DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Tomlinson, Tomlinson and Redden-King* [2019] QDC 98
PARTIES:	**THE QUEEN** **v** **GARY ROY TOMLINSON** (first defendant) **MERVYN ALFRED JAMES TOMLINSON** (second defendant) **DIANE PATRICIA REDDEN-KING** (third defendant)
FILE NO:	32 of 2019
DIVISION:	Criminal
PROCEEDING:	Trial
ORIGINATING COURT:	District Court
DELIVERED ON:	28 May 2019 (ex tempore)
DELIVERED AT:	Gympie
HEARING DATE:	22-24, 27-28 May 2019
JUDGE:	Porter QC DCJ
ORDER:	**1. Direct that the jury enter a verdict of not guilty in respect of count 1 of forcible entry against the second and third defendants.** **2. Otherwise dismiss the no case application of the second and third defendants.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST PEACE AND PUBLIC ORDER – FORCIBLE ENTRY – where the indictment charges all defendants with entering into the customer call centre area of the Gympie Regional Council offices in a manner likely to cause reasonable fear of violence to the mayor – where the second and third defendants were allowed entry into the customer call centre area by a member of council staff – whether it is open to a properly instructed jury to convict the second or third defendants of forcible entry CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – ASSAULT – where the indictment charges the second and third defendants of aiding the first defendant in committing various alleged assaults – where video footage had been tendered as evidence

– whether it is open to a properly instructed jury to convict the second or third defendants of the assault charges

Criminal Code Act 1899 (Qld), s 70

Prideaux v Director of Public Prosecutions (Vic) (1987) 163 CLR 483
R v Goldsworthy [2016] QSC 220
Shaw v Coco [1994] 1 Qd R 469

O'Regan R. S., 'Forcible entry, legal history and the Griffith code' (1982) 15(2) *University of Queensland Law Journal* 239

COUNSEL: R Reid for the Crown
A McAvoy SC for the first defendant
AM Preston for the second defendant
D Yarrow for the third defendant

SOLICITORS: Office of the Director of Public Prosecutions for the Crown
Just Us Lawyers for the first, second and third defendants

[1] I have before me two applications for a directed verdict of not guilty in respect of certain charges in the indictment against the second and third defendants on the basis that there is no case to be answered on the evidence of the prosecution, which has now closed.

Background

[2] The indictment being tried alleges eight offences, one count of forcible entry, three counts of common assault, two counts of assault occasioning bodily harm and one count of serious assault. The offences charged in the indictment arise out of events which occurred at the offices of the Gympie Regional Council on 31 May 2016. On that day, the three defendants went to the Gympie Regional Council offices at 242 Mary Street. CCTV footage shows that on arrival they asked for the mayor and said they had documents to give him. There was no evidence as to the contents of those documents although there was some indication they may have been marked "eviction notice".

[3] CCTV footage shows that, soon after arrival, the first defendant climbed into the area behind the reception desk. The other two defendants remained where they were. The first defendant is shown telling the reception officer, in effect, he was evicting the council, and she should leave if she does not want to get hurt. The other defendants are not shown saying anything about that. Thereafter, the first defendant, Gary Tomlinson, also called Wit-Boooka, moved into the customer call centre area adjacent to the reception desk area. There is evidence he said words to the effect that the people in there were to get out, and they were evicted. His demeanour was generally described as forceful.

[4] The evidence shows the second and third defendants remained in the foyer area until the third defendant was invited to come into the customer call centre area through a secure door which was opened and held open by a council employee. The evidence of that employee, Ms Kennedy, was that she asked the third defendant to come in to

try to calm the first defendant down. The evidence shows the third defendant accepted that invitation and entered by that secure door into the customer call centre area. The second defendant followed the third defendant into that area. Ms Kennedy said she noticed second defendant do so, but did not ask him to leave. This entry into the customer call centre area is what is particularised as being an offence against section 70 of the *Criminal Code Act* 1899 (Qld) by each of the defendants as principal offenders. That is count 1 on the indictment.

[5] The events in the call area after the defendants entered are broadly uncontentious, but are very contentious as to detail. Bearing in mind this is a no case submission, I will generally refer to the evidence as most beneficial to the Crown, but it is important to note that this summary provides only a background to the resolution of the applications.

[6] The Crown alleges that the first defendant assaulted two council officers, Mr Scordalides and Ms White, in circumstances where they placed themselves in his way to stop his entry into that area, or perhaps to stop his continued movement around that area. This gives rise to counts 2 and 3 on the indictment. It appears soon after, Bernard Smith, the CEO of the council, and Michael Curran, the mayor, arrived in that area. Soon after their arrival, the CEO and the mayor, and Dimitri Scordalides found themselves in front of the first defendant. The Crown alleges that at about that time the first defendant pushed Mr Smith. Mr Smith gave evidence to that effect. That comprised count 4 on the indictment.

[7] The second and third defendant are not charged with counts 2, 3, and 4, either as principal offenders or as aiding the first defendant. There is evidence that at that time at least Mr Curran was asking the first defendant to leave. I do not recall any evidence that such a request was directed specifically to the second or third defendants at this point. The evidence also supports the view that while in the formation of the first defendant confronting Mr Curran, Mr Smith, and Mr Scordalides, Mr Curran struck the first defendant on the bridge of the nose. Mr Curran gave evidence he did so to aid Mr Scordalides, who Mr Curran said had been pushed by the first defendant.

[8] Up to this point, the only evidence of the involvement by the second and third defendants in events in the customer call centre is that they were standing and watching. Some witnesses said they were not really doing anything. There were numerous council witnesses who gave similar evidence to that effect. Thereafter, there is evidence that the first defendant and the mayor became engaged in a scuffle, in which the Crown alleged Mr Curran was pushed in the throat, grabbed by the groin, and had his arm painfully bent around a door by the first defendant. These comprise offences 5, 6, and 7 in the indictment. Mr Curran, at least, gave evidence of each such offence, and other corroborating evidence exists for various aspects of those three assaults.

[9] It is to be noted the Crown alleges, in respect of counts 5, 6, and 7, that the second and third defences are liable for aiding or seeking to aid the first defendant in committing those offences, and are party to those offences under section 7(1)(b) or (c) of the Code. The evidence, at its highest, for the Crown, in that regard, differs considerably between the second and third defendant. As to the second defendant, there is CCTV footage that he was involved in the melee in which Mr Curran and other witnesses said those three offences occurred. As for the third defendant, the

evidence at its highest is that she recorded the events on her camera. The evidence supports the view she began filming sometime after the first blow to the first defendant's nose. There is some other evidence of her involvement through the course of the scuffle and subsequent struggle. On one view of it, the third defendant holds out an eviction notice or flyer to the mayor after events have become heated in what, it is submitted by the Crown, could be accepted as an attempt to give that to the mayor.

[10] There is also evidence that, in the second clip filmed by Ms Lewis (a council employee), the third defendant can be seen in close proximity to the first defendant while he is aggressively shouting at staff members. The Crown submits that the jury can infer from this footage that the third defendant is moving around as if to achieve a desired angle from which to film and holding folders.

[11] The Crown alleges that various witnesses saw the third defendant filming at various times, and it is obvious from her own footage that that was occurring. She was not otherwise involved, whether physically or verbally, in that melee. Sometime after the end of the melee involving the mayor and the first defendant, Sergeant Richards of Gympie Police arrived with Constable Walker. He says he told the first defendant he was under arrest for public nuisance and asked him to come outside. At its highest for the Crown, the evidence shows the first defendant unwilling to comply with that instruction, and, when Sergeant Richards sought to arrest him, another scuffle broke out. This is count 8.

[12] There is some evidence that the second defendant was involved in this scuffle. There's no evidence that I am aware of regarding the third defendant's conduct during this period. She appeared to continue to film throughout. The second and third defendants are charged as party to those offences. This overview of the evidence does not do justice to the detail of the evidence of the numerous witnesses. It is intended to give a sufficient overview to dispose of the applications before me.

[13] Mr Yarrow, for the third defendant, submitted she had no case to answer on the prosecution's evidence in respect of any of the charges against her. To be clear, that is count 1, forcible entry, and counts 5 to 8, various assaults. Mr Preston, for the second defendant, submitted that his client had no case to answer for any of counts 1, 5 and 6 on the indictment.

[14] It is convenient to deal with the applications together, because, to a degree, the issues overlap. However, there is no necessary reason why the applications should have the same result. Though the second and third defendants were involved, generally together, their conduct at various times was materially different. This is particularly so for the assault charges. The no case submissions for both defendants are put on the basis that they accept, for the purpose of their applications, that there is a prima facie case that the first defendant committed each of the assaults with which he is charged. To be clear, that does not involve any suggestion they accept those offences were committed. Rather, that is the basis upon which the second and third defendants are content to argue there is no case against them. Frankly, that is the only credible basis upon which the submissions could have been put.

[15] Mr Yarrow helpfully set out the principles to be applied on a no case submission in paragraphs 3 to 6 of his submissions. He wrote:

3. It is uncontroversial that the test for determination of a no case submission is "whether on the evidence as it stands [the accused] could lawfully be convicted" (*May v O'Sullivan* (1955) 92 CLR 654 at 658 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ).

4. The test was described by a unanimous High Court in *Doney v R* (1990) 171 CLR 207 as follows:

> [I]f there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty (*Doney v R* (1990) 171 CLR 207 at 214-215 per Deane, Dawson, Toohey, Gaudron and McHugh JJ).

5. It is not the function of a trial judge to choose between inferences which are reasonably open to the jury (*R v Stewart; ex parte Attorney-General* [1989] 1 QdR 590 at 592 per McPherson J (with whom Andrews CJ and Demack J agreed at 590)). "Where the Crown case rests either wholly or partly on circumstantial evidence, a no case submission is to be decided on the basis of such inferences that are reasonably open in support of the Crown case" (*R v Goldsworthy, Goldsworthy & Hill* [2016] QSC 220 at [10] per Burns J). A no case submission proceeds on the basis that "the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution" (*Questions of Law Reserved on Acquittal* (1993) 61 SASR 1 at 5 per King CJ (with whom Bollen J agreed at 10)).

6. These submissions are also cognisant of the recent decision of the High Court of Australia in *The Director of Public Prosecutions Reference No. 1* [2019] HCA 9 where the Court decided *per curiam* that:

> The direction commonly referred to as the 'Prasad direction' is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person.

[16] I also refer to *R v Goldsworthy* [2016] QSC 220 where Burns J said (footnotes omitted):

> [5] When a no case submission is made, the question of law to be decided is "whether on the evidence as it stands [the accused] could lawfully be convicted". If the answer to that question is in the affirmative, the case must be left with the jury. If not, it is the duty of the trial judge to direct a verdict of acquittal.
>
> [6] The approach that must be taken to the determination of that question was authoritatively laid down by the High Court in *Doney v The Queen*, as follows:
>
> > "[I]f there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."

[7] It follows that a trial judge who is called on to rule on a no case submission must take the Crown case at its highest. Furthermore, questions of credibility, reliability or the weight to be accorded particular evidence are all matters within the exclusive province of the jury. So, too, are inconsistencies in the evidence; they are for the jury to resolve. Nor is it for a trial judge to consider whether a verdict of guilty returned by the jury on the evidence comprising the Crown case might later be determined by the Court of Appeal to be unsafe or unsatisfactory. That is not the test.

[8] The jury is the arbiter of the facts. As the Court remarked in *Doney*, it is fundamental to the determination of the facts that "the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful". As to questions concerning the reliability of particular evidence, the Court accepted as correct the following proposition taken from *R v Galbraith*: "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of the witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[9] Of course that is not to say that a trial judge should not consider whether evidence that has a "tenuous character" or an "inherent weakness or vagueness" should be the subject of a warning to the jury but, even if such a warning is given, that evidence will still be available for use by the jury subject to that warning. It is then a matter for the jury to decide what weight should be given to that evidence.

[10] Where the Crown case rests either wholly or partly on circumstantial evidence, a no case submission is to be decided on the basis of such inferences that are reasonably open in support of the Crown case. It is not the function of a trial judge to choose between inferences which are reasonably open to the jury. Just as the determination of the facts is a matter for the jury, so too is the drawing of inferences based on those facts. The judge must therefore proceed on the basis that "the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution". That however does not mean that reasonable hypotheses consistent with innocence arising on the Crown case can in every instance be ignored. To the contrary, the task of the trial judge is to determine whether the evidence is capable in law of supporting a verdict of guilty. Thus, if the evidence in the Crown case is incapable of excluding all reasonable hypotheses consistent with innocence, the evidence will not be capable in law of proving the charge and there will be no case to answer in relation to it. That is just another way of saying that it is only if the evidence is such that an inference of guilt is incapable of being drawn beyond reasonable doubt that it might be concluded there is "in law no material on which a verdict of guilty might be found", however that point is not reached merely by the existence of a "possible inference consistent with innocence". It follows that the question whether the Crown has excluded every reasonable hypothesis consistent with innocence is a question for the jury; whether the evidence as a whole, and taken at its highest, is capable of doing so is one for the judge.

[11] For completeness it should be said that what is required of the Crown in discharging the onus of proof of guilt is not that every possibility of innocence be excluded by the evidence but only that every reasonable possibility be excluded. As such: "The existence of an admitted possibility but one that is assessed by experts in the field as being

> 'extremely unlikely', or 'very remote', or the result of a 'very rare coincidence' is not sufficient to introduce a reasonable doubt precluding the jury from being satisfied to the requisite standard of proof of guilt."

[17] These principles were not in dispute.

Forcible entry alleged against the second and third defendants

[18] It is convenient to deal first with count 1 on the indictment, which relates to the manner of the alleged entry by the defendants into the Gympie Regional Council offices.

[19] Section 70 of the Code provides:

> **70 Forcible entry**
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> (1) Any person who, in a manner likely to cause, or cause reasonable fear of, unlawful violence to a person or to property, enters on land which is in the actual and peaceable possession of another commits a misdemeanour.
>
> Maximum penalty—2 years imprisonment.
>
> (2) It is immaterial whether the person is entitled to enter on the land or not.

[20] Count 1 alleges specifically that on 31 May 2016 the defendants each entered on land, which was in the actual and peaceable possession of Bernard Smith, in a manner likely to cause fear of violence to Michael Curran.

[21] Count 1 is particularised by the Crown further as follows: the three defendants entered the customer call centre area of the Gympie Region Council in a manner likely to cause reasonable fear of violence. I emphasise the identification of the area said to have been entered in the relevant manner was the customer call centre.

[22] It is also particularised that their entrance to that area was likely to cause reasonable fear of violence to Mr Curran. This was said to arise because the first defendant had begun to behave aggressively, had told staff to leave, and had expressly or impliedly threatened that harm would come to staff if they did not leave, and the second and third defendants were part of the same group.

[23] For this offence, the prosecution has to establish beyond reasonable doubt that the customer call centre area of the Gympie Regional Council office was in the actual and peaceable possession of Mr Smith, that the defendants entered this area, and that each of them entered the area in a manner likely to cause reasonable fear of unlawful violence to Mr Curran. The second and third elements require some discussion. As for the second element, one might think that entry, where used in s 70 of the Code, refers to the act of physically entering and no more. That is, going onto the relevant land or, in this case, into the relevant room.

[24] However, there is authority to suggest a broader meaning. In *Prideaux v Director of Public Prosecutions (Vic)* (1987) 163 CLR 483, the High Court was dealing with a similar but not identical provision in Victoria, which was modelled on section 70 of the Code. There, the Victorian Full Court had construed "enter" as having the prosaic ordinary meaning I just identified. The High Court disagreed with their Honours' construction. The central conclusion of the High Court was that "enter",

where used in the Victorian statute, had the meaning of entering for the purpose of taking possession. That construction was said to arise from an historical analysis of the object of statues which were identified by the High Court as predecessors (in some case, ancient ancestors, including the original statute enacted in 1381) of the Queensland and Victorian provisions. The key passage in the judgment is as follows (at page 486):

> The meaning of "entry" in the statute of 1381 and in its statutory successors is well established. The "entry" of which they speak is an entry by which the offender takes possession of the premises or which the offender makes with the intention of taking possession: see *Blackstone's Commentaries*, Bk IV, ch 11, pp 147-148; Hawkins, *Pleas of the Crown* (8th ed, 1824), Bk I, ch 28, ss 20 and 21, p 500 and Child (1846) 2 Cox CC 102. The meaning of "entry" in the statute accords with its primary legal meaning. The *Oxford English Dictionary* (Murray, 1897) defines the legal meaning of "enter" thus: "To make entry (into lands) as a formal assertion of ownership; to take possession", and defines "to enter on" in corresponding terms. The *Macquarie Dictionary* contains a similar definition for "entry": "the act of taking possession of lands or tenements by entering or setting foot on them". Legal dictionaries agree that the primary legal meaning of "entry" is not a mere going or coming onto land. Thus Jowitt's *Dictionary of English Law* (2nd ed, 1977), defines "entry" to mean "the act of going on land, or doing something equivalent, with the intention of asserting a right in the land". An earlier legal dictionary Tomlins' *Law Dictionary* (4th ed, 1835), and an American legal dictionary, Bouvier's *Law Dictionary* (8th ed, 1914) accord. The statutes of forcible entry protect the peacefulness of actual possession of land (*Lows v Telford* (1876) 1 App Cas 414 and *Hemmings v Stoke Poges Golf Club* [1920] 1 KB 720, esp at 752) and that is an object as appropriate to a modern civilised society as it was to the society of fourteenth century England.
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> In *Iron Mountain and Helena Railroad v Johnson* (1887) 119 US 608 Miller J, who delivered the opinion of the Supreme Court, said (at 611):
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> > "The general purpose of these statutes is, that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror."

[25] After citing further authorities supporting the meaning of entry identified by the High Court, their Honours said (at pages 487-488):

> Moreover, the statutes of forcible entry prohibit only such entries as are forcible (*Hemmings v Stoke Poges Golf Club* at 749-750), that is, such as use or show force calculated to prevent resistance: *Smyth* (1832) 5 C & P 201; 172 ER 939. The statutes do not prohibit peaceful entries which are effected for the purpose of assuming or resuming possession. Both the purpose of the entry and the means of effecting entry are material in determining whether the conduct of an entrant is prohibited by the statutes of forcible entry.
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> In construing s 207, the Court of Criminal Appeal dismissed the authorities which construed the statutes of forcible entry. The old reasoning, it was said, "pays no regard to the plain meaning of 'entry' in the setting of the modern language of the statute". Their Honours took that "plain meaning" to be "the act of going on land". But if so broad an interpretation be given to s 207, the offence it creates would be committed whenever a person goes onto any land in a manner likely to cause a reasonable apprehension of a breach of the peace, whether or not any other person's right to possession of the land is challenged and whether or not the breach of the peace which is apprehended consists in the use of force. A person who carries a contentious placard into a public place might be caught by the section though the manner of actual entry onto the public place was not accompanied by any force, and though the entry was not intended to challenge

> the right of other members of the public to be in the public place and did not impair in any way their right to be there.
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> …
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> There is no reason for departing from the established construction of the statutes of forcible entry when it is clear that s 207 is the statutory successor of the statute of 1381 and contains no language which casts doubt on the applicability of the established construction.

[26] The second and third defendants invite the court to construe the word "enter" in section 70 of the Code in the manner identified in *Prideaux*. There is no authority in Queensland to that effect, though Mr O'Regan QC supports that view.[1] Macpherson SPJ also cited the case without providing commentary in *Shaw v Coco* [1994] 1 Qd R 469 at 482.

[27] This raises the question of how one should consider contested questions of law on a no case submission. The analogy with the approach to questions of law in a summary judgment application was raised. However, in my view, on a no case submission, I ought to consider the legal question on the basis that I would sum up to the jury. That seems correct, because the ultimate question is whether it would be reasonably open to the jury to convict, and that involves both the directions on law the jury would have before it and the findings of fact the jury might make, given those directions.

[28] Mr Reid, for the Crown, submitted that the ordinary meaning approach of the Victorian Full Court is preferable and more consistent with modern approaches to statutory construction. I disagree. In my view, the approach in *Prideaux* applies to the expression "enters on land" in section 70 of the Code. This is because the reasoning of the High Court in that case seems to apply to section 70, and the distinctions with the Victorian statute are not apt to impugn applicability of that reasoning. In that latter respect, I agree with Mr O'Regan's analysis in his article that by far the better view is that the High Court's approach would be applied to the construction of section 70.[2] That is the way I intend to sum up the case to the jury. I will direct the jury that the expression "enters on land" in section 70 means entry on land with the intention of taking possession from the person in peaceable occupation. I will consider this no case submission on that basis.

[29] As to the third element, in my view, the identification of the manner of entry for the purposes of considering whether it can be characterised as likely to cause reasonable fear of unlawful violence requires some consideration of the temporal and circumstantially related events, both prior to and following entry. Based on that approach, the third defendant's counsel submits that it would not be open to a jury reasonably to convict the third defendant of that offence because first, her entry into the customer call centre area was the result of being invited to enter. And secondly, although the first defendant's conduct in the reception desk area might be thought by the jury to have informed the manner of the third defendant's entry into the reception area, that is not the matter that is the subject of the charge.

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1 O'Regan R. S., 'Forcible entry, legal history and the Griffith code' (1982) 15(2) *University of Queensland Law Journal* 239.

2 O'Regan at 240-242.

[30] The subject of the charge is the entry into the customer call centre area. Mr Yarrow submitted that not only was the third defendant invited into that area, but that once she was there, the evidence is all one way that she took no part in what was going on, and was quite peaceable in her conduct.

[31] As to the second defendant, he was not specifically invited in, but he went in with the second defendant. Ms Kennedy said she noticed the second defendant's entry, and did not ask him not to enter. Again, the evidence seems to be all one way that the second defendant was quite peaceable, until the confrontation between the first defendant and the council officers became more intense.

[32] In those circumstances, focusing on the manner of their entry to the customer call centre, one might think that it would not be open to a jury to conclude that the second and third defendant entered in a way that was likely to cause reasonable fear of unlawful violence to Mr Curran. This is simply because they did not force their way into the customer call centre area or use threats of force, and once there, did not do anything that seemed to cause anybody any alarm.

[33] The prosecutor rightly pointed to their association with the first defendant's conduct in the reception desk area, and he submitted that it would be open to a jury, properly directed, to conclude that this conduct in that area could be used to determine the character of the second and third defendant's entry into the customer call centre area. I am unable to persuade myself that a jury, properly directed, properly could reach that conclusion. That is because of the specific facts of this case, and the specific circumstances of the indictment.

[34] The indictment is concerned with entry to the customer call centre. Once the first defendant had extended his conduct into the customer call centre, the second and third defendant made no effort to enter, until invited to do so. The fact of invitation is not itself, a complete legal answer to this. However, it is an important factual matter in this case. The fact that they stayed in the reception area seemed to me to make it impossible for a jury reasonably to attribute to them the manner of the first defendant's entry into the reception desk area, and then into the customer call centre area.

[35] The result might have been different if, on being invited in, either the second or third defendant started yelling slogans or encouraging the first defendant to greater forcefulness. But the evidence all seems to be one way: that for the whole period which rationally could inform the manner of their entry into the customer call centre, they did not do anything at all.

[36] In those circumstances, I do not think it is open to a jury, properly instructed, to convict the second or third defendants, under section 70, of the offence as charged and particularised on the indictment. I will direct that the jury enter a verdict of not guilty in respect of that charge against those two defendants.

Assaults alleged against the second defendant

[37] I do not intend to discuss this at great length. Mr Preston for the second defendant quite properly only put this submission in respect of counts 6 and 7.

[38] It seems to me that it requires far too a subtle sifting of the evidence and the inferences properly to conclude that a jury could not, properly instructed, reach the

view that the second defendant aided, or sought to aid, the first defendant in the course of those assaults.

[39] The submission was not put in respect of counts 5 and 8, and in all the circumstances, particularly as it involves to a substantial degree what one infers from behaviour shown on video footage, I am not persuaded that it would not be open to the jury, applying their common sense and experience, to convict on one or more of those charges. That is not to say anything about the strength or weakness of the case, except to say that it is not hopeless, using that as a general description for what is required on a no case submission as stated in the above authorities.

Assaults alleged against the third defendant

[40] That leaves the third defendant's no case submission in respect of counts 5 to 7, and count 8. There is no evidence of the third defendant involving herself in the struggle directly. The primary considerations relied upon in the particulars are these: her non-dissenting and deliberate presence in the first defendant's vicinity aided him, and her filming around the time of this conduct and attempts to hand out eviction notices aided the first defendant by encouragement. There seems to be very little evidence of an attempt to hand out eviction notices, although there is some evidence which might, it seems, be able to be interpreted by a jury as being an effort to hand a flier to the mayor.

[41] There is no doubt that she filmed from the time the scuffle broke out and there is no doubt that she was present with the first defendant. She did not, on any of the evidence, seek to dissuade him from his course of action (bearing in mind that I have to deal with this on the assumption that the alleged assaults occurred, and that the first defendant was legally responsible for them). It is relevant to note that the third defendant was filming, even bearing in mind the circumstances where she started to do so and the fact that she was there, together with the first defendant as part of the general protest (without suggesting there is anything wrong with protesting done in accordance with the law). These matters are such that it is not possible for the third defendant to meet the very high test required for a no case submission. It might well be that the more likely inference on some views of the filming is that it was not, in any way, aiding. However, that is the sort of matter that the jury should decide in all the circumstances of the case. I dismiss the application in that regard.