

MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Queensland Police Service v Roche* [2021] QMC 7

PARTIES: **QUEENSLAND POLICE SERVICE**

v

DARREN JAMES ROCHE

FILE NO/S: MAG-00002372/20

DIVISION: Magistrates Courts

PROCEEDING: Criminal Trial

ORIGINATING
COURT: Magistrates Court, Mackay

DELIVERED ON: 27 October 2021

DELIVERED AT: Mackay

HEARING DATE: 22 February 2021

MAGISTRATE: Acting Magistrate J M Aberdeen

ORDER: **Charge dismissed.**

CATCHWORDS: CRIMINAL LAW – Offences against the Person – Defences
- Assault occasioning bodily harm – Justification of force
used in preventing commission of a crime.

CRIMINAL LAW – Offences against the Person – Defences
- Assault occasioning bodily harm – Justification of force
used in preventing continuation or renewal of a breach of the
peace.

CRIMINAL LAW – Offences relating to Parental Rights and
Duties – Taking (attempting to take) child from possession
of parent against parent’s will.

CRIMINAL LAW – Offences against the Person – Use of
force – Requirement that force used be “reasonably
necessary” – Force used not excessive.

Criminal Code (Qld) ss. 260, 266, 283, 363

APPEARANCES: For Prosecution: Snr Const H Beaumont (police prosecutor)

For Defence: Defendant in person – not legally represented

QUEENSLAND POLICE SERVICE

v

DARREN JAMES ROCHE

DECISION

- [1] The Defendant, Mr Darren Roche, appears before the Court charged with one offence of assault occasioning bodily harm. The charge is in the following terms:

That on the 10th day of January 2020 at Mount Pleasant in the State of Queensland one Darren James ROCHE unlawfully assaulted one Krysten Renee PULLEN and thereby did her bodily harm

AND the offence is also a domestic violence offence

- [2] To this charge Mr Roche has entered a plea of “Not Guilty”. This matter came before me, and proceeded to trial on 22 February 2021. This is a criminal proceeding, and the Court must be satisfied beyond any reasonable doubt of the guilt of the Defendant upon this charge. If the Court is not so satisfied, the Defendant is entitled to an acquittal.
- [3] Mr Roche was not legally represented at his trial. As a result, I am alive to the possibility that if any matters of defence are disclosed by the evidence - although not argued by Mr Roche in his defence – it is my duty to assess any such matters against the standard of proof imposed upon the prosecution.
- [4] The evidence before me was of relatively narrow compass. The following witnesses were called by the prosecution:

Senior Constable Jason SMITH	Investigating Officer ¹
Krysten BUTCHER (PULLEN)	Victim, and Mr Roche's former partner ²
Andrew JUDAS	eye-witness ³
Leannette KANE	eye-witness ⁴
Senior Sergeant Tanya SPITERI	Police photographer ⁵

[5] For the defence, the following evidence was called:

Darren ROCHE	Defendant ⁶
Samantha ALLEY	Mr Roche's partner & eye-witness ⁷

[6] The following exhibits were tendered:

Exhibit 1	Body-worn camera footage
Exhibit 2	CCTV footage of incident
Exhibit 2.A	s.95 Certificate (re CCTV footage)
Exhibit 3	Photographs of victim (x 5)

The CCTV footage:

[7] This case was unusual insofar as the incident containing the actions the subject of the charge was captured, almost in its entirety, by a CCTV camera affixed to business premises very near to the location of the alleged assault. The footage is quite clear; indeed, unusually clear for commercial CCTV footage. I intend to describe this footage in detail in these reasons.

[8] The footage shows the car park and a shop-front area in the retail complex known as Northpoint. To the far left of the screen, one can see the right-hand end of "The

¹ Transcript pp 1-8 to 1-22.

² Transcript pp 1-22 to 1-37.

³ Transcript pp 1-39 to 1-41

⁴ Transcript pp 1-41 to 1-44.

⁵ Transcript pp 1-44 to 1-45.

⁶ Transcript pp 1-47 to 1-54.

⁷ Transcript pp 1-54 to 1-62.

Good Guys” store. The principal area captured by the CCTV consists of the shopfronts, and footpath outside the “Rebel” store, and the “Original Mattress Factory” (OMF). There is a row of cars parked outside these two shops. A small grey car is visible, slightly to the right of centre-screen, positioned between a white 4x4 and a black Twin-Cab. This small grey car is the car in which the Defendant, his two children, and the Defendant’s partner – Ms Samantha Alley – leave the area after the incident.

[9] The evidence indicated that the reddish car, parked in the second row back from the right-hand end of “The Good Guys” store was the victim’s – Ms Butcher’s – car.

The viewer of the footage should focus their attention upon the area extending from the doorway to the “Rebel” store, which lies just beyond the last of the cars parked outside the Rebel-OMF frontages.

[10] The total length of the CCTV footage is 9 mins 33 seconds. The period of importance, encompassing the subject incident, finishes at 3 mins 55 seconds, when the vehicle containing the Defendant, Ms Alley, and the children, reverses out of its parking space, and drives off.

[11] The principal persons of interest in the footage are –

- The Defendant Mr Roche – wearing blue jeans and a dark shirt;
- The victim Ms Butcher – wearing red board shorts, and a dark top; and
- Ms Alley – wearing a white (patterned) top, with a dark skirt.

[12] I have included in paragraph [51] below a summary of the various events depicted on the CCTV footage, together with a reference to the relevant time indicated on the footage.

[13] At trial, Mr Roche acknowledged that he had viewed the footage, and he agreed that it accurately portrayed what had occurred on the 10 January 2020.⁸

Background to the relationship:

[14] Mr Roche and Ms Butcher had previously been in a domestic relationship. They had together twin girls, who were aged nine (9) at the time of hearing.

[15] They separated when the twins were still infants, perhaps some 3 months old, and there had, since separation, been in force an Order of a Family Court. The Order

⁸ Transcript p 1-10, line 30.

current at the time of this incident, I was told, was based, broadly speaking, on a regime of shared custody on a largely 50/50 basis.⁹

The events of 10 January 2020:

[16] Ms Butcher gave evidence that the twins had been in the custody of Mr Roche for the week ending at 4:00pm that afternoon.¹⁰ The “change-over”, as I shall call it, was due to take place at 4:00pm that day. Both parents had agreed to meet at Rebel at 2:00pm¹¹, so that suitable school shoes, for the coming year, could be purchased for each of the twins.¹²

[17] Ms Butcher indicated that this was a task that she and Mr Roche had carried out before¹³; and it was their practice, she stated, that they would pay for half (of the shoes) each.

[18] The parties arrived at the Rebel store for the purpose of buying the shoes, and parked their respective vehicles. They then went into the Rebel store.

[19] At some point, while they were in the store, an argument arose between them. Ms Butcher gave evidence that:

“...I paid for my shoes first, and he didn’t want to pay for his shoes, and this is where it got heated, from this moment...”¹⁴

[20] Mr Roche then left the store.¹⁵ Ms Butcher left the store, with the twins, shortly afterwards.¹⁶

“...Darren [Roche] and his partner were outside. And this is where it sort of became heated, because I said to him, ‘Well this is – we now need to leave here and go and purchase and order the children’s school uniforms ... at the uniform shop. And Darren told me that he didn’t have any notice and didn’t

⁹ Transcript p 1-47, and 1-23 line 31. Neither the prosecution, nor Mr Roche, sought to provide to the Court a copy of the relevant order which was said to be in force on 10 January 2020. An appropriate copy of that Order could have been received pursuant to section Section 53 of the Evidence Act 1977. As a result, I can make but limited use of the assertions, by both parties, that the twins were to be in the custody of Mr Roche for the period ending at 4:00pm on the 10 January 2020, after which time they would be collected by Ms Butcher, and would then spend some time with her. The understanding of one or both parties, as to their respective rights under the Order, cannot be considered in any detail; but the information given to the Court serves as background to their actions on this day.

¹⁰ Transcript p 1-25 line 43.

¹¹ Exhibit 1, Part 1, at 3:30 (Body-worn footage).

¹² Transcript p 1-22 line 37. I believe I can take judicial notice of the fact that the 10 January 2020 fell within the Christmas/New Year school holiday period in Queensland.

¹³ Bearing in mind that they had been separated for a period in excess of 8 years.

¹⁴ Transcript p 1-23 line 1.

¹⁵ Exhibit 2 at 00:05 (CCTV).

¹⁶ Exhibit 2 at 00:56.

know that we were doing this today. ...And I kept saying, 'Well, we need to do it or the kids are going to have – not going to have any uniforms. We need to do this now'. And he came past me and shoulder [barged] me. We – we- our shoulders hit each other."¹⁷

Prosecutor: "And where exactly did that happen?"

A: "So that happened outside the front of the store, in front of the carpark...outside Rebel Sport... and he barged me with his shoulder and said 'Fuck off' ... because he didn't want to go and have to buy uniforms as well that day. ...And then it was a – it was a heated moment at that time, where he got cranky and wanted to just leave."

[21] Some perspective of time may be relevant here. Constable Smith, in his evidence, stated that he and his colleague were assigned to attend a disturbance at Rebel at 2:35pm.¹⁸

[22] Ms Butcher continued her evidence:¹⁹

"The children come into my care on that – that day at 4 o'clock. So I was sort of hoping that we'd go get uniforms, and then I would just keep the kids from that point on.

And then the kids were quite upset because of the way he was acting outside Rebel.

And then he wanted, obviously, the kids to get into the car and leave, so he was – he'd come – he came to me and took one of the twins and dragged them to his car. And they were screaming they didn't want to go; they were crying for me. And then he came to get the next one, again dragging them to the car. They were screaming. And I became distressed, because they were upset, he was angry, and I didn't want the children to get into the vehicle with him in that state. So I was telling them to, 'Run, Get out. No, come back to me. Don't go with him. He's going to do something silly. He's done this before'. The last time he was like this he tried...".

[23] Ms Butcher was stopped by the prosecutor at this point:²⁰

Prosecutor: "Don't worry about the last time... Let's focus on this instance".

A: "I didn't want – you know, there's been a recurrence and I didn't want anything bad to happen to the kids. ...so I tried going down to the vehicle and opening the car door. And he'd locked the car, so I couldn't get the kids out.

¹⁷ Transcript p 1-23 line 6 *et seq.*

¹⁸ Transcript p 1-8 line 44. I accept this as being the most accurate assessment of a time during this incident.

¹⁹ Transcript p 1-23, from line 31.

²⁰ Transcript p 1-24.

And that's when he came back around to me and started physic – verbally abusing me, telling me to leave. ... And then he started pushing me into the – into the ... chest, sort of onto the shoulder... pushing me away until I couldn't move back any further. And then the last push, I fell into the vehicle which was parked beside him, which was a four-wheel drive, and I leant over the car – the bonnet. And pretty much at that point, that's when the gentleman stepped in, and then it sort of just, yeah, dispersed.

Prosecutor: “And did you notice anything to yourself from the pushes or from – in your chest area?”

A: “Yeah. So straight away, I had felt that impact. ...it was sore ... And then later on, after we left, I went home and I had – I was all red on the chest ...from where he'd hit me. And I had, you know, just pain relief for that. That night, it started bruising.”

[24] The description of injury suffered by Ms Butcher is confirmed by Constable Smith who, within a couple of days after the 10 January, attended Ms Butcher's home, and saw “some redness and some slight bruising on her chest.”²¹

[25] Ms Butcher was undoubtedly distressed by the incident; and more than a year had elapsed before she was called upon to give evidence in this hearing. To the extent that her recollection departs from the sequence of events, as depicted in the CCTV (Exhibit 2), I place reliance upon the CCTV footage. It is in the nature of real evidence²², and, to my observation, is very clear footage. Naturally, it does not contain recordings of the statements made by the people involved in this incident. To that extent, the Court must rely upon the recollection of the various witnesses, notwithstanding the stress of the situation as it developed, on 10 January, and the delay in the provision of that recollection to the Court.

[26] Mr Roche was spoken to by investigating police, at his home, later in the afternoon of 10 January²³. The conversations were recorded, and from Exhibit 1, in chronological order, the files containing the conversations consist of:

Part 1 509 MB	14:03
Part 2 160 MB	04:37
Part 3 332 MB	09:42

[27] He confirmed that he was to meet with Ms Butcher at Rebel Sports at 2:00pm that afternoon. When the parents were in the Rebel shop together, Ms Butcher told him that the girls needed uniforms. Mr Roche told her that it would not be happening

²¹ Transcript p 1-13 line 7.

²² *R v Sitek* [1988] 2 Qd R 284, per Carter J at 286, citing *The Statute of Liberty* [1968] 2 All ER 195 at 196; and de Jersey J (as the Chief Justice then was) at 292 [20].

²³ Exhibit 1, Parts 1-3 (Body-worn footage).

that day. He asked Ms Butcher to let him know what the girls needed. Mr Roche paid for one pair of shoes, and left Ms Butcher and the twins to pay for the second pair. He then went outside, and waited with Ms Alley for the twins to come out with their mother.²⁴

[28] When she came out of Rebel, Ms Butcher went to where Mr Roche was waiting. She raised again the issue of needing uniforms for the twins. Mr Roche said that that was “when it all broke out”²⁵

[29] Mr Roche said that Ms Butcher was telling him that “he needed to do this, and he needed to do that”²⁶. Ms Butcher, he stated, then said: “I don’t feel the girls are safe with you”

at which point Ms Butcher grabbed Riley [one of the twins] out of his hand and “reefed her”²⁷. Ms Butcher started to walk away with the girls; he “grabbed her, restrained her, and told his partner [Ms Alley] to get the girls and put them in the car”²⁸:

“They [the twins] were in my care”.²⁹

“She kept going for my girls, I kept grabbing her hands, and I restrained her. ...didn’t hit her, didn’t bash her, didn’t do anything”³⁰

[30] Mr Roche was asked how he restrained her. He stated that he grabbed Ms Butcher by the hands. He was asked whether there was anything else? He stated:

“Pushing her”.³¹

He stated that he was “trying to get [Ms Butcher] away from me and my girls.”³²

[31] Later in the interview he stated:

“She was in my space”³³ and

“I didn’t push her hard enough to put her on her arse.”³⁴

²⁴ See Exhibit 2, at 00:05 to 00:56.

²⁵ Exhibit 1, Part 1, at 06:52.

²⁶ Exhibit 1, Part 1, at 05:00.

²⁷ *Ibid* at 05:05.

²⁸ *Ibid* at 05:20.

²⁹ *Ibid* at 05:24.

³⁰ *Ibid* at 05:28.

³¹ See Exhibit 1, Part 1, at 08:37 to 08:50.

³² *Ibid* at 12:10.

³³ Exhibit 1, Part 2, at 44:08.

³⁴ Exhibit 2, Part 2, at 45:00.

[32] The investigating officer sought advice, by way of telephone, from his supervisors, as to how he should proceed at this time. In due course, and based upon the statements of the witnesses, and the advice he had received, he formed the view that the force used was disproportionate to the occasion, and issued Mr Roche with a Police Protection Notice. When advised of this, Mr Roche stated, again, that Ms Butcher was “in his space”, and that he believed that, as she was now married to a police officer, he was being unfairly treated.

[33] Mr Roche also gave evidence in this Court at hearing. After some brief background information provided at the request of the Court, he was cross-examined by Senior Constable Beaumont, who appeared for the prosecution.

[34] It became apparent that Ms Butcher had called one of the twins while they were travelling to Rebel with their father and Ms Alley. Mr Roche was not part of that communication, but heard enough to understand that it was something about school uniforms. He was questioned about this:

Q: “You knew that the complainant Ms Butcher wanted to get uniforms that day as well?”³⁵

A: “Yes”.

Q: “Okay, so you’re leaving Rebel Sport, Mr Butcher has told you she wants to get the uniforms, or clothing, as well today?”

A: Well, I didn’t know any of that until I pretty much got inside, she was talking with the girls, not me.”

Q: “Hang on. Stop, Mr Butcher [*sic*]. You’ve just said that on the way there you knew about it?”

A: “I knew it was about the uniforms but the conversation wasn’t between me and Ms Butcher, it was between her and the – my daughter.”

Q: “No, but you knew about it on the way there?”

A: “I knew something about it.”

Q: “Okay, and then Ms Butcher has told you about it at the shop?”

A: “She’s approached me when I walked into the shop, so talking about shoes, trying these ones on, and that they needed uniforms. I told her that we couldn’t do it today because my two-year old stepdaughter, she was in hypo, she was a type one diabetic, and we had to do what we had to do there and go home and address it.”

³⁵ From Transcript p 1-49 at line 29.

Q: "Okay, So is that your daughter with your current partner?"

A: "Stepdaughter."

Q: "So your stepdaughter is the type one diabetic?"

A: "Yep."

Q: "Type one did you say."

A: "Yep."

Q: "Yes. Okay. So Ms Butcher needed to get the clothes for the girls, you've got a stepdaughter who is a diabetic, surely you two have – you want to raise your kids without confrontation and without trouble, is that correct?"

A: "Yes."

Q: "Okay. So we've got an hour before changeover in which Ms Butcher is prepared to take the kids shopping and you're angry about that?"

A: "Didn't say I was angry. But there is a court order in place and I did try and meet up with her at 10:30, she changed that agreement and we had to go back later, so, no."

Q: "But, surely, a reasonable parent would be okay... (**A:** "Sorry") ...with the mother of their children taking them to get clothes for school without him?"

A: It could have been done any other day. If she needed clothes in her care, that's her issue. I've still got a lot of clothes that fit them."

Q: "Okay. So you think – just to confirm, Mr Butcher [*sic*], you think it's her responsibility to get the clothes when they're with her and it's not your responsibility as a father?"

A: "The clothes I've got at home, the uniforms, still fit them."

Q: "Right."

A: "They tell her they needed to upgrade the clothes and..."

Q: "Okay. So you were angry that Ms Butcher needed to spend more money on clothes?"

A: "No, I wasn't angry. I try to get away from the anger. She's – she's the one that become angry while I was in there, because she's asking for money and I told her to produce the receipts. And we have this argument every year about it, and the agreement is that she emails the receipts and then I put the money directly in her bank account."

Q: "So you needed to get away from the situation because of the child who's a diabetic, or...?"

A: "Just to get away from her in general."

Q: "But in your evidence – in your record of interview, you said you needed to get away because you had the real estate coming?"

A: "Well, that too."

Q: "Okay. So we're adding to it. Okay. So you say that she would normally produce receipts?"

A: "Yep."

Q: "Correct. You said that in your record of interview?"

A: "Yep."

Q: "And that you would then pay her?"

A: "Yep."

Q: "What would be wrong with the complainant buying the clothes at 3 o'clock and then you just paying her later?"

A: "She was talking about receipts filed on another day, that I hadn't paid."

Q: "Okay."

A: "So until I get them receipts I don't hand over any money."

Q: "So your anger in this situation is because the complainant's trying to take the kids early; is that right?"

A: "No. My anger become involved when she grabbed my daughter, threatened custody against me and tried to take my daughters away."

Q: "Okay."

A: “She’s saying – screaming out that they’re not safe with me, I’m mental. Her partner’s the better partner. She don’t want me in the girls’ lives. I’ve tried walking away. She’s continued to follow in the opposite direction to what her car was parked in, causing an argument.”

Q: “So this is what your evidence is now?”

A: “Yep.”

Q: “That she was saying those words? But when Constable Smith interviewed you on the day of the offence, you never made any mention of those words whatsoever that she has allegedly said to you at the time?”

A: “Yeah.”

Q: “All right?”

A: “I had other things on my mind that day.”

[35] I would interpose at this point in the cross-examination of Mr Roche. As indicated above, Mr Roche told Constable Smith, on the afternoon of the 10 January, that Ms Butcher said to him “I don’t feel the girls are safe with you”.³⁶ Following that statement, Ms Butcher, he said, took Riley’s hand, out of his own hand, and “reefed her.”

[36] The witnesses who were in the vicinity of the incident – Mr Judas and Ms Kane – gave relatively brief evidence of what they had seen and heard on the afternoon of 10 January. Both stated that they had heard yelling and screaming, which had attracted their attention. Mr Judas walked out of Supercheap [Auto] in Northpoint Retail, and observed a man yelling at a lady “across the way”.³⁷ He was able to state that he saw the man (whom he identified at the Bar table as Mr Roche) yelling at and pushing the lady, and yelling at some kids. He also heard the lady scream and yell.³⁸ The male, he said, grabbed the lady’s shirt, and had his hands towards her neck and was pushing – he pushed her 2 or 3 times - her. He sounded very aggressive.³⁹ The lady sounded distraught.⁴⁰ He thought it was about 2:15pm⁴¹. He also heard Mr Roche yelling at the children to get into the car.⁴²

[37] Ms Kane stated, that outside Rebel and the OMF, but closer to the OMF⁴³:

³⁶ See paragraph [29].

³⁷ Transcript p 1-39 line 22.

³⁸ *Ibid* lines 24-29.

³⁹ *Ibid* lines 31 and 39-47.

⁴⁰ *Ibid* Transcript p 1-40 line 11.

⁴¹ *Ibid* line 21.

⁴² Transcript p 1-41 line 1.

⁴³ Transcript p 1-42 lines 4 to 17.

"I could hear the screaming coming from towards the front of the Rebel building in front of the Original Mattress Factory. I could hear and see a gentleman and a lady having a confrontation. They were walking towards each other yelling. I could hear a gentleman saying, "Just get in the car", several times. As the lady and gentleman got closer the arguing continued to which I saw a gentleman push a lady towards the wall. At this stage I started to walk towards that, as I was a distance away. As I was walking towards there I did see people walk towards there – started running towards there and as I went across my view was obstructed by a vehicle. As I got there I could see the two arguing. I did see the gentleman push the lady again in the upper chest area. I asked the lady – the employee in the Original Mattress Factory could she call the police, please. There was another lady who was saying "Just get in the car", to which the gentleman and the other lady got into a small silver car and as they were reversing the other lady said words to the effect that "Just give me back my kids. Can't you see how distressed they are", and that was when the car left the carpark."

[38] It is clear to me that Mr Judas and Ms Kane saw the latter part of the confrontation between Mr Roche and Ms Butcher. Ms Kane's description of Mr Roche (who she identified at the Bar table) pushing the lady "towards the wall" would indicate this probably refers to the latter part of the incident, outside the OMF. Mr Judas stated he saw Mr Roche push the lady once towards the car, once along the footpath, and once towards the wall at Rebel Sports.

[39] The cross-examination of Mr Roche continued as follows:⁴⁴

Q: "I put it to you, Mr Roche, that you were frustrated with the complainant because she wanted to take the girls shopping at that time, and you had handover at 4?"

A: "Yep".

Q: "So you shoulder barged her?"

A: "Didn't shoulder barge her".

Q: "I put it to you, you pushed her in the chest, outside Rebel Sport, at least once?"

A: "Several times, yes".

Q: "Several times outside Rebel Sport?"

A: "Yep".

⁴⁴ Transcript p 1-51 line 28 *et seq.*

Q: The girls are gone away at that point. The girls are then with your partner, Samantha. They're going into the car, and then you come back and you push her a few more times, outside the mattress shop. Correct?

A: "Because she's trying to approach them with the car".

Q: "But the doors are locked and you still push her?"⁴⁵

A: "The video shows it".

- [40] Mr Roche was taken through the CCTV footage, and comment was sought at a number of points during that process.
- [41] Ms Alley was called for the defence. Ms Alley was at the time Mr Roche's partner, and was in an advanced state of pregnancy with their child. Ms Alley gave evidence of being present, in the car, when the twins received a phone call from Ms Butcher, which had something to do with school uniforms. She was also able to say that Mr Roche had told the girls that they would not be able to shop for uniform that day.⁴⁶
- [42] Ms Alley stated that she went into Rebel with Mr Roche and the twins. They met with Ms Butcher. Ms Butcher became angry when told that Mr Roche would not be shopping for uniforms that day. Ms Butcher wanted Mr Roche to pay for both pairs of shoes, as Mr Butcher said she had paid for all of the schoolbooks.⁴⁷ Mr Roche asked Ms Butcher for copies of the receipts from the school book purchase; Ms Butcher did not provide a copy to him. Mr Roche then went up to the counter, and paid for one pair of shoes. He left the shoes on the counter, and then walked out of Rebel with Ms Alley, and went outside.
- [43] When Ms Butcher left the Rebel store, Ms Alley stated that she came to where they were waiting and "started asking about going back for the uniforms"⁴⁸. Ms Butcher was told that that was not going to happen. Ms Butcher then asked Mr Roche "what was going on, and that she was – didn't feel safe with the girls being safe with us"⁴⁹.
- [44] Ms Alley then said that Mr Roche got into a heated argument with Ms Butcher, when [Ms Butcher] was "in his face"⁵⁰:

"[Ms Butcher] was standing there next to me, trying to get one of the girls, saying that the twins weren't safe, and I just kept on reassuring her that the twins were safe in our care and that we would never do anything to hurt them."

⁴⁵ This proposition put to Mr Roche was incorrect. The rear passenger-side door of the car, where the twins were seated, was in fact open until after any pushing by Mr Roche had ended: see Exhibit 2 at 03:21.

⁴⁶ Transcript p 1-55 line 26.

⁴⁷ *Ibid* at line 35.

⁴⁸ *Ibid* line 45.

⁴⁹ Transcript p 1-56 line 1.

⁵⁰ *Ibid* line 7.

[45] She stated that she remembered Mr Roche pushing Ms Butcher. She also confirmed that her daughter [Mr Roche's step-daughter] was a "newly-diagnosed type 1 diabetic" and that "our phone had just alarmed us that she was in hypo, so we needed to go treat her"⁵¹.

[46] Following her evidence-in-chief, Ms Alley was asked for some clarification by the Court, as to what had happened after Ms Butcher had said that she was scared for the twins' lives. She stated:

"Darren [Mr Roche] said that we were leaving, asked for me to help get the kids into the car. So we've – he's gone to walk away, and she was still – started yelling out that we were kidnapping the kids and that she was scared for them and telling girls to run. She grabbed one of the girl's arms and Darren has disconnected their arms, and we kept on trying to move down towards our car. She kept on following, and Darren had to push her back to stop her from coming for us. ... We were just trying to walk away and get in the car and leave. ...

[47] Ms Alley was asked by the Court to continue from there⁵²:

"She has tried to get one of the girls again, and that's when one of them was standing there – was sitting on the ground with me, and she was telling me that they weren't safe, and I've explained to her that they were safe in our care. We wouldn't do anything to them, and that's when Darren come back up with the other twin, and we've started to try and walk away again, and she just kept on following us to our car."

[48] Ms Alley was then cross-examined by the prosecutor. She was asked why she had not returned calls to the investigating officer, so that he could get a statement from her. She advised that she had other things to attend to at that time, and agreed that the officer had made contact to her phone "probably about two...two" occasions:

"...by the time I had realized, they had already arrested [Mr Roche] and they didn't – he was at my front door and he didn't ask me to go back in for a statement."⁵³

[49] Ms Alley agreed she had read a copy of the prosecution brief, that she had previously watched the CCTV, and that she had discussed the incident with Mr Roche.

[50] She agreed that she had seen Mr Roche pushing Ms Butcher at the time when the twins and her own daughter were already in the grey car. She said:

⁵¹ *Ibid* line 18.

⁵² Transcript p 1-59 line 3.

⁵³ *Ibid* at line 35.

“...she [Ms Butcher] was coming towards us. I’ve gone over to them and I was yelling at them both to stop and think about the kids.”⁵⁴

Summary of the CCTV footage – Exhibit 2:

[51] I intend to note, as far as I am able to do so, what I perceive to be the most significant parts of the CCTV footage – Exhibit 2 – and make such observations as I believe are relevant to the evidence of the various witnesses:

Recorded time	Event/s depicted
00:05	Defendant and Ms Alley exit the Rebel store; walk up footpath (moving closer to camera), stop, and stand in front of (first) large window into Rebel; Ms Alley picks up a small child;
00:56	Ms Butcher (wearing red board shorts) exits Rebel with the twins (one twin in a red top, the other in a darker top), walks up footpath towards Defendant and Ms Alley;
01:13	The group comes together near the large window; there may be some conversation involving the parties [this might coincide with the discussion where Ms Butcher raises with Mr Roche the need to buy the twins’ uniforms that day: see evidence of Ms Butcher]
01:20	Mr Roche leaves group and commences to walk towards camera; walks about 2-3 metres, then stops and turns to face Ms Butcher; Mr Roche walks back towards her; he stops in front of her; there is further conversation between them; Ms Alley, still holding her child, stands against the wall between them; Mr Roche turns and walks away again (01:30)
01:33	Ms Butcher starts to walk after him; Mr Roche stops, turns, and walks to Ms Butcher again; some apparent conversation. They are standing facing each other, perhaps 1.5 to 2 m apart; Ms Alley is standing near them;
01:36	Mr Roche walks past Ms Butcher, who turns slightly to her left; it is not possible to identify any contact, but is impossible to say that there was none;
01:37	Mr Roche walks to one of the twins; appears to take the child by the hand; Ms Butcher immediately moves closer to Mr Roche; there still appears to be communication between them; Ms Butcher has her back to the camera, and is facing Mr Roche;
01:41	Mr Roche and Ms Butcher are very close together; it is not possible to see any contact; there is some movement of the parents; the twin whose hand Mr Roche appeared to have taken, appears to Mr Roche’s left; the twin appears to move forward a little, then back, then forward again (01:44); Mr Roche moves back a step or two, and Ms Butcher seems to go with him; Mr Roche appears to extend his left arm, and appears to push Ms Butcher back a short distance (incident #1); Ms Butcher bends over and appears to pick something up (01:52);

⁵⁴ Transcript p 1-61 line 2.

01:49	Mr Roche and Ms Butcher are face-to-face in close proximity to each other; Mr Roche takes one or two steps forward, and Ms Butcher takes steps backwards; Mr Roche's left arm, and Ms Butcher's right arm, appear close together; not able to ascertain if there is any contact at this point (01:51); Mr Roche's right hand appears to move forward quickly, but it cannot be seen if there is contact, and if so, where; Mr Roche, possibly with both hands, pushes Ms Butcher back again so that she is pushed against the bonnet of a black 4x4 (incident #2); When he does so, the twin whose hand he appeared to take earlier, appears standing back against the wall of Rebel, with no-one holding her hand (01:55); Ms Alley remains standing during this period, still holding a child, and close to Mr Roche and Ms Butcher;
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01:52	The twin in the red top walks away from where the adults are standing, and sits down in front of the second large window into Rebel, not far from Ms Alley.
01:57	Mr Roche remains standing near the front of the parked vehicle; Ms Butcher approaches Mr Roche again, and Mr Roche pushes her backwards again; she is moved backwards, and contacts the parked car again (incident #3); Ms Alley moves away from the Rebel wall, and reaches out, appearing to place her hand in the vicinity of Mr Roche's shoulder;
02:00	Mr Roche walks over to where the twin is standing against Rebel's wall, and takes her by the hand again; as he is doing so, Ms Butcher walks to near where Ms Alley is standing, and leans over and takes the other twin (with the red top) by the hand (02:02);
02:07	Mr Roche walks past where Ms Butcher is standing, with one of the twins (in the darker top); he releases the child's hand, and the child walks further up the footpath towards the where the small grey car is parked; Mr Roche turns and appears to close with Ms Butcher, who is holding the twin in the red top by the hand. Ms Butcher (holding a red parcel) is pushed back again until she makes contact with the parked car (incident #4); this results in the twin with the red top being separated from Ms Butcher.
02:15	Twin in the darker top reaches the front of the grey car, and stands there;
02:16	Ms Butcher drops a red-coloured parcel; she bends and picks it up; she then bends again, possibly to pick up another item; at this time the twin in the red top starts running up the footpath in the direction of the small grey car; she is followed by Mr Roche, who in turn is followed by Ms Alley, who is carrying a small child; both are walking briskly towards the small grey car;
02:26	Ms Butcher, who has just picked up her parcels outside Rebel, also commences walking briskly up towards the grey car; at this point, the twin in the darker top is standing at the rear door of the grey car, with the other twin standing with Ms Alley and Mr Roche near the front of the grey car;
02:27	The twin in the darker top opens the rear left door of the grey car, and gets in; Mr Roche walks from the footpath down beside the grey car, the left rear door is still open; Ms Alley is at the front of the car; Ms Butcher takes a second child (not a twin) by the hand, and walks up to near where the grey car is parked

02:29	Mr Roche walks back to the footpath, and looks towards Ms Butcher, who is walking up towards the grey car; he walks along the footpath towards Ms Butcher, who is walking towards him; He extends his right arm and points away from the location of the grey car; Ms Butcher continues to walk towards Mr Roche, with a small child following a few metres behind her;
02:33	Mr Roche and Ms Butcher meet up at the point where the Rebel and OMF stores meet; Mr Roche pushes Ms Butcher backwards twice in quick succession (incidents #5 and #6), and then turns and walks a few metres back towards the grey car; after being pushed, Ms Butcher turns and walks after Mr Roche; the rear left door of the grey car is still open;
02:37	Mr Roche meets Ms Butcher, who is still walking towards the grey car; he pushes her backwards twice in quick succession (incidents #7 and #8);
02:40	Second twin (with the red top) enters grey car by left rear door. Car door remains open (until closed by Mr Roche at 03:21). Ms Alley appears to be placing a child into the car at the right rear door. Car's left rear door still open.
02:43	Ms Butcher walks towards Mr Roche, and Mr Roche pushes her backwards; she moves back a little (incident #9); he pushes her again (incident #10) and she is pushed back; she comes back to face him; he then pushes her a third time
	(incident #11) directly in front of a large window, with a large painted circle in the centre, at the front of the OMF Store
02:45	Mr Roche pushes Ms Butcher three further times, in quick succession, in front of that same window (incidents #12, #13, and #14). He then pushes her and appears to close with her, holding her against the glass window for about 8 seconds (incident #15). Car's rear left door is still open.
02:52	Ms Alley, who is at the car's rear door, looks towards the shop, closes the car door, and hurries towards Mr Roche and Ms Butcher. She reaches Mr Roche and appears to put her hand on his shoulder. Three other people, two of whom were running, move towards the location where Mr Roche and Ms Butcher are standing.
03:04	Mr Roche moves back from Ms Butcher, and Ms Alley returns to the grey car. Mr Roche then pushes Ms Butcher once more (incident #16)
03:12	A bystander goes to Ms Butcher, and Mr Roche walks to the front passenger door of the grey car
03:16	There may be some short conversation between Mr Roche and the bystander, with brief gesturing by both, while Mr Roche stands at the passenger side of the grey car.
03:21	Mr Roche closes the rear left door of the grey car. [it is also possible he locks it at this point]
03:29	Mr Roche enters the front passenger side of the car, and closes the door; Ms Alley enters the driver's door of the grey car;
03:30	Ms Butcher leaves the bystander, and walks along the passenger side of the grey car. Mr Roche opens the door again, and gets out of the passenger side of the car, as Ms Butcher reaches the rear left side of the car.

03:33	Ms Butcher extends her right hand towards the back door of the car, and Mr Roche takes hold of Ms Butcher's right wrist or lower forearm, and pushes it away (incident #17); He releases her arm after about 2-3 seconds, and gets back into the car.
03:46	The small grey car commences to reverse, while Ms Butcher is still standing beside it. She appears to be attempting to interact with the occupant of the left rear seat. The car reverses out of the parking spot, and departs the frame (04:00)

Consideration:

- [52] The incident which resulted in the present charge was of short duration. From the time Ms Butcher and the twins walked out of Rebel Sports, until the time Ms Alley commencing reversing the car containing herself, Mr Roche, and the children, out of its parking space, was a little under 3 minutes. That entire incident, as I indicated at the outset, was caught on CCTV footage.
- [53] I have no doubt whatsoever that the event was a highly-charged and emotional incident for all concerned; especially, I believe, for the children who were exposed to it.
- [54] The prosecutor in this matter elicited statements of opinion from the eye-witnesses, as to who was the aggressor in this incident. The eye-witnesses who were called saw parts of the interaction between Ms Butcher, and Mr Roche. Ms Kane heard yelling and screaming, and saw that part of the incident where Mr Roche and Ms Butcher were in front of the OMF. This was the latter part of the incident. The only conversation she could recall was a male voice saying "Just get in the car"; a female voice (another lady – possibly Ms Alley?) saying "Just get in the car"; and Ms Butcher, while the small grey car was reversing from its parking space, saying "Just give me back my kids; can't you see how distressed they are".
- [55] Mr Judas first saw the incident when the parties were "on the footpath near the Rebel Sporting complex" ... "about 20 or 30 metres down from the entrance" to Rebel Sport. He recalled hearing Mr Roche "yelling at the kids to get in the car."⁵⁵
- [56] I don't find statements as to who the eye-witnesses thought was the aggressor as being of any real assistance to me, and I don't place any real weight upon them. I have the best evidence available in the form of the CCTV footage, and it is from that, taken with the evidence of *all* the witnesses, as to what was said, and why certain things were done, that I will form any conclusions concerning the mental state of the either of the people involved in the altercation.
- [57] Similarly with any mention, by either Mr Roche or Ms Butcher, of matters which could be described as incidents which had allegedly occurred at other times during their post-separation relationship. I am concerned in this case with one question,

⁵⁵ Transcript p 1-41 line 1.

and one question only – namely, am I satisfied, beyond all reasonable doubt, as to the guilt of Mr Roche of the charge the subject of this hearing.

- [58] During her submissions, Senior Constable Beaumont adverted to the defence of provocation in the context of this incident. She submitted that one reason why the defence of provocation would not be applicable in this case was that, assuming that Ms Butcher breached an order of the Family Court, that would not be a “wrongful act or insult” within the meaning of section 268 of the *Criminal Code*⁵⁶. I have some difficulty in accepting the prosecutor’s submission that a breach of an order of a court of record would not be capable of constituting a “wrongful act or omission” within the terms of section 268.
- [59] With the exception of this part of her submission, the prosecutor passed over the issue of an alleged court order with no further comment. It is my view that the potential relevance of an order of a Court cannot be so lightly dismissed.
- [60] There were numerous references, in evidence⁵⁷, to this order, and to at least one aspect of what were said to be its terms, namely, that the twins were in Mr Roche’s care, under the Order, until 4:00pm on the 10 January; at which point there would be a change-over, and the twins would then be in the care of Ms Butcher. This proposition was clearly accepted by both Ms Butcher and Mr Roche, and – the absence of contrary cross-examination would indicate – was not contrary to the prosecutor’s instructions.⁵⁸ Mr Roche was not challenged at any time as to his statements that an Order was in place, and that he was entitled, under the Order, to the care of the twins until 4:00pm that day.
- [61] Contrary to the position seemingly taken by the prosecution, I do not perceive the existence of this Order to be irrelevant to the determination of this matter. Although neither party tendered a copy of this Order⁵⁹, it is clear to me that there was *some*

⁵⁶ Citing *R v Stevens* [1989] 2 Qd R 386. I do not think *Stevens* supports this contention; rather, I understand it as supporting the contrary position. In delivering judgment in that case Mr Justice Demack (with whom Kelly SPJ and Kneipp J agreed) said (at 391 line 41): “In my opinion ... the word ‘wrongful’ should be construed to embrace matters which are unlawful under the criminal law **and matters which involve the infringement of some right, whether it is provided by some law or established by some court order**” (emphasis added); conduct in breach of a court order is again noticed, at 392 line 35. In *R v Rahman* (1985) *The Times*, 5 June, Lord Lane CJ, for the Court of Appeal, in a case involving an offence of false imprisonment of a child by its parent, observed by way of *obiter*: “There are many ways in which the prosecution might prove unlawfulness. The existence of a court order might be one way, by showing that parental control had by order been given to someone other than the parent, and the detention by the parent was contrary to that order. In this case there was no such order.”

⁵⁷ See *eg* Transcript pp 1-25 lines 1 *et seq* (evidence of Ms Butcher); 1-47 line 25 (evidence of Mr Roche); 1-48 line 27 *et seq* (xxn of Mr Roche); 1-50 line 15 (xxn of Mr Roche).

⁵⁸ Note also Transcript p 1-66 line 11, where the prosecutor appeared to concede the custody order may have been breached. It should be clear that, in this proceeding, I am not concerned with whether or not there has been a breach of the Order, but only with the relative positions as pertains to custody of the twins.

⁵⁹ As an unrepresented litigant, I would not have expected Mr Roche to have been aware of the desirability that a copy of any such order should be before this Court.

Order pertaining to respective custody in place and, relevantly, on the day of the incident.⁶⁰ I intend to approach consideration of the evidence on that basis.

- [62] The question of “reasonableness” of the force used by Mr Roche is a question of fact, for the tribunal of fact – in this Court, in a summary proceeding, it is my function to assess the degree of force used, in the light of *all* of the circumstances. It is not permissible to look only at part of what took place, *eg* outside the Original Mattress Factory, and then to base a conclusion on that part of the incident alone.

Findings of fact:

- [63] I make the following findings of fact based upon (i) the statements by the parties and witnesses to the event, and (ii) by reference to the CCTV footage.
- [64] Mr Roche and Ms Butcher had previously been in a personal relationship. That relationship ended at the time their twin girls were about three months old. Since that time, they have been separated, and the issue of custody of the twins has been governed by an order made under the *Family Law Act 1975* (Cwth).
- [65] At about 2:00pm on the 10 January 2020, Mr Roche and Ms Butcher, by previous arrangement, met at the Northpoint Retail Centre, North Mackay.
- [66] The purpose of meeting there had originally been to purchase school shoes for each of the twins, for the coming school year.
- [67] As Mr Roche, Ms Alley and the twins were travelling to Northpoint, Ms Butcher telephoned one of the twins, and told her that after they had bought the shoes, they were going to shop for new school uniforms for both girls. This further intended purchase had not previously been discussed between Mr Roche and Ms Butcher.
- [68] Mr Roche, Ms Butcher, Ms Alley, and the twins, met up in the Rebel store shortly after 2:00pm, and shoes were bought for each of the twins. There was disagreement between Mr Roche and Ms Butcher, while they were in Rebel, as to who was going to pay for the shoes, in light of the fact that Ms Butcher had, she said, paid for all the school books the twins would require. Mr Butcher required receipts for the books to be provided. Ms Butcher raised the issue of going shopping for new uniforms for the twins after they had purchased the shoes. Mr Roche advised Ms Butcher that the shopping for shoes was not going to happen that day. I accept that this conversation became somewhat heated. Mr Roche paid for one pair of shoes and, with Ms Alley, left the store. They stood outside Rebel, a few metres along the footpath from the entrance, and waited for Ms Butcher to finish in the store, and bring the twins out. I

⁶⁰ As the litigants involved in any such Order, Ms Butcher and Mr Roche may well have been present in Court when the Order was made.

find that both Ms Butcher and Mr Roche were somewhat agitated as a result of the “uniform” discussion inside.

- [69] After a short time, Ms Butcher and the twins came out of Rebel, and walked up to where Mr Roche and Ms Alley were waiting⁶¹.
- [70] The small group stood outside Rebel for a short time, and it is reasonably clear that conversation was passing between, at least, Ms Butcher and Mr Roche. I find this was conversation about the necessity to take the twins shopping for new school uniforms. I find that the situation as between Ms Butcher and Mr Roche remained tense, and probably increased a little in intensity: Ms Butcher told Mr Roche that the twins needed their new uniforms at that time, while Mr Roche told Ms Butcher that he had not been given any notice that uniform-shopping was to occur that afternoon; and, in effect, that it wasn’t going to happen that afternoon.
- [71] Mr Roche then commenced to walk away from the group, walking in the direction of the OMF store, outside which his car was parked⁶².
- [72] He walked about 3 metres and stopped, turning around to face Ms Butcher. He walked back closer to Ms Butcher. There was a further short conversation, and Mr Roche then turned around again, and commenced to walk in the direction of his car. He walked about 2 metres and stopped, and Ms Butcher walked up to him.⁶³ There is clearly more said at this time.
- [73] At 01:36, Mr Roche, still facing Ms Butcher, walks forward quite briskly. He passes alongside Ms Butcher, and I accept there was some contact – probably in the area of the shoulders – between them. There is no indication, in the way that Ms Butcher moved, that she was subjected to substantial force. I would not describe what appears, on the CCTV, as a “shoulder charge”; but I accept Ms Butcher’s statement that “our shoulders hit each other”. I accept Mr Roche may have told Ms Butcher to “fuck off”.
- [74] To this point, Mr Roche had twice turned to walk away from Ms Butcher, on each occasion commencing to walk towards his car. This movement, however, being forward, and striking Ms Butcher’s shoulder with his own as he went past her, was different to what he previously done.
- [75] I accept the evidence of Ms Alley as to what had happened at this point. She was standing very close to both parents, and in a position to hear what was being said by both parties. She stated in her evidence that Ms Butcher, after Mr Roche had said that he was not going to buy the twins’ uniforms that afternoon, asked Mr Roche “what is going on”, and that she [Ms Butcher] said that she didn’t feel safe with the girls being with Mr Roche and Ms Alley.

⁶¹ At about 01:10, Exhibit 2.

⁶² 01:18, *ibid*.

⁶³ Both parents were facing each other, side on to the CCTV camera, perhaps a metre apart: 01:35.

- [76] I find it was that statement by Ms Butcher, *ie* that the children were not safe with him, which caused Mr Roche to walk past Ms Butcher as he did. He walked directly to where the twins were standing together; he bends forward a little, and appears to take one of the twins by the hand. As he did that, Ms Butcher took a step or two back towards Mr Roche.
- [77] Precisely what happens at that point between Mr Roche and Ms Butcher is difficult to make out. Ms Butcher has her back to the camera, while Mr Roche is standing in front of her; but she is much of the time between the camera and Mr Roche.
- [78] Ms Butcher and Mr Roche are close together, face to face, and are moving – “to’ing and fro’ing” – is perhaps the best description I can give. The twin in the darker top appears to move out from the parents, and then back in, and then out again. What is happening cannot be seen behind Ms Butcher. In his recorded conversation with the police later that day, when asked about what had happened, Mr Roche told police⁶⁴ Ms Butcher said to him “I don’t feel the girls are safe with you and [she] grabbed Riley [one of the twins] out of my hand, and reefed her”.
- [79] He continued, “[she] started to walk away with the girls, I grabbed her, restrained her, and told my partner to get the girls and put them in the car”⁶⁵ ...”They were in my care”⁶⁶.
- [80] Ms Butcher’s evidence on this point, which I restate at this point, was:
“...he wanted, obviously, the kids to get into the car and leave, so he was – he’d come – he came to me and took one of the twins and dragged them to his car. And they were screaming they didn’t want to go; they were crying for me. And then he came to get the next one, again dragging them to the car. They were screaming. And I became distressed...”
- [81] This interchange lasts for a little over 20 seconds. I find that Mr Roche was holding one of the twins by the hand. Ms Butcher confronted him, and may, at that point, have said that she did not believe the children were safe with him⁶⁷. Ms Butcher has pulled the twin out of Mr Roche’s hand. This has occurred when the twin can be seen, moving backwards and forwards, next to both parents. Both twins appear to have been involved, to some extent, in what was happening. I find that both parents, at some times, have hold of the twins, and that there is a struggle, between the parents, over what can only be described as physical “possession” of the twin.
- [82] At about 01:49, Mr Roche pushes Ms Butcher back; the twin in the red top appears to pop out from the struggle, walks over to the wall of Rebel, and sits on the sill at the bottom of a large window. At this time, the other twin can also be seen, standing

⁶⁴ Exhibit 1, at about 05:05.

⁶⁵ *Ibid* at 05:20.

⁶⁶ *Ibid* at 05:24.

⁶⁷ I have found that a statement to similar effect was made shortly before this one. It seems clear, from Ms Alley’s evidence, that statements to this effect were made more than once.

against the wall of Rebel, perhaps 5 metres away from the twin in red. Ms Butcher, after being pushed back, comes forward to Mr Roche, who pushes her back against the bonnet of a black SUV parked front-in to the footpath. Ms Butcher again comes forward to Mr Roche, who again pushes her back against the black SUV. Ms Butcher comes forward again, and Mr Roche walks to the twin standing against the wall of Rebel, takes her by the hand, leads her up the footpath for a few metres, at which point she walks up the footpath to where her father's car is parked, and stands at the front of his car.

- [83] As Mr Roche was walking down to this twin, Ms Butcher has walked over to the twin in the red top, who was sitting near Ms Alley, and when she reaches the twin, she extends her hand, which her daughter takes. She then commences to walk in the opposite direction to where Mr Roche's car is parked. As Mr Roche lets go of his other daughter's hand, and she walks up towards his car, he intercepts Ms Butcher who has their second daughter by the hand. Mr Roche separates Ms Butcher from the twin with red top, and then pushes Ms Butcher back again to the bonnet of the black SUV. Mr Roche, Ms Alley, and the twin in the red top then all walk quickly towards their vehicle. When they arrive at their car, Mr Roche goes to the front passenger door, the twin in the darker top goes to the rear passenger door, and Ms Alley, holding her young child, walks to the driver's door.
- [84] As Mr Roche and Ms Alley were arriving at their car, Ms Butcher was picking up a parcel which she had dropped when she was pushed on the last occasion by Mr Roche, and she commences to walk towards Mr Roche's car. Mr Roche sees one of the twins into the back of the car, and then turns and sees Ms Butcher walking towards them. He walks from the car, and walks down to meet Ms Butcher. Just before he reaches her, he points in the opposite direction to her travel, and then, when they meet, he pushes Ms Butcher back.
- [85] He turns and walks back towards his car; and Ms Butcher immediately follows him. The rear door of the car, with one twin inside, is still open. The twin in the red top is standing at the front of their car; she then walks around to the back passenger side, and enters the back seat. Ms Alley is engaged in placing her own infant into the driver's side of the back seat. When he gets to Ms Butcher, Mr Roche pushes her back three times. On each occasion, she comes back immediately to face him. She then walks up the footpath a further few metres, and turns towards Mr Roche's car. Mr Roche is standing in front of her, and he pushes her back against the glass window of OMF. She moves forward, and he pushes her back. This happens four times. On the last occasion, he holds Ms Butcher against the glass wall for about 8 seconds. Ms Alley has left the car, and come forward. She arrives and appears to place her hand on Mr Roche's shoulder.
- [86] Three members of the public walk over to where Mr Roche and Ms Butcher are standing. Two other members also appear to be on their way.

[87] Mr Roche and Ms Butcher separate. Mr Roche walks to the passenger side front door of his car. Ms Butcher and a member of the public are standing on the edge of the footpath, and Mr Roche is beside his car. The rear door of Mr Roche's car is still open. Mr Roche moves to the back door, and Ms Butcher advances towards him. Mr Roche closes the back door, and goes to the passenger front door. Ms Butcher goes back to the footpath.

[88] I make the following findings –

- (a) After Mr Roche has refused to go uniform-shopping, she has stated to Mr Roche that she did not believe the twins were safe with him;
- (b) Mr Roche has immediately walked to where the twins were standing, has taken one by the hand, and turned to walk to his car; Ms Butcher stated that he was cranky, and angry. I accept that as broadly accurate;
- (c) Ms Butcher has stood in front of him, and the two of them have become involved in a struggle over the twins – Ms Butcher trying to gain possession of the twins, and Mr Roche trying to prevent that. In the course of this, both twins were involved in the struggle to the extent that they were the subject of it;
- (d) The twins at this time, and until that day at 4:00pm, were in the lawful care and custody of Mr Roche;
- (e) In order to get access to the twins, Mr Roche has pushed Ms Butcher backwards, *ie* away from the twins;
- (f) Both twins are then free of their parents; one goes to the right, towards the door of Rebel, and stands against the wall; the other goes to the left, and sits down near Ms Alley;
- (g) Ms Butcher comes forward after being pushed by Mr Roche; Mr Roche believes she still intends to take the children. He pushes her back once, and she comes straight back up; he then pushes her away again;
- (h) Mr Roche then walks to the twin in the darker top, and takes her by the hand; at the same time, Ms Butcher goes to the twin in the red top, and takes her by the hand;
- (i) Mr Roche sends one twin up to the car, and then recovers the second twin from Ms Butcher, after another short struggle, in the course of which she is pushed back again to the black SUV;
- (k) I reject Ms Butcher's assertions that Mr Roche dragged one twin to his car; and then came back and did the same with the other twin. What happened is very clearly shown on the CCTV. Both twins, after Mr Roche has been able to regain them from Ms Butcher, have walked quickly up to his car;

- (l) Ms Butcher has then walked after Mr Roche and the others, still with the intention, if possible, of recovering possession of the twins;
- (m) On a number of occasions, which have been detailed and described above, she has been prevented, by Mr Roche, from going towards the twins, by being pushed away by Mr Roche. Some of those pushes, to judge by the distance Ms Butcher was pushed, were of modest force;
- (n) The most forceful pushes were those (i) immediately after he had separated Ms Butcher from the children in the vicinity of the black SUV, and (ii) when Ms Butcher was outside OMF;
- (o) Ms Butcher, at all times up until Mr Roche and his party reversed out of the parking bay, intended to take her children from Mr Roche if possible; I find that, as shown on the video, even after Mr Roche's group are all in the car, Ms Butcher goes to the car, and tries the back passenger door, where the twins are seated. That door was locked. Mr Roche got out of the car, and grabbed Ms Butcher's hand and held it for a few seconds before releasing her;
- (p) At around this time, she called out "Just give me back my kids"⁶⁸.
- (q) I find that both parties, Ms Butcher and Mr Roche, were yelling at each other for much of this altercation⁶⁹; and that the twins were distressed and upset;
- (r) I find that, at some point during this incident (and I am unable to be precise as to which point), Ms Butcher yelled out that Mr Roche was kidnapping her children.
- (s) I find that the intention of Ms Butcher, from the point when she first stated that she believed the twins were not safe with Mr Roche, was to take the twins from Mr Roche's care and custody, and that she was prepared to use force to achieve that purpose.

Legal incidents of proved facts:

[89] Mr Roche has pushed Ms Butcher a total of 16 times, as revealed by the CCTV footage. Additionally, he has taken hold of her hand once (incident #17). I don't accept that early in the event there was a "shoulder charge" by Mr Roche, into Ms Butcher. I do find that there was some contact, shoulder to shoulder, at 01:36 into the footage⁷⁰, when Mr Roche pushed past Ms Butcher in order to reach the twins standing behind them.

⁶⁸ Evidence of Ms Kane.

⁶⁹ Evidence of Ms Kane and Mr Judas.

⁷⁰ "And he came past me and shoulder [barged] me. We – we- our shoulders hit each other."

- [90] An “assault” may conveniently be described as being constituted by the act of applying any degree of force to another person, without their consent. Any one of the incidents indicated above is capable of constituting an assault, and thus an offence, unless each application of force to the person of Ms Butcher was “authorised, justified or excused” by law⁷¹. To determine this issue, it is necessary to commence with Mr Roche’s motive, and intention, when each of these incidents of force were applied to Ms Butcher.
- [91] There was an Order of a Court in force in this case throughout this altercation. This Order gave to Mr Roche the custody and care of his children – the twins – until 4:00pm that afternoon.
- [92] From the moment when Ms Butcher told Mr Roche that she did not believe the twins were safe in his care, Ms Butcher has attempted to take the twins out of the custody of Mr Roche. Mr Roche has resisted the removal of the twins, and has attempted to prevent that result.
- [93] Mr Roche was not legally represented. In submissions, the prosecution addressed the possible application of the defence of provocation; and in this respect, submitted (i) that Ms Butcher’s actions were not “wrongful” acts, within the meaning of section 268 of the *Criminal Code*⁷²; and (ii) that in any event, the force used by Mr Roche was, in all of the circumstances, excessive. During submissions, I raised with the prosecutor the possible engagement of section 260 of the *Code* – the “breach of the peace” preventative provision. The prosecutor once again submitted that, if the section was applicable, the force used was nevertheless excessive.
- [94] I have not received the benefit of argument by Counsel, on either side, upon the fundamental issue as to whether Mr Roche had lawful justification to resist the taking of the children. As a result, I have been required to undertake a good deal of research in an effort to resolve this issue: does the law permit the use of force, by Mr Roche, to prevent the twins being taken from his custody, he being the person who, at the relevant time, had lawful custody of them?
- [95] It seems to me that if there is no right or authority on the part of a custodial parent to try to prevent the taking of a child from their lawful possession, then conflict, at least to the extent of a “breach of the peace” in some form, is rendered very likely.

⁷¹ The acts recorded on the CCTV are separate and distinct acts. There is a single charge, of assault occasioning bodily harm, preferred against Mr Roche. The entirety of the “assaults” took place within a 2-minute period. It is acceptable, in some cases, to charge one count of assault, although there may be separate blows given over the course of a particular altercation. I think, in this instance, it is appropriate to proceed on the basis that it is a case where a single count of assault may properly be charged: see eg *R v Robertson* (1974) 2 Qld Lawyer Reps 259; *Biddle v Dimmock* [1992] QCA 265.

⁷² I have dealt with this submission above.

[96] In *R v Austin*⁷³, Watkins LJ, speaking for the Court of Appeal, in a case under section 56 of the *Offences against the Person Act 1861*, the model for the corresponding provision in Queensland's *Criminal Code*, observed:

“From some of the submissions made to this Court, we have the impression it is commonly understood that when parents have been separated one parent may against the will of the other take away by force a child or the children of the family. That notion if it exists needs to be dispelled.”

The use of force to prevent a crime:

[97] Section 266 of the Criminal Code justifies the use of force, in limited circumstances, for the purpose of preventing the commission of a crime. It provides:

266 Prevention of crimes and offences for which an offender may be arrested without warrant—prevention of violence by particular persons

It is lawful for any person to use such force as is reasonably necessary in order to prevent the commission of an offence which is such that the offender may be arrested without warrant; or in order to prevent any act from being done as to which the person believes, on reasonable grounds, that it would, if done, amount to any such offence; or in order to prevent a person whom the person believes, on reasonable grounds, to be an involuntary patient under the *Mental Health Act 2016* or a forensic disability client under the *Forensic Disability Act 2011* from doing violence to any person or property.

[98] The section has three limbs, of which the first two fall to be considered in this case. The relevant elements can be articulated as follows:

- (i) it is lawful
- (ii) to use such force
- (iii) as is reasonably necessary
- (iv) to prevent
EITHER
- (v) the commission of an offence
- (vi) which is such that the offender may be arrested without warrant **OR**
- (vii) any act from being done
- (viii) which the person believes
- (ix) on reasonable grounds
- (x) would, if done, amount to any such offence

[99] The common law background to this section eludes precise identification⁷⁴. It is one of a family of provisions, which includes prevention of continuance or renewal of a

⁷³ [1981] 1 All ER 374, at 375 f.

⁷⁴ A separate justification in respect of prevention of serious crime, involving open force, was articulated by Sir James Stephen in the first edition of his *Digest of Criminal Law* (1877) Article 199 at pp 138-9, citing the treatises by Sir Matthew Hale, Sir Michael Foster, and Sir Edward East. This formulation was

breach of the peace (s 260) and self-defence (ss 271, 272). The common law antecedents not infrequently overlap with these other areas⁷⁵, but clearly Sir Samuel Griffith, and by inference the Legislature, had in mind a separate justification for the prevention of (arrestable) crime.

[100] The *Criminal Code* of Queensland, as passed, abandoned the concept of a “felony” in favour of the term “crime”, which was intended to take the place of “felony” in denoting the more serious offences in the *Code*. As had been the case at common law with felonies, the classification of an offence as a “crime” engaged a general power to arrest without warrant⁷⁶.

[101] Section 266 is therefore applicable to offences under the Code which are defined as crimes. The removal of the clause “*and which would be likely to cause immediate and serious injury to the person or property of any one*”, on the recommendation of the Commission of Inquiry, as noted above, had the result that the power to use force to prevent *all* crimes was granted, and was not confined to those with a violent aspect, as had been the case under English law⁷⁷.

[102] The first two limbs of section 266 appear to be alternatives, and are directed to two different situations. The first limb applies whereby it renders lawful

“such force as is reasonably necessary in order to prevent the commission of an offence which is such that the offender may be arrested without warrant.”

carried over to Stephen’s Draft *Criminal Code (Indictable Offences) Bill 1878*, as section 118. The Royal Commission to Consider the Law Relating to Indictable Offences, in its Report (1879) included the relevant provision as Section 54 of its Draft *Criminal Code Bill*. This changed Stephen’s earlier formulation, by deleting reference to named felonies, and instead premised the justification upon “any offence for which the offender could be arrested without warrant (which, at that time, meant felonies) *and which would be likely to cause immediate and serious injury to the person or property of any one*”. The Commission also added the alternative limb, namely “or in order to prevent any act being done which he upon reasonable grounds believes would, if committed, amount to any of such offences. It was transmitted in this form to England’s Draft *Criminal Code Bill 1880* as section 55. This Bill provided the model for Sir Samuel Griffith’s Draft Code (section 273): *Draft Code of Criminal Law* (1897) p 113. The Draft Code for Queensland was referred to the Criminal Code Commission, of which Sir Samuel Griffith was Chairman; and the Commission recommended that the words “be likely to cause immediate and serious injury to the person or property of any one” be struck out, without including in its Report a reason for the change: *Report of the Royal Commission* (1899) p 83 . In that amended form, it was enacted by the *Criminal Code Act 1899*.

⁷⁵ Sir John Smith has suggested that “...there is such a large overlap between the law governing private defence and that governing the prevention of crime that the law cannot sensibly distinguish between them”: *Justification and Excuse in the Criminal Law* (1989) at p 123. The older cases often cited as involving prevention of crime almost invariably related to defence of self, habitation (eg preventing arson of a dwelling: 26 Lib Ass pl 23 f 123a (1352)), or property; the first two of which have dedicated defence provisions included in Queensland’s *Code*.

⁷⁶ See sections 5 and 546.

⁷⁷ Canada also has a *Criminal Code* which has its origin in the Stephen draft codes. In *R v Ulmer* (1993) 107 Sask R 107; 1993 Canlii 8859 (SK QB) the facts were broadly similar to the present case; however, the Canadian provision had retained the limitation on the use of force in preventing a crime, which Queensland had rejected in 1899, *ie* it would be likely to cause immediate and serious injury to the person or property of anyone.

[103] This limb is applicable where the matter is before a Court, which is able to make a determination, on the evidence, as to whether an arrestable offence had been about to be committed (or continued), and whether the force used was reasonably necessary for the purpose of prevention.

[104] The second limb focuses upon the subjective belief of the user of the force, and upon the grounds for that belief *ie* they must be “reasonable grounds”:

“or in order to prevent any act from being done as to which the person believes, on reasonable grounds, that it would, if done, amount to any such offence.”

[105] This second limb is not free from difficulty. The requirement that the force used in prevention must be “reasonably necessary”, it appears clear, applies to both limbs. The second limb then would seem to apply where a person acts under a reasonable mistake of fact that an arrestable offence has been committed. On the other hand, a belief that an act “amount[s] to any such offence” suggests to some extent a mistake of law⁷⁸.

Was an arrestable offence committed? - Taking a child out of possession:

[106] The possible application of section 363 of the *Criminal Code* to a case involving a custody order under the *Family Law Act 1975* was suggested in an essay published a decade after the introduction of the *Family Law Act*⁷⁹:

“If the child is under a prescribed age, and is taken away from the custodial parent by fraud or force, this may constitute the statutory offence of child-snatching under a State or Territory law. Provisions giving the abducting parent a defence if he or she has a ‘claim of right’ to possession of the child would seem to be inapplicable where the other parent has sole custody under a court order.”

[107] I have consequently given consideration to the terms of section 363, and its potential application in this case. It provides, in full:

(1) Any person who, with intent to deprive any parent, guardian, or other person who has the lawful care or charge, of a child under the age of 16 years, of the possession of such child, or with intent to steal any article upon or about the person of any such child—

⁷⁸ This may explain why, when Sir Samuel Griffith drafted the *Code*, he included the second limb, while also inserting into the *Code* section 24, which was a general “mistake of fact” defence. It is possible he perceived that the second limb could include a mistake of law, and for that reason did not delete the second limb as being unnecessary. A leading authority on mistake in the common law, *Levett’s Case*, (1638) Cro Car 358 [79 ER 1064], was a case where the accused, believing his home to have been burgled at night, used fatal force against the intruder. As it happened, the “burglar” was a young woman who had been assisting the household’s maid with her domestic chores, but of whose identity, and occasional presence in the home, the accused was not aware. For a more recent example, *R v Dennis* (1905) 69 JP 256 (CCC). Such factual situation was cited by Stephen when discussing the defences of keeping the peace, prevention of crime, and self-defence, in his history: *A History of the Criminal Law of England* (1883) vol iii, pp 12-14. *Levett’s Case* is commonly cited by texts as an example of a mistake of fact.

⁷⁹ M Chesterman & P Waters, “Contempt and the Disobeying Spouse” (1985) 8 UNSWLJ 106 at p 123.

- (a) forcibly or fraudulently takes or entices away, or detains, the child; or
- (b) receives or harbours the child, knowing it to have been so taken or enticed away or detained;

is guilty of a crime, and is liable to imprisonment for 7 years.

(2) It is a defence to a charge of any of the offences defined in this section to prove that the accused person claimed in good faith a right to the possession of the child, or, in the case of a child whose parents were not married to each other at the time of its conception and have not since married each other, not being a child who has been adopted as aforesaid, is its mother or claimed in good faith to be its father.

(3) In this section—

corresponding parentage order means an order under a law of another State that provides for a parentage order similar to a parentage order under the *Surrogacy Act 2010*.

parent includes—

- (a) for a child who has been legally adopted in Queensland or in another State—a person who has adopted the child; or
- (b) for a child whose parentage has been transferred by a parentage order under the *Surrogacy Act 2010* or a corresponding parentage order—a person who is a parent of the child under the order; or
- (c) for a child whose parentage has been transferred under a cultural recognition order made under the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020*—a person who is a parent of the child under the order; but does not include a natural parent of the child.

[108] The original legislative model for section 363 was the English Act of 1814⁸⁰ which was aimed at the practice known as “child stealing”. It prohibited the forceful or fraudulent taking of a child out of the possession of its parent or legal custodian. This Act was succeeded by Lord Landsdowne’s Act of 1828⁸¹ which generally followed the earlier model. The enactment of the England’s *Offences against the Person Act 1861*⁸² re-stated the basic elements of the earlier offences, and was the model for

⁸⁰ 54 Geo III, c. 101.

⁸¹ 9 Geo IV, c. 31, s. 21.

⁸² 24 & 25 Vict c. 100, s. 56; J E Davis, *The Criminal Law Consolidation Statutes* (1861) pp 275-276. A pertinent and almost-contemporary observation on the application of the section noted: “The stealing or decoying of children is to be carefully distinguished from that detention or attempt at possession of a child, which may be a fair subject of dispute between parents of the child, or between guardians and others, who have been lawfully intrusted with, or may have acquired lawfully, such possession. As between the parents of illegitimate children, or parents living apart or separated judicially, and guardians of children whose parents are dead, certain rules prevail as to the custody, which may occasion contention; and in vindicating supposed rights, violence and stratagem may often be resorted to by one party or the other without any unlawful intention, and no criminal punishment in such cases is proper or necessary: J Paterson, *Commentaries on the Liberty of the Subject* (1877) vol ii, pp 324-325.

Queensland's first legislation to deal with the subject in the *Offences against the Person Act 1865*⁸³. This was replaced by section 363 of the *Criminal Code* in 1899⁸⁴.

[109] The elements of the current offence, in their possible application to the facts of the present case, are:

- (i) a person
- (ii) with intent to deprive a parent
- (iii) of the possession
- (iv) of a child under 16
- (v) forcibly or fraudulently
- (vi) takes *or* entices the child away
- (vii) is guilty of a crime

[110] The leading text on criminal law in Queensland, *Carter's Criminal Law*, in a note to section 363, sounds a caution against using this section where a parental dispute has resulted in the taking of a child in defiance of a Court order⁸⁵; contempt proceedings should be preferred where some action is necessary⁸⁶. The present case, however, where the criminal law has already been invoked against one party, seems to require that, in attempting to determine the criminal liability of the party, some reference must of necessity be made to section 363 in order to ascertain the relative positions of both parties.

[111] There may, in a particular case, be an argument concerning potential section 109⁸⁷ inconsistency between section 363 of the Queensland *Code*, and section 65M of the *Family Law Act 1975*. Such a conflict may have to be determined where, in the context of a prosecution, a breach of a Federal order is involved, and the provisions of section 363 of the *Code* are also engaged. In the present case, there is no prosecution for a breach of any Federal Court order; and no indication was given, at hearing, that any such prosecution was being considered.

[112] Reference to section 363 is necessary, and its (at least theoretical) application to the facts of this case is required as a step in determining the criminal liability of Mr Roche for an assault alleged to have been committed in the course of a physical altercation arising out of the custody of two children. In these circumstances, it is my perception that no question of inconsistency arises, and it need not be further considered. The offence in issue in this proceeding, and the exculpations and justifications which bear upon this offence, all arise under the law of the State.

⁸³ Cooper's *Statutes of Queensland* (1881) vol i, pp 654-655.

⁸⁴ See Sir Samuel Griffiths' *Draft Code of Criminal Law* (1897) p 140, for the texts of the 1865 and 1899 provisions.

⁸⁵ Citing *R v D* [1984] AC 778.

⁸⁶ The majority of the Court of Appeal was more cautious on this point: *R v Tauiiili* [1997] 1 NZLR 525, at 536 [20].

⁸⁷ S. 109, *Constitution of the Commonwealth of Australia*.

Elements of the section 363 offence:

- [113] An intention to deprive the parent in possession⁸⁸ of the child, of that possession, is required. It has been held, upon the similarly-worded English Act, that the deprivation will fall within the scope of the offence even though it may contemplate only a short, or temporary deprivation of possession⁸⁹. In this case, the extent of the possession remaining to Mr Roche was something less than 1 ½ hours, until 4:00pm, at which time Mr Roche's rights under the Order would cease, and Ms Butcher's rights would commence. I have found that Ms Butcher had the intention to remove the children from Mr Roche's care. I base this upon her statement that the twins "were not safe" in Mr Roche's care, and her admitted statements that she told the twins to "run, get out, don't go with him". Her conduct then, in causing Mr Roche to lose hold of one twin – Ms Butcher "reefed" the twin from his grip⁹⁰ – and her subsequent conduct in taking the other twin (in the red top) by the hand and commencing to lead her in the opposite direction to where Mr Roche's car was parked⁹¹, leave me in no doubt that she intended to take both twins from Mr Roche's care against his will.
- [114] The commission of an offence against section 363 is a crime⁹², and as such is subject to a general power of arrest without warrant⁹³.
- [115] Both twins were under 16 years of age at the relevant time. They would have been 8 years old at the time of this incident⁹⁴.
- [116] The element of force requires careful scrutiny⁹⁵. The term "force" is not defined for the purposes of the section⁹⁶. In *R v Bruer*, his Honour Judge Nicholson considered, at some length, the South Australian counterpart to section 363⁹⁷. In that case, the accused had attended a Health Service, where his former partner and their child were to be found. Upon arrival, the accused found the mother, and the child, and a

⁸⁸ The term "possession" seems singularly inappropriate to be applied to the relationship of parent and child, but such description is required under the statute; compare *R v Bruer* (2012) 114 SASR 365 (CCA), at 369 [18]; and *R v Tauilili* [1997] 1 NZLR 525, at 536 [36].

⁸⁹ *R v Powell* (1915) 79 JP 272 (Central Criminal Court, Bosanquet, Com Sjt); compare *R v Mears* [1975] Crim LR 155 (on "detain").

⁹⁰ Exhibit 1, Part 1, at 05:05 – "...grabbed Riley out of my hand and reefed her". Significantly, Mr Roche was not challenged in cross-examination with respect to this statement.

⁹¹ Exhibit 2, at 02:02.

⁹² Sections 363 (above).

⁹³ Sections 5 and 536.

⁹⁴ They were 9 years old at the time of trial: Transcript p 1-23 line [27].

⁹⁵ There is no evidence of an apparent fraud, either upon the children, or upon Mr Roche.

⁹⁶ The force may be directed to either the child, or the parent/guardian in possession: *R v Bellis* (1893) 62 LJM 155 (CCR). It is the use of force or fraud which gives the taking, enticing or detaining its character as an offence; even though there may be no Court order in force: compare *R v Austin* [1981] 1 All ER 374 (CA). And although the conduct is criminalised, Parliament has, by the inclusion of the defences, decided that the type of conduct involved "should not give rise to wholesale criminal prosecutions arising out of disputes about children": *Austin* at 378g.

⁹⁷ Section 80 of the *Criminal Law Consolidation Act 1935* (SA).

verbal argument ensued between the parents. The accused then, with no warning, picked up the child who was then 4 years and 8 months old, hoisted her on his hip, held her close and strode determinedly or marched away from the mother. He took the child to his car in the carpark, and drove away⁹⁸.

[117] His Honour ruled:

“ ‘Force’, in the manner suggested by *R v Webb* and *R v Pollitt* in the context of the offence under s. 59, that is, force not necessarily amounting to physical violence but sufficient to take [the child] against [the mother’s] will, was exercised by the accused on that occasion. I am satisfied beyond reasonable doubt that the element of taking by force has been satisfied with respect to count 1.”

[118] Upon conviction, the accused appealed to the Court of Criminal Appeal on two grounds, one of which was Judge Nicholson’s ruling on “force”. The Court upheld the ruling⁹⁹:

“ Section 80 is aimed at the protection of young children. In the case of very young children, they are not able to resist, either physically or by their conduct, their removal from a safe environment to the environment created by a person who unlawfully removes them by physically taking them. If a defendant picks up a child who, by virtue of their age or physical size, or both, is in no position to object, and the defendant takes the child from the custody of the person charged with looking after the child, that is sufficient, in our opinion, to satisfy the removal by force. Force involves the conduct of removing the child against the child’s will, or without permission of the person who has the immediate care of the child. The act of picking up the child, against the will of the parent who has lawful custody, is sufficient.”

[119] I find that the “reefing” of one twin from Mr Roche’s grip, early in the altercation, was sufficient to constitute “force” within the meaning of section 363. I further find that taking the second twin by the hand, and leading her in the opposite direction to Mr Roche’s car, with the intention of taking her out of her father’s care, was also capable of constituting “force” in this context. The twins, most regrettably, were being given two different sets of instructions – by Mr Roche, to go to his car (outside the OMF store), and by Ms Butcher to “run”, and “get out” – “don’t go with him”. I have no doubt, under the circumstances, that both of the twins were completely confused, and very distressed, as a result of what was going on between their parents.

Has the section 363 offence been made out to the degree necessary to support a justification under section 266?

⁹⁸ *R v Bruer* [2011] SADC 184, at [52] and [53]. The accused’s conduct in this matter was contrary to a Custody Order of the Federal Magistrates Court.

⁹⁹ *R v Bruer* (2012) 114 SASR 365, at 372 [35].

- [120] It seems to me that, where proof of the commission of an offence is relied upon, not by way of accusation against a Defendant, but rather as an element of a “defence” or justification raised by the evidence of a Defendant to a criminal charge, the standard of proof should be the civil standard, as is the case generally with proof of criminal defences. I am satisfied to that standard that the offence is made out on the evidence; and that as a result, it can be relied upon by Mr Roche to underpin a justification under the first limb of section 266 of the *Code*.
- [121] A possible question might arise in respect of the expression “takes ... away”. Just as the degree of force used by Ms Butcher was not great, so the “taking away” of the twins was very limited by way of distance. In the case of the first twin, it could be seen as not being a case of being taken “away”, in that although Ms Butcher pulled her daughter’s hand away from Mr Roche, there was an immediate scuffle, and the twin was recovered. In respect of the twin with the red top, Ms Butcher took her hand, and walked a couple of metres with her, before Mr Roche intervened and separated them. In both cases, the degree of asportation was extremely small.
- [122] I believe, however, that having due regard to all the circumstances – what was done, and said, by Ms Butcher – it is clear that there would have been an attempt to take each of the twins away, and out of the custody of Mr Roche. There were overt acts by Ms Butcher, both physical and verbal, which, to my mind, leave no reasonable doubt as to her intention.
- [123] An attempt to take a child by force from the custodial parent is also a crime¹⁰⁰, and thus falls within the terms of section 266.
- [124] If I am in error in respect of these matters, I am nevertheless satisfied that the evidence of Mr Roche, contained within the statements he made to Constable Smith, and in his evidence before this Court, supports a justification based upon the second limb of section 266, *ie* that he believed on reasonable grounds, that Ms Butcher was engaged in taking the twins out of his physical and lawful care, against his will.
- [125] The section 363 offence, in subsection (2), creates two defences¹⁰¹ to a charge under the section. The first is that the taker of the child claimed, in good faith, a right to possession of the child. The second defence arises in circumstances where at the time of the child’s conception, the parents were not married to each other, and have not since married each other, and is the child’s mother, or claims in good faith to be its father.
- [126] In their 1985 essay¹⁰², Chesterman and Powers suggested that an Order of the Family Court could supersede these defences.

¹⁰⁰ Section 535.

¹⁰¹ Some other jurisdictions with similar provisions having their origins in the English legislation provide, in lieu of a “defence”, an immunity from prosecution.

¹⁰² See [106] above.

- [127] Where such an order is in place, its terms would seem to be capable of rendering the second defence inapplicable.
- [128] I am, however, cautious as to whether the “good faith” defence would be nullified by such an Order¹⁰³.
- [129] When assessing the possible commission of an offence, for the purpose of a section 266 justification, I do not believe that it is necessary to descend into the details of what might be raised by way of a defence to what appears to be a completed offence.
- [130] The facts which must be present in the mind of the person who seeks to rely upon the justification would probably include the basic factual details of the offence. But to require that there be some belief as to matters such as arrest status applicable to that offence, the basic elements of possible defences to the charge, or details of the text of the law as to the offence, or the justification or the defences, would defeat the potential reliance upon s. 266 by any ordinary person.¹⁰⁴

Preventing a breach of the peace:

- [131] Sir James Fitzjames Stephen, in the course of his *History*, observed¹⁰⁵:

“I now come to acts of violence necessary for the preservation of peace and the prevention of crime. The distinction between these two objects is matter rather of language than of substance¹⁰⁶, for on the one hand every breach of the peace is a crime; and on the other, no force can prevent crime except crimes of violence. No one uses force or would be in any way justified or excused in using force to prevent a man from committing forgery or perjury.”¹⁰⁷

- [132] Section 260 of the *Criminal Code* provides:

¹⁰³ In *R v Tauilili*, the accused, who was charged with a similar offence in New Zealand, raised concerns for the safety of his child, as being the reason for failing to return the child on the completion of contact.

While finding the offence to be made out, the Court of Appeal expressed the view that the accused could still rely upon the “good faith” defence at his future trial: [1997] 1 NZLR 525, at 536 line [18].

¹⁰⁴ In *R v Rose* (1884) 15 Cox CC 540, the accused had killed his father, because he believed his father was cutting, or about to cut, his mother’s throat. Lopes J directed the jury that, if they were satisfied that the accused, at time he fired the fatal shot, honestly believed his mother’s life was in imminent peril, and that there were reasonable grounds for that belief, and for the belief that firing the shot was absolutely necessary to save his mother’s life, the accused should be acquitted. There was no direction that the accused should have known that the involved was a felony, or arrestable, or any other legal incident. This, of course, was a trial under common law, as the Bill of 1880, upon which section 266 was based, never passed into law. Indeed, there was no statutory statement of the “prevention of felony” justification in England until the passage of the *Criminal Law Act 1967*, section 3 (leaving aside 24 Hen VIII, c.5 (1532) which was confined to abolition of forfeiture by a person who killed another about to commit murder, robbery or burglary).

¹⁰⁵ *A History of the Criminal Law of England* (1883) vol iii, p 13.

¹⁰⁶ The present case, I believe, is one which fully bears out this generality.

¹⁰⁷ In reference to English law. The law in Queensland may be different; although it is difficult to imagine how force could prevent *eg* perjury.

260 Preventing a breach of the peace

It is lawful for any person who witnesses a breach of the peace to interfere to prevent the continuance or renewal of it, and to use such force as is reasonably necessary for such prevention and is reasonably proportioned to the danger to be apprehended from such continuance or renewal, and to detain any person who is committing or who is about to join in or to renew the breach of the peace for such time as may be reasonably necessary in order to give the person into the custody of a police officer.

[133] The section justifies the use of force against another in the circumstances falling within its parameters. There are two aspects of section 260: (i) prevention (of continuance or renewal), and (ii) detention.

[134] The components of preventive force or restraint for breach of the peace are:

- (i) the defendant who witnesses
- (ii) a breach of the peace
- (iii) and interferes to prevent
- (iv) continuance or renewal of it¹⁰⁸
- (v) may use reasonably necessary force
- (vi) which force is also reasonably proportioned to the danger to be apprehended

[135] With respect to (i) above, Mr Roche was present at all times during this incident, and observed the actions of Ms Butcher in respect of the twins.

[136] The expression “breach of the peace” is a generic term of great antiquity, and is not *per se* an offence. At common law it encompassed acts of interpersonal violence (*eg* assaults, woundings, *etc*) and acts which were considered *in terrorem populi*¹⁰⁹ (*eg* affrays, riots, going armed in public).

[137] The modern content of the expression “breach of the peace” was proposed by the Court of Appeal in *R v Howell*¹¹⁰:

¹⁰⁸ Section 260 does not give a citizen the power to intervene to prevent a breach of the peace before it occurs. Section 50 of the *Police Powers and Responsibilities Act 2000* gives a power to police in respect of a “threatened” breach of peace, or where there is an “imminent likelihood” of such. Although the House of Lords in *Albert v Lavin* [1982] AC 546 confirmed that all citizens had always had the same power (ie in respect of an imminent breach), there may have been some difference of opinion about this at the turn of the 19th century, when the Queensland Code was drafted: see discussion in *R v Howell* [1982] QB 416 at 424-426; and *eg Stone’s Justices Manual* (1900) at 127. This might have impacted upon the content of section 260.

¹⁰⁹ Acts which put the public in fear (or terror).

¹¹⁰ [1982] QB 416, *per* Watkins LJ at 426C, and 427E. Note comments upon its application to property, in *Percy v DPP* [1995] 1 WLR 1382 at 1393D (QBD); and Glanville Williams commentary on *Howell* in (1982) 146 JP 199 and 217.

“We hold that there is a power to arrest for breach of the peace where: (1) a breach of the peace is committed in the presence of the person making the arrest or (2) the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested although he has not yet committed any breach or (3) where a breach has been committed and it is reasonably believed that a renewal of it is threatened. ...

We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.”

- [138] Since it was pronounced, this elaboration of “breach of the peace” has frequently been referred to, in both England¹¹¹, and in Australia¹¹².
- [139] In respect of this head of justification, the issues posed are: (i) was there a “breach of the peace”; (ii) if so, was Mr Roche justified in trying to prevent its continuation, or renewal?
- [140] In *R v Cotter*¹¹³, his Honour Judge Demack (as Justice Demack then was) gave consideration as to how the concept of “breach of the peace” should be approached in Queensland, having regard to the terms of the *Criminal Code*. His Honour was of the view that the expression “breach of the peace”, while having been used for a very long time, had to be considered against a background of codified criminal law. It was necessary to keep in mind the well-settled principles applicable to the interpretation of a *Code*.

¹¹¹ It was confirmed, by Lord Bingham, as continuing to represent English law, in *R (Laporte) v Chief Constable of Gloucestershire* [2007] 2 AC 105 (HL) at [28] p 124.

¹¹² See *eg Panos v Hayes* (1987) 44 SASR 148 (SC) at 151; *Webb v Allen* [1988] WASC 351; *cf Nicholson v Avon* [1991] 1 VR 212 (SC) at 221. More recently, there has been a shift in the content afforded to “breach of the peace” in New South Wales. In *New South Wales v Bouffler* (2017) 95 NSWLR 521 (CA), the Court referred to the judgment of Campbell JA in *New South Wales v Tyszyk* [2008] NSWCA 107, where his Honour expressed the view that “...the account of breach of the peace given by *Howell* suggests that the concept of breach of the peace has lost some of the protean quality it once had”. The *Bouffler* Court preferred the view expressed by Campbell JA in *Tyszyk* that a breach of the peace included “a wide range of actions and threatened actions that interfere with the ordinary operation of civil society.” This apparent shift is discussed by Mr Murphy, in “Retaining and Expanding Breach of the Peace” (2017) 41 Crim LJ 222-241. In *Fletcher v New South Wales* [2019] NSWCA 31, the Court appeared to accept *Bouffler* as correctly stating the law in New South Wales (at [32]); Basten JA, in giving the main judgment, referred to *Howell*, but only in the context of confirming that a police officer had power to arrest where there was imminent danger of a breach of the peace. *Howell* was followed in the *pre-Bouffler* case of *Nilsson v McDonald* (2009) 19 Tas SR 173 at [42], by the Full Court of Tasmania – a codified jurisdiction. In the absence of an appellate decision on this point in Queensland, I believe I should reach my decision in accordance with *Howell*, as reflecting the law of England, both currently, and in respect of the *pre-Howell* period. Glanville Williams, in “Arrest for Breach of the Peace” [1954] Crim LR 548, reviewed quite extensively the older English authorities, and his conclusions as to the content of “breach of the peace”, in my view, correlate closely to the *Howell* formulation. Similarly, the Tasmanian Court in *Nilsson*, after a careful historical review of the authorities, had no difficulty in applying *Howell*.

¹¹³ (1974) 2 Qld Lawyer Reps 265.

[141] The history of “breach of the peace”, his Honour opined, while undoubtedly the subject of “very interesting debate” and “fascinating study”, had little application to questions arising under the *Code*:

“Rather it appears to me that the words “breach of the peace” are used in s.75, not to bring in the various common law offences, but to point to the sections of the *Code* which create offences analogous to the common law concept of breach of the peace. For example, the offences associated with tumults and riots are set out in ss.61 *et seq.* Also, an assault fell within the concept of a breach of the peace.”

[142] It is an element of section 363 that force is used, which may be either against the child, or against the parent in lawful custody. It is, on any view, an offence involving violence, irrespective of the degree of violence necessarily required. It falls within the concept of breach of the peace, along with many other offences under the *Code*,

for example: the group of offences of which assault is an element, causing grievous bodily harm, wounding, homicide, offences against liberty, and offences *in terrorem populi* (namely Chapter 9 offences, *eg* threatening violence, going armed, and *etc.*). These offences come from various Parts and Chapters contained in the *Code*. But, in accordance with the concept of breach of the peace, they all have the common denominator of interpersonal violence.

[143] The acts of Ms Butcher on the day in question constituted a breach of the peace in that (i) they involved the application of interpersonal force; and (ii) they fell within the terms of an offence contained within the *Criminal Code*.

Provocation:

[144] I have given careful thought to the possible defence of provocation. For the reasons I have stated above, I believe there were a number of wrongful acts by Ms Butcher, which were capable of underpinning the defence. The difficulty, as it seems to me, is that there is no evidence of a loss of the “power of self-control”, or that the “assaults” occurred in the heat of passion, as required by section 269. In considering this issue, I take into account that I am required to consider the defence, even if it has not been raised specifically by the defence; and indeed, even where a defendant does not give evidence.

[145] Mr Roche did give evidence himself. As an unrepresented person, I draw no adverse inference from the fact that he did not claim that he lost his self-control, and acted in the heat of passion.

[146] But what does, in my opinion, carry substantial weight, is his statements to the police, at his home, shortly after the event, where he said “I didn’t push her hard enough, *etc*”¹¹⁴. Rather than a loss of self-control, this indicates to me that the force he used was measured and (to him at least) was restrained.

¹¹⁴ See paragraph [31] above.

- [147] To my mind, this is quite inconsistent with the section 269 defence. He has pushed Ms Butcher on the occasions of almost all contact between them. As I have said, some of the pushes look to be more forceful than others. But the injury suffered by Ms Butcher was relatively minor, and having seen Mr Roche's size, and build, at trial, I have little doubt that he would be capable of inflicting much greater force if he chose to do so, or if he had truly lost his self-control¹¹⁵.
- [148] I readily accept that, in respect of a number of findings required in this matter, different minds might reach different conclusions. But on what I have before me, I am not satisfied that provocation is raised on the evidence in this trial.

Was the force used by Mr Roche reasonably necessary?

- [149] Any defence which may be raised on the evidence of Mr Roche must confront, as a condition of potential success, the issue of the degree of force used in some, or all, of the contacts between Ms Butcher and himself. It is this aspect which was focussed upon by the prosecutor in her submissions at trial.
- [150] Both section 260 and section 266 limit the force which can be used to force which is "reasonably necessary" to achieve the purpose of the respective provisions.
- [151] The acknowledged sources for both sections, as noted above, were the relevant clauses under the ill-fated English *Criminal Code Bill of 1880*. The *Bill's* provisions in these respects were each premised upon the limitation that the force used must be "reasonably necessary" to achieve the particular purpose¹¹⁶.
- [152] In their Report, annexing a Draft *Criminal Code* for England, the Criminal Code Bill Commission of 1879 explained its approach to the proposed law with respect to the use of force¹¹⁷:

"We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is

¹¹⁵ I have no difficulty in finding that Mr Roche was affected by a degree of anger at what had happened; but anger, as a matter of law, does not meet the requirements of provocation.

¹¹⁶ Section 49 of the *Bill* stated: "Every one who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal of such breach of the peace, and may detain any person committing or about to join in or renew such breach of the peace in order to give him into the custody of a peace officer: Provided that the person interfering uses no more force than is reasonable necessary for preventing the continuance or renewal of such breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of such breach of the peace". Section 55 of the *Bill* provided: "Every one is justified in using such force as may be reasonably necessary in order to prevent the commission of any offence for which if committed the offender may be arrested without warrant, and the commission of which would be likely to cause immediate and serious injury to the person or property of anyone; or in order to prevent any act being done which he on reasonable grounds believes would, if committed, amount to any of such offences."

¹¹⁷ *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) Command 2345, at p 11.

necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which may reasonably be anticipated from the force used is not disproportioned to the injury of mischief which it is intended to prevent. This last principle will explain and justify many of our suggestions.”

[153] The wisdom displayed in this passage retains its appeal even with the passage of 140 years: if lesser force would have achieved the desired purpose, that *might* indicate that the force used was excessive; and, whatever the potential mischief if force is *not* used, the force employed must not be disproportionate to that potential mischief.

Indeed, the latter qualification finds its place as a statutory requirement of the justification pertaining to prevention of breach of the peace in section 260¹¹⁸.

[154] There is no legal formula available to determine what degree of force is “reasonably necessary” in any particular case; its content is fact-specific. The determination as to whether or not the force used in a particular transaction was excessive in all of the circumstances, is a question for a tribunal of fact – in the case of a trial upon indictment, by a jury of twelve; and in the case of a trial in this Court, by a Magistrate alone.

[155] At no time did Ms Butcher apply any force directly to Mr Roche. The “mischief” in this case was not the use of force, in and of itself. The mischief to be apprehended was that Mr Roche’s children would be taken, against his will, from his care and custody. How (one might well ask) does one assess the seriousness of such a consequence? In this case, Mr Roche may have lost physical custody for up to 1 ½ hours. If it had have been the case that there was still (for example) 1 week to elapse before the next changeover, does that result in a more serious situation? Or is the actual period of custody under the Order which stands to be lost to the parent an irrelevant consideration?

[156] There is, of course, a world of difference between the facts of this case, and a situation where a stranger would attempt to take children from their parent. The latter case would present no difficulty whatsoever, with respect to the use of very substantial force.

[157] In this case, the dispute arises between two parents, both of whom love their children; there is no physical danger whatsoever to be apprehended from Ms Butcher’s care and control of her children. The detriment to Mr Roche which would follow from Ms Butcher taking physical custody of the twins would be, as already indicated, the loss of the pleasure and enjoyment of the twins’ company for a very modest period.

[158] Perhaps there is a preliminary question - should *any* force have been used?; or should the children have simply been allowed to go with their mother to shop for

¹¹⁸ See [132] above.

uniforms? Glanville Williams raised this question in considering the terms of section 3 of the *Criminal Law Act 1967* (UK)¹¹⁹:

“The section does not say that moderate (non-extreme) force can always be used when necessary to prevent a crime, so perhaps the citizen has to decide two questions: whether it is reasonable to use any force, and if so what force is reasonable? But the section might perhaps be interpreted more widely. It does not say that force may be used *if* it is reasonable to prevent crime; it seems to assume that force may be used, declaring only that it must be reasonable (*scil.* In amount).”

[157] To take a child by force from a parent’s lawful custody is designated as a crime. That designation is indicative that the Legislature views the matter as serious. But, as experience shows on a daily basis, other prohibited acts – such as stealing – are also crimes; but there is a great difference in the possible degrees of “seriousness” which might be encountered in different cases of the offence in question.

[158] In *Soppa v Chatterton*¹²⁰, the Court of Appeal had occasion to consider the question of excessive force in a case involving *inter alia* a defence under section 260 of the *Code*. The Court made it very clear that the determination as to the excessive, or otherwise, nature of the force depended very much upon the Magistrate’s conclusion as to the “seriousness of the struggle”¹²¹:

“It was the nature and seriousness of their struggle which was the critical point for the magistrate to consider...

[but] the fact that the intervention was effective does not necessarily require that the issues raised in the case be decided in favour of the intervener.”

[159] Mr Roche has successfully retained physical custody of his children; but was the cost too high? A breach of the peace has ensued, in public, which in turn has drawn in other citizens who were nearby, and who were clearly disturbed by what was happening.

[160] I believe I would be in error if I tried to ascertain what would have been the most reasonable course to follow, on the part of both parties – assuming such a course was at all possible. Reason does not necessarily correlate to the legal position¹²²; and it is the latter which, to my mind, is paramount in this case.

[161] On this day, I find that Ms Butcher was quite determined to take the twins from Mr Roche’s custody. I find that Mr Roche was entitled, as a matter of law, to resist that attempt. Ms Butcher, being aware that Mr Roche was not in agreement with an early changeover, has persisted in attempts to take the children, even though she is

¹¹⁹ *Textbook of Criminal Law* (1978) p 440.

¹²⁰ [1995] QCA 066. The Court delivered a joint Judgment.

¹²¹ At pp 5 and 6.

¹²² See *eg Ali v South Australian Police* [1995] SASC 5160 at [6] *per* Cox J. The prosecutor adverted to what might be termed the “unreasonableness” of Mr Roche’s conduct, and her point is not lost on me: see *eg* cross-examination at Transcript p 1-50 lines 14 to 37. In fairness, however, there was nothing placed before the Court which indicated any reason why uniform shopping had to occur that afternoon; was there really any necessity for that initial disagreement at all?

being repeatedly pushed back by Mr Roche. Sixteen pushes have not deterred Ms Butcher from her efforts to achieve her goal, which she has continued to pursue even after Mr Roche and his family were secured in their vehicle.

[162] I am not prepared to find that this was a case where the law permitted no force at all to be used.

[163] Any assessment I make as to the reasonableness of the force used by Mr Roche must also take into account the situation in which he found himself – on the sudden, as it were – when Ms Butcher commenced her efforts to take the children. In looking at the entire situation, I have no difficulty, in assessing the conduct of Mr Roche in trying to prevent the removal of his children, to accept that one should not use “jeweller’s scales” to measure what is reasonable force¹²³.

[164] I believe I may also have proper regard to the fact that Mr Roche, when his custody of the twins was challenged, could not be expected to “weigh to a nicety the exact measure” of the response he made. But I have no doubt that, both at the time, and in hindsight, he honestly believed he was justified in using the force that he did. As the Privy Council observed in *Palmer v The Queen*¹²⁴:

“If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.”¹²⁵

[165] There were no slaps, or punches. I am of the opinion that a push is a less severe form of force than a slap, or punch. In the pushing which occurred straight after Ms Butcher had taken a twin from Mr Roche’s grasp, the pushing was of longer duration, in that Ms Butcher was pushed back against a black car.

[166] The pushing which occurred towards the end of the interaction was also more forceful, to my perception, than what had occurred earlier. But I must, I think, factor in that by this time, it was reasonably clear that Ms Butcher did not intend to be deterred from her purpose by the pushing which had occurred prior to that point. It was timely that the intervening member of the public arrived when he did; in that, as it seems to me, it was his arrival which resulted in the final cooling-down of the situation.

[167] I have already noted that, when Mr Roche’s group were all in the vehicle, Ms Butcher nevertheless went to the rear passenger door of the car, and reached

¹²³ *per* Geoffrey-Lane J in *Reed v Wastie*, *The Times*, 9 February 1972; [1972] Crim LR 221 (QBD). The analogy appears only in *The Times* report. The case concerned the use of force in prevention of crime, namely, prevention of an obstruction of the highway, in that the plaintiff, having been pulled over by police, refused to move from where he was standing – next to the door of his truck – to the rear of the vehicle, to keep clear of passing traffic.

¹²⁴ [1971] AC 814 at 832B.

¹²⁵ *Palmer* was a case which dealt with self-defence. However, the analogy, in my opinion, is valid, in that in cases of prevention of crime, or ongoing breach of the peace, just as in self-defence, the subject is required to react immediately, and without the quiet time for reflection which might later be available to a jury, or a Magistrate.

towards the door handle. Mr Roche got out of the car, and held her wrist for a few seconds, to prevent further such action.

- [168] I cannot see how Mr Roche could have prevented, or delayed Ms Butcher, by any lesser means. If she committed a breach of the peace, Mr Roche was entitled to detain her until, at least, the threat had passed. I am of the view that any physical detention would have exceeded, in terms of force, the pushing which took place. The modest level of force used is confirmed, to some extent, by the low level of injury sustained¹²⁶.
- [169] Mr Roche could, perhaps, have extended his arm, with palm outwards, in an attempt to keep Ms Butcher at arm's length; but the difficulty, it seems to me, was Ms Butcher's determination to take the children. It is probable that she would simply have walked around him. If not discouraged by a physical push, Ms Butcher was not likely to be discouraged by such an action.

Conclusions:

- [170] As a matter of law - as I understand it to be - Mr Roche was justified in using force to try to prevent Ms Butcher taking the twins from him against his will.
- [171] I find that the justification permitted by section 260 of the *Criminal Code* is fairly raised on the evidence before me; and that it has not been negated by the prosecution;
- [172] I also find that the justification permitted by section 266 of the *Criminal Code* is fairly raised on the evidence before me, and that the elements of an offence against section 363 of the Code have been proved as basis for action under section 266. I also find that this justification has not been negated by the prosecution.
- [173] In acting as he did. Mr Roche was justified in using such force as was reasonably necessary to achieve that purpose; further, the force used had to be proportionate to the mischief sought to be prevented;
- [174] I have to take into account the position in which Mr Roche found himself, and to consider his conduct against all of the circumstances, bearing in mind that if he had only done what he honestly and instinctively thought was necessary, that would be an indicator that his actions had been reasonable, and proportionate.
- [175] I am not satisfied to the necessary standard, on the case presented, that the force used by Mr Roche was excessive, within the meaning of section 283.

¹²⁶ There was no evidence led which would enable me to make any finding as to whether the redness and bruising suffered by Ms Butcher was the result of one push, or the combined effect of multiple pushes

[176] I find that the offence has not been made out, and accordingly I find Mr Roche to be Not Guilty. I dismiss the charge, and I discharge Mr Roche with respect to this offence. I publish my reasons.

Acting Magistrate J M Aberdeen

Mackay, 27 October 2021