on indictment, there is no statutory direction that a charge of a simple offence may not be prosecuted on information or indictment.

- Leaving aside cases involving the issue of a warrant and other special provisions, when a complaint is made of a simple offence the court processes with respect to receiving the appearance before the court of the defendant are initiated by the Justice issuing a summons for the appearance of the person charged by the complaint.

- The statutory scheme provides different procedures for the disposal of charges on complaint and information. Summary procedures follow for charges on complaint. Charges on information may proceed to a

preliminary examination and committal for trial or sentence on indictment before the Supreme Court or, in specified circumstances, to summary disposition before the Court of Summary Jurisdiction either by trial or sentence.

**Simple Offence on Information**

[59] As I have said, the offence of stalking charged in count 1 is a simple offence. It was presented to the appellant and the Court on a document headed "**INFORMATION FOR AN INDICTABLE OFFENCE**" being a standard form of information issued under the *Justices Act* for charges of crimes. If the charge of stalking was to be reduced to writing, it should have been on a document headed "**COMPLAINT**" in the standard form issued under the *Justices Act*.

[60] In these circumstances, the critical issue for determination is readily identified. Was a valid complaint of stalking before the Magistrate? If an indictment was presented to the Supreme Court containing a charge of a simple offence, that indictment would be invalid and a nullity. However, the issue is not the validity of the document containing the charge of a simple offence as an information. In issue is the validity of the document as a complaint or, more correctly, the validity of count 1 on the document as a complaint of stalking.

[61] In *Pioch v Lauder*[4] Forster J was presented with a charge of aggravated assault on information. His Honour held that an offence of aggravated assault was a simple offence and should have been charged on complaint. In those circumstances, his Honour expressed the view "that entitling the charging document 'Information' is a nullity …".[5]

[62] Counsel for the appellant placed reliance upon that observation of Forster J. However, when that statement is read in its context, I am far from satisfied that his Honour meant that the charge was a "nullity" and could not found the jurisdiction of the Magistrate. The wider context is found in this passage of which the reference to the information being a nullity is a part:[6]

> "At the outset it should be observed that although the charge of assault accompanied by circumstances of aggravation appears on a document entitled 'Information', and an information is the appropriate document for laying a charge of an indictable offence, the learned magistrate started the proceedings by asking for a plea from counsel for the defendant. This procedure is wholly inappropriate where the charge is one of an indictable offence but appropriate if the charge is one of a simple offence. It becomes of critical importance to the answering of the special case stated to determine whether a charge of assault accompanied by circumstances of aggravation is a simple offence or an indictable offence. *If it be a simple offence, I consider that entitling the charging document 'Information' is a nullity and the appropriate procedure for the magistrate to follow was that for a simple offence,* which indeed was what he appears to have done at the commencement of the proceedings at least, although later in the hearing he stated that it was an indictable offence. If it was so, of course, the appropriate procedure was the administrative hearing of the evidence and determination whether or not a prima-facie case was made out by the prosecution and, after such determination, the learned

[4] (1976) 27 FLR 79.
[5] *Pioch v Lauder* (1976) 27 FLR 79 at 81.
[6] *Pioch v Lauder* (1976) 27 FLR 79 at 81.

> magistrate could have, so to speak, reverted to the status of a court and proceeded to deal with the charge as a minor indictable offence or he could have committed the defendant for trial in the Supreme Court. When the learned stipendiary magistrate decided that there was a prima-facie case made out and that he would deal with it himself then that was the appropriate time to ask for a plea." (my emphasis)

[63] Forster J determined that although "entitling" of the charging document as an information was "a nullity", nevertheless "the appropriate procedure for the magistrate to follow was that for a simple offence ...". In other words, there was a valid charge before the Magistrate, namely, a charge of a simple offence and the Magistrate should have followed the procedure laid down by the statute for a simple offence. Forster J did not find that the charge was a nullity and, therefore, the Magistrate did not have jurisdiction. Far from supporting the appellant, the decision of Forster J supports the Crown contention that a complaint of a simple offence was validly before the Magistrate and the Magistrate had jurisdiction to hear and determine it.

[64] The appellant also relied upon the decision of the Western Australian Court of Criminal Appeal in *Bounds v The Queen*.[7] The relevant legislation divided offences into simple and indictable offences and, like the Northern Territory, an indictable offence was triable only on indictment unless expressly authorised otherwise. A simple offence could not be charged on indictment and, therefore, the Court held that the indictment before the District Court was a nullity with respect to the particular count alleging a

[7] [2005] WASCA 1. An appeal to the High Court was dismissed: *Bounds v R* (2006) 228 ALR 190.

simple offence and the District Court did not have jurisdiction to try that count. McKechnie J made the following observation:[8]

> "A document setting out particulars of a simple offence can never be an indictment, no matter what it purports because it does not set out the provisions for an indictable offence. Any document such as count 2 is a nullity. The jurisdiction of the superior court is never invoked by such a document. Therefore, the procedures for trying a simple offence disclosed by such a document are never activated."

[65] In an earlier decision of *Paciente v The Queen*[9] a similar situation had arisen and the particular count was held to be a nullity. Franklyn J, with whom Nicholson and Ipp JJ agreed, said:

> "The indictment presented to the Court was signed by the senior assistant Crown counsel. It is not in dispute that he was authorised in that behalf by the Governor. However by count 2 it did not charge an indictable offence, but a simple offence which, by reason of s 9, was to be tried summarily.
>
> Thus the indictment alleged an offence not capable of being the subject of an indictment or of a committal for trial. In my view, in respect of count 2, the indictment was a nullity".

[66] In *Bounds*, the jurisdiction of the District Court could only be invoked by the filing of an indictment. To the extent that the document, purporting to be an indictment, set out particulars of a simple offence, that document was incapable of amounting to an indictment. The issue under consideration is different. It is not whether the document before the Magistrate was valid as an information. It is whether the document was valid as a complaint.

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[8] *Bounds v The Queen* [2005] WASCA 1 at [120].
[9] (Unreported, Western Australian Court of Criminal Appeal, Franklyn, Nicholson and Ipp JJ, 10 November 1992).

[67] A valid complaint could have been made orally. It could have been reduced to writing on a scrap piece of paper. While the power of amendment in s 182 of the *Justice Act* could not be used to cure a fundamental defect that renders an information a nullity, it could be used in the circumstances under consideration to delete the heading "**INFORMATION FOR AN INDICTABLE OFFENCE**" and to substitute the heading "**COMPLAINT**". In my view, a valid complaint of the offence of stalking was before the Magistrate and his Honour followed the correct procedures with respect to the hearing and determination of that complaint. If necessary, I would make an order amending the "complaint" of 29 August 2007 accordingly.

[68] The use of an incorrect document as the document recording the complaint of stalking did not cause any prejudice to the appellant. If evidence was erroneously admitted or taken into account on the stalking charge, it matters not that the Magistrate might have been misled by the title of the document on which the complaint was presented. If error occurred, and it did, the appeal process is available to rectify any miscarriage of justice caused by such error. The reason for the error is of no consequence. Reason for error aside, no miscarriage of justice occurred through the use of the incorrect document as the written record of the complaint of stalking.

**Ground 3 – Wrongful Admission of Evidence**

[69] Ground 3 complained that as a consequence of erroneously proceeding with the charge of stalking on information, the Magistrate erred in admitting evidence of events that occurred more than six months prior to the date on which the information was laid. If the proper procedure had been followed and a complaint had been laid, the complaint could not have been based upon evidence of events occurring more than six months prior to the laying of the complaint because s 52 of the *Justice Act* requires that a complaint be made "within 6 months from the time when the matter of the complaint arose".

[70] The offence of stalking contrary to s 189 of the *Criminal Code* requires proof of conduct that includes repeated instances or a combination of types of conduct identified in s 189(1)(a)–(g). The instances of conduct upon which the prosecution relied were identified by the Magistrate as follows:

> "(a) the defendant was pacing up and down in front of the cash register area of Woolworths with the intent of intimidating Dickens;
>
> (b) the defendant was driving slowly by the house of Dickens on a Sunday and staring at him;
>
> (c) an incident outside the premises of Target in the presence of Dickens and Larry Sullivan;
>
> (d) a series of incidents on 9 December 2006 outside the home of Dickens involving playing loud music and spinning the wheels of a vehicle followed by waiting for Dickens outside a block of flats in Callistemon Drive and thereafter following him to Woolworths.

(e) events outside Dickens' home on 16 April 2007 involving the defendant, Dickens and Dickens' father-in-law, John Burger;

(f) parking beside Dickens' vehicle on First Street, outside the Katherine Court House, laughing and gesturing at Dickens and thereafter waiting at the Target car park and following Dickens on Chambers Drive."

[71] The Magistrate expressed the view that should he find any two of the allegations set out in paras (a) to (f), the requisite conduct for the purposes of count 1 would be proven. Ultimately his Honour was not satisfied that the conduct identified in (a) and (b) formed part of the relevant course of conduct because there was no evidence that those incidents occurred after the employment of the appellant's son at Woolworths had been terminated. His Honour was satisfied that the conduct identified in paras (c) – (f) occurred and constituted repeated instances of or a combination of the various types of conduct referred to in s 189.

[72] The charge of stalking was first laid on 19 April 2007, but the complaint that proceeded to trial was dated 22 August 2007. By reason of a six month time limit, it could be based only upon conduct occurring on or after 22 February 2007. In these circumstances the Magistrate erred in relying upon the conduct identified in paras (c) and (d) because they occurred outside the six month period.

[73] Although the Magistrate erred in this way, in my opinion no miscarriage of justice has occurred with respect to the conviction for stalking. His Honour was of the view that should he find any two of the allegations set

out in paras (a) – (f) proven, the charge of stalking would be established. In these circumstances, the erroneous inclusion of the conduct identified in paras (c) and (d) did not result in a miscarriage of justice with respect to the conviction for stalking. However, different considerations arise in connection with the sentencing of the appellant for that offence which are discussed later in these reasons

[74] In connection with this ground of appeal, the appellant's written submissions contended that evidence of events outside the six month period would have been inadmissible if the charge of stalking had been laid on complaint. This submission must be rejected. By reason of the statutory time limitation, conduct occurring outside the six month period could not be relied on as conduct amounting to stalking, but the question of admissibility of evidence concerning such conduct is not determined by reference to the statutory limitation. It is determined by the application of the ordinary test of relevance.

[75] As to the charge of stalking, the entire course of conduct was directly relevant to the intention of the appellant. In order to prove the offence of stalking, the Crown was required to prove that the appellant undertook the conduct specified in paras (e) and (f) "with the intention of causing physical or mental harm to the victim or of arousing apprehension or fear in the victim for his or her own safety or that of another person …". The appellant's earlier conduct, which formed part of a course of conduct

aimed at the victim, was probative as to his intention when he engaged in the conduct specified in paras (e) and (f).

[76] The Crown was also required to prove that the conduct specified in paras (e) and (f) actually caused mental harm to the victim or aroused an apprehension or fear in the victim for his safety or that of another person. Viewed in isolation, the conduct in paras (e) and (f) bears an entirely different complexion from its true complexion viewed in the context of the prior conduct over a number of months. The prior course of conduct was relevant to an assessment of whether the conduct in paras (e) and (f) actually caused mental harm or aroused the relevant apprehension or fear.

[77] Evidence of the appellant's conduct toward the victim outside the six month period was also relevant and admissible in respect of a number of the charges. The entire course of conduct was relevant as bearing upon the appellant's attitude to the victim and a likelihood that he would engage in the conduct alleged. In particular, the entire course of conduct was relevant to the charge of threatening to kill. That course of conduct was probative of the appellant's intention when he uttered the threats. It was also relevant to the question whether the threats were of such a nature as to cause fear to any person of reasonable firmness and courage.

**Ground 4**

[78] Ground 4 complains that in relation to the charges of stalking and assault, "the appellant was deprived of the right to a trial according to law". This

ground relied upon the various matters to which I have already referred, including evidence of the events occurring outside the six month period. It is unnecessary to add to what I have already said.

**Grounds 5 and 6 – Duplicity**

[79] This ground as originally presented complained that duplicity arose because in finding the offence stalking proved, the Magistrate relied upon conduct that was the basis of the convictions in count 3 for driving without due care and count 4 for behaving in an offensive manner. However, on the hearing of the appeal, counsel for the appellant properly conceded that the Magistrate had not erred in this respect because these counts were based upon events that occurred in the absence of the victim and his Honour had relied only upon events occurring in the presence of the victim and the victim's father-in-law.

[80] There was one area of overlap that had the potential to give rise to the problem of duplicity. The conduct in para (f) had the potential to overlap with the dangerous driving charged in count 7. The course of events identified in para (f) included a period of driving on Chambers Drive and it was while the two vehicles were on Chambers Drive that the dangerous driving occurred when the appellant, whose vehicle at the relevant time was in front of the victim's vehicle, slammed on his brakes causing the victim to take evasive action.

[81] In my opinion, however, no overlapping occurred. After the appellant slammed on his brakes and the dangerous driving occurred, the victim's vehicle overtook the appellant's vehicle in the avoidance manoeuvre and proceeded with the appellant following close behind. In identifying the conduct in para (f), the Magistrate referred to the appellant "following [the victim] on Chambers Drive". His Honour did not rely upon the earlier conduct when the appellant was in front and slammed on his brakes.

[82] In any event, even if there was a degree of overlap, it was not such as to give rise to duplicity and no miscarriage of justice has occurred.

**Threat to Kill – Summary Trial – Absence of Consent**

[83] An additional ground added at the hearing of the appeal alleged that the Magistrate erred in proceeding with the summary trial of the charge of threatening to kill without first obtaining the consent of the appellant. In these circumstances it was said that the trial on that charge was a nullity.

[84] This ground of appeal requires consideration of the statutory scheme pursuant to which the Court of Summary Jurisdiction is given jurisdiction to hear and determine in a summary manner charges of indictable offences on information. I discussed the scheme in *Birkeland-Corro v Tudor-Stack*[10] and I adhere to the views expressed in that decision. In summary, the relevant features of the scheme for present purposes are as follows:

[10] (2005) 15 NTLR 208 at [63] – [101].

- Subject to jurisdiction to hear and determine in a summary way specific indictable offences, the procedure commences with the preliminary examination: *Justices Act* ss 105A – 112.

- If the charge is one of a "minor indictable offence", pursuant to s 109(3)(a), the Justice may proceed in the manner directed and under the provisions contained in Div 2 of Pt V. A "minor indictable offence" is defined in s 4 as an indictable offence which is capable of being, and is, in the opinion of the Justice, fit to be heard and determined in a summary way under the provisions of Div 2.

- Division 2 of Pt V contains a number of provisions conferring jurisdiction upon a Magistrate to hear and determine charges of indictable offences in a summary manner:

  (i) Offences identified in s 120 which are described as "minor offences". This jurisdiction may be exercised whether or not the defendant consents to its exercise.

  (ii) Offences identified in s 122A which include an offence punishable by not more than ten years imprisonment: s 121A. The offence of threatening to kill is such an offence.

  (iii) Section 121A prescribes a number of conditions that must be met before the jurisdiction conferred by s 121A can be exercised. These include the consent of the defendant.

(iv) Section 121A is subject to the operation of s 122A which directs that "serious or difficult matters" are not to be dealt with summarily if it appears to the court that by reason of the seriousness or other matters likely to arise at the trial the offence should be tried by the Supreme Court.

(v) Section 131A provides that summary jurisdiction in respect of bodily harm and aggravated assault shall not be exercised if the court is of the opinion that the charge should be prosecuted on indictment.

[85] Following an examination of the history of the various provisions, in *Birkeland-Corro v Tudor-Stack*[11] I concluded that the legislature did not intend that before the summary jurisdiction under any of these provisions could be exercised, a preliminary examination had to be conducted. I remain of that view.

[86] The jurisdiction to hear and determine in a summary way a charge of threat to kill contrary to s 166 of the Code is found in s 121A which expressly states that where the defendant consents, "the Court has jurisdiction to hear and determine the charge in a summary manner …". In the absence of consent the Court does not posses the necessary jurisdiction.

[87] The earliest transcript now available is for 22 January 2008. Neither that nor transcript of later appearances contains any reference to the question of consent. The appellant and his wife both gave evidence that the appellant

[11] (2005) 15 NTLR 208 at 227.

was not asked whether he consented to a summary disposition of the charge of stalking. Further, the appellant and his wife gave evidence that they were never advised of the appellant's right to a trial by jury. Nor were they advised that the appellant's consent was required in order for the matter to be determined summarily. The Crown did not cross-examine the appellant or his wife.

[88] The appellant initially sought legal advice from the Northern Australian Aboriginal Justice Agency ("NAAJA"). A solicitor from that Agency represented the appellant until being given leave to withdraw on 29 August 2007. No evidence has been called to rebut the appellant's evidence, and that of his wife, that he was not advised of his choices or the requirement of consent.

[89] Between August 2007 and the summary hearing in January 2008, the appellant retained the services of a solicitor, Mr Peter Maley. Mr Maley gave evidence that when he received instructions it was on the basis that the matter was to proceed by way of a summary trial. In these circumstances, it did not occur to Mr Maley that he should discuss with the appellant his right to choose between a trial by jury and a summary hearing. Nor was there any discussion about the appellant consenting to a summary disposition.

[90] I am satisfied that the appellant was not aware of his right to choose between a trial by jury and a summary hearing. Nor was the appellant

aware that his consent was required before the Magistrate could proceed with a summary hearing.

[91] In these circumstances, from a practical point of view the appellant was denied the opportunity of exercising his fundamental right to choose a trial by jury. Further, I am satisfied that as a matter of fact the appellant did not consent to the summary disposition. A condition precedent to the enlivening of the Magistrate's jurisdiction was not fulfilled. The Magistrate had no jurisdiction to hear and determine in a summary manner the charge in count 5 of threatening to kill. That conviction must be set aside.

[92] Counsel for the appellant urged that I quash the conviction and not remit the matter to a Magistrate. The appellant has served approximately three days in prison and the errors that occurred in the hearing before the Magistrate did not involve any fault on the part of the appellant. In particular, counsel urged that the absence of jurisdiction was caused by the Magistrate's failure to obtain the appellant's consent to a summary disposition of the charge of threat to kill and, therefore, it would be unfair to remit the charge for further hearing.

[93] I accept that it is the duty of a Magistrate to ensure that jurisdiction to proceed to summary disposition exists. If consent is required to found jurisdiction, a Magistrate is required to obtain consent explicitly before proceeding in a summary manner. This case demonstrates the danger of

assuming that counsel has obtained a defendant's consent. The specific question should be asked and it will often be advisable to obtain from counsel an assurance that the defendant has been advised of the options and has given explicit consent to summary disposition.

[94] The appellant will now face re-sentencing in respect of the charge of stalking. In addition, the appellant has appealed against the severity of the sentence imposed for the offence of assault and, as these reasons later disclose, I have allowed that aspect of the appeal and will re-sentence for that offence.

[95] In the context of the course of conduct which the Magistrate found had occurred, the threat to kill was a serious offence carrying a maximum penalty of seven years imprisonment. On the facts found by the Magistrate, his Honour was of the view that the offence warranted a sentence of 14 months imprisonment. His Honour determined that the offence of stalking required a sentence of ten months imprisonment, but he imposed an aggregate sentence of 14 months imprisonment for the offences of stalking and threatening to kill. That sentence was to be suspended after service of five months. In re-sentencing the appellant for the stalking offence I will not take into account the threats to kill.

[96] In all the circumstances I have decided that the appropriate course is to remit the charge of threatening to kill in count 5 for hearing before another Magistrate. The appellant will be entitled to consent to a summary

hearing. If he does not consent, a summary trial cannot occur and a preliminary examination will be required. As the Crown evidence has already been the subject of a full trial before a Magistrate in which the Crown witnesses were examined and cross-examined, it would be open to the appellant to reduce delay and expense by consenting to the Director of Public Prosecutions laying an ex officio indictment in the Supreme Court.

**Convictions Unsafe**

[97] Ground 8 asserts that the convictions with respect to counts 1, 5 and 6 "were against the evidence and the weight of the evidence". This ground was not canvassed in the written outline of submissions. Nor was it addressed orally. It is sufficient for me to observe that it was open to the Magistrate to accept the evidence of the victim and other witnesses for the prosecution. Once such evidence was accepted, it was not only open to the Magistrate to convict, but his Honour would have been in error if he had not done so. From my reading of the transcript, the evidence was convincing and his Honour reached the correct conclusions.

**Sentence**

[98] As I have said, the Magistrate imposed an aggregate sentence of 14 months imprisonment in respect of the offences of stalking and threatening to kill. Section 52 of the *Sentencing Act* authorises the imposition of an aggregate sentence, but only if the offences are joined in the same information, complaint or indictment. The charge of stalking was on complaint, but the

charge of threatening to kill was on information. In these circumstances, s 52 of the *Sentencing Act* had no application.

[99] In addition, an aggregate sentence cannot be imposed if one of the offences is a "violent offence". For this purpose, a violent offence is an offence listed in sch 2 of the *Sentencing Act* and includes an offence of threatening to kill contrary to s 166 of the Code.

[100] The appeal against the sentence imposed with respect to the offence of stalking is allowed. I will re-sentence the appellant in respect of that offence.

[101] As to the offence of assault charged in count 6, the Magistrate imposed a sentence of three months imprisonment to be served concurrently with the aggregate sentence of 14 months imposed in respect of counts 1 and 5. The appellant submits that the sentence was manifestly excessive.

[102] The offence of assault was based upon the conduct of the appellant in threatening the victim with the knuckleduster. The appellant banged the knuckleduster on a pole saying, "See this, see this" and flicked it onto the gate while threatening to split the victim's head open. The offence was committed through the threat of violence and no application of physical force occurred.

[103] The Magistrate carefully excluded other conduct, such as the threat to kill, from the facts upon which he was to sentence for the offence of assault.

However, it is difficult to avoid the conclusion that his Honour might have been influenced by what he perceived was an "ongoing, deliberate campaign of terror over more than a four-month period" in which the appellant engaged. His Honour did not explain why he regarded a sentence of imprisonment as the appropriate sentence for an assault which did not involve physical violence. If his Honour took into account the course of conduct over a four-month period, his Honour would have been in error because that conduct, described by his Honour as a campaign of terror, was taken into account in connection with the offence of stalking.

[104] The Magistrate faced a difficult task in sentencing on the basis of facts separated from surrounding circumstances which were taken into account in respect of other offences. It was necessary to isolate the facts of the assault and to avoid an overlapping of factors. When the facts of the assault are isolated from other facts, in my opinion a sentence of three months imprisonment was manifestly excessive.

**Conclusion**

[105] The appeal against the conviction for stalking charged in count 1 is dismissed. The appeal against the sentence imposed on count 1 is allowed and the sentence is set aside.

[106] The appeal against the conviction for threatening to kill charged in count 5 is allowed. The conviction and sentence with respect to count 5 are set

aside. The charge on information on count 5 is remitted to the Magistrates Court for hearing before a different Magistrate.

[107] The appeal against the conviction for assault charged in count 6 is dismissed. The appeal against the sentence imposed on count 6 is allowed and the sentence is set aside.

**Re-sentencing**

[108] I am now required to re-sentence the appellant for the offences of stalking and assault. This sentencing exercise takes place in the context that the appellant has already served approximately three days in custody and paid an aggregate fine of $1,000, together with $120 in levies, for the offences of driving without due care (count 3), offensive behaviour (count 4) and driving in a manner dangerous to the public (count 7). In addition, with respect to count 7, the Magistrate disqualified the appellant from holding or obtaining a driver's licence for a period of six months.

[109] As to the factual basis of the offence of stalking for which sentence must be imposed, subject to excluding the threat to kill and the facts of the assault involving use of the knuckleduster, and subject also to the exclusion of the driving that was the subject of count 7, the essential facts of the stalking offence occurred on 16 and 17 April 2007 and were summarised by the Magistrate in paras (e) and (f) which are set out in para [5] of these reasons.

[110] The appellant submitted that these events "formed one incident". No doubt there was a single underlying cause of the appellant's behaviour, namely, the dismissal of his son from Woolworths, but the events of 16 and 17 April 2007 were separate episodes, each of which were distressing to the victim. Counsel contended that the appellant's threat that "this isn't over" uttered as he left after the altercation at the victim's premises on 16 April 2007 was nothing but bravado. If it was, the victim and his wife could be forgiven for not realising that it was merely bravado.

[111] The appellant's conduct on 16 and 17 April 2007 is not to be viewed in isolation from the earlier events. While those earlier events set out in paras (a) – (d) of para [5] of these reasons are not the subject of the acts comprising the stalking offence because they occurred more than six months before the date of the complaint, nevertheless they are not to be ignored for sentencing purposes. They provide the context in which the relevant conduct of stalking occurred. Those earlier events demonstrate that when the appellant engaged in the relevant conduct on 16 and 17 April 2007, he intended to intimidate the victim and to instil in the victim a belief that he would carry out his threats. That earlier conduct also demonstrates why, from the perspective of the victim and his wife, the actions of the appellant on 16 and 17 April 2007 were not isolated acts of no concern to the victim or his wife. From the perspective of the victim, the appellant was continuing his course of intimidatory conduct which the

victim had every cause to believe posed a genuine threat to his wellbeing and that of his wife.

[112] As to the assault, again the acts of the appellant that constitute the assault are to be viewed in the context of the earlier conduct of the appellant. Given the earlier intimidatory conduct carried out over a number of months, the threat by the appellant with the knuckleduster was not a minor offence. The appellant used a dangerous weapon and deliberately set out to intimidate and put fear into the victim. He was successful in scaring the victim who feared physical violence and harm.

[113] As the Magistrate observed, the ongoing campaign of intimidation in which the appellant engaged did not end voluntarily. It took the arrest of the appellant and strict bail conditions to end it. The appellant has shown no indication of any remorse. At the time of sentencing by the Magistrate in February 2008, his Honour observed that the behaviour of the appellant had produced a "profound effect" on the lives of the victim and his wife and they had not been able to move on. I do not have any information as to the progress or otherwise of the victims in recovering from their ordeal.

[114] In mentioning these matters, I emphasise that the appellant is not to be sentenced for an ongoing campaign of intimidation. He is to be sentenced for the offence of stalking comprised of the conduct on 16 and 17 April 2007, but viewed in the context of the earlier intimidatory conduct. He is to be sentenced for the facts of the assault, but also in that same context. I

mention these matters to emphasise that the conduct for which the appellant is to be sentenced was not trivial conduct carried out by way of bravado. It was serious intimidatory conduct through which the appellant sought to intimidate and put fear into the victim and it was conduct that had significant adverse effects upon the victim and his wife.

[115] As to matters personal to the appellant, he was born in Western Australia and is now aged 43 years. The appellant has worked most of his adult life in the construction and farming industries. As at February 2008 he was working as a mango farmer outside Katherine.

[116] The appellant has been married for over 20 years and he and his wife have four adult children. As at February 2008 they owned a home in Katherine and both the appellant and his wife were working in order to meet their mortgage commitments.

[117] In September 2006 the appellant was convicted of assault and fined $800. That assault occurred in August 2006 at about the same time that the appellant commenced his course of conduct against the victim. That offence also concerned a person who the appellant believed was part of a group responsible for the decision that resulted in the appellant's son's employment at Woolworths being terminated.

[118] It was put to the Magistrate that the appellant and his family had moved on and the appellant found his few days in custody a "harrowing and sobering event". I accept that the appellant is determined to get on with his life, but

personal deterrence remains a factor in the exercise of the sentencing discretion. As I have said, the appellant has shown no remorse and there is no basis upon which I can find that he has a proper insight into the nature of his actions and why his conduct was totally unacceptable.

[119] On the charge of stalking, I impose a sentence of four months imprisonment. In respect of the offence of assault, s 78BA of the *Sentencing Act* requires that I must order that the offender serve a term of actual imprisonment or a term that is suspended partly but not wholly. I impose a sentence of imprisonment for one month and direct that the sentence be served concurrently with the sentence imposed for the offence of stalking.

[120] I direct that the sentences commence on 26 April 2009 in order to reflect the three days that the appellant has already served by way of custody. The sentence will be suspended from today and the operational period of suspension for the purposes of the *Sentencing Act* is 12 months from today. It is a condition of the suspension that for the operational period the appellant not assault, harass or intimidate the victim, the victim's wife or any member of the victim's immediate family or the wider family of the victim and the victim's wife, namely, their parents, siblings or children of their siblings.

[121] As I have said, in arriving at these sentences I have put aside entirely the evidence that the appellant threatened to kill the victim and members of his

family. If the offence of threatening to kill is proven, in the context in which it occurred, that offence was the most serious offence committed by the appellant and had the greatest adverse impact upon the victims. If the appellant is convicted of the threat to kill, the sentencing court will be entitled to take into account the total context in which the crime was committed in the knowledge that the facts of that crime and its particular impact upon the victims have not been taken into account by me.

28 AUG 2007

Appearances -
Prosecutor - Truman
Layton for and with the defendant

PG 3, 4, 5 ~~x~~. Counts 1, 2, 6 + 7 dismissed.
Plea of guilty count 8.
~~Facts admitted. Found proved~~
Charge of Mer indicted.
NAAJA granted leave to withdraw.
Pleas vacated. ~~Mer~~
D requires next legal representation
Vacate hearing this week.
Adjd 21-23 January 08 for hearing
CMI 10.12.07
BAC 28/8/07
B/E to 10.12.07.

[122]