

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CRIMINAL

**CITATION** : CROSSWELL -v- AINSWORTH [2014] WASC 186

**CORAM** : ALLANSON J

**HEARD** : 27 NOVEMBER 2013

**DELIVERED** : 28 MAY 2014

**FILE NO/S** : SJA 1085 of 2013

**BETWEEN** : BRANDT DAVID CROSSWELL  
Appellant

AND

MITCHAL WILLIAM AINSWORTH  
Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : MAGISTRATES COURT OF WESTERN  
AUSTRALIA

**Coram** : MAGISTRATE S R MALLEY

**File No** : PE 49394 of 2012

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*Catchwords:*

Criminal law - Appeal against conviction in Magistrates Court - Whether use of excessive force by police - Whether finding arrest unlawful excludes defence of provocation - Error of law - Miscarriage of justice

*Legislation:*

*Criminal Appeals Act 2004* (WA), s 14(2)

*Criminal Code* (WA), s 231, s 235, s 245, s 246, s 318(1)(d)

*Criminal Investigation Act 2006* (WA), s 16(1)

*Result:*

Leave to appeal granted on each ground

Appeal allowed on ground 3

Conviction set aside

New trial ordered

*Category:* B

**Representation:**

*Counsel:*

Appellant : Mr L M Levy SC & Mr S Nigam

Respondent : Ms S Markham

*Solicitors:*

Appellant : S C Nigam & Co

Respondent : Director of Public Prosecutions (WA)

**Case(s) referred to in judgment(s):**

Challis v The State of Western Australia [2014] WASC 8

Donovan v Mason [2012] WASC 151

Ellis v Ellis [1999] WASC 30

Weiss v The Queen [2005] HCA 81; (2005) 224 CLR 300

1     **ALLANSON J:** The appellant was charged with two counts of assaulting  
a public officer in the execution of his duty. He pleaded not guilty. After  
trial, the appellant was acquitted on the first charge, but convicted on the  
second. He seeks leave to appeal that conviction.

2             The events in question took place in Murray Street Perth between  
about 6.49 pm and 6:55 pm on 13 October 2012. The appellant was at a  
hotel with a group of friends. Two police officers, Acting Sergeant  
Dawson and Constable Kandic, attended the hotel in response to a  
complaint (not relating to the appellant or his friends). An object was  
thrown towards them, striking Constable Kandic and his bicycle. The  
officers saw the appellant make a finger gesture towards them, before  
leaving the hotel. They followed him.

3             The prosecution alleged that the appellant then attempted to strike  
Sergeant Dawson, and was arrested for that offence. The second charge  
alleged that the appellant head-butted Sergeant Dawson when he was  
being escorted to the police van following his arrest. The appellant  
admitted that he assaulted Sergeant Dawson on the second occasion. This  
appeal turns on what happened in the period of approximately six minutes  
between the arrest and that assault, and whether the assault was unlawful.  
During that time, Sergeant Dawson pushed the appellant to the ground,  
and the police were restraining the appellant on the footpath. For much of  
it, the appellant was face down on the pavement, with one and sometimes  
both of the officers kneeling or sitting on his body.

4             There were several witnesses, including the two police officers. The  
appellant gave evidence, and called witnesses on his behalf. Much of  
what happened, but not all of it, was captured on film by two  
closed-circuit cameras. The camera's view was frequently obstructed by  
vehicles and people between the camera and the events.

5             There were two cameras and a slight discrepancy in the time  
recorded by each of them, but it is still possible to establish the sequence  
of events. I will follow the usage at trial in giving times on a 24 hour  
clock.

**The legislative background**

6             The appellant was charged under s 318(1)(d) of the *Criminal Code*  
(WA) under which any person who assaults a public officer who is  
performing a function of his office or employment is guilty of a crime.  
Assault is an element of the offence.

7 The defence relied upon provocation. Where assault is an element of an offence, the law relating to provocation is found in s 245 and s 246 of the *Code*. The effect of provocation is to remove criminal responsibility for the assault. By s 246:

A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely to cause death or grievous bodily harm.

Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.

8 If there is evidence which raises the possibility of the defence of provocation, the prosecution carries the burden of proving beyond reasonable doubt that the defence is excluded.

9 Relevantly, a lawful act is not provocation to any person for an assault: s 245. The conduct of the two police officers in arresting the appellant could not be provocation for his assault on Sergeant Dawson, if the arrest was lawful. An arrest that is unlawful is not necessarily provocation, but it may be evidence of provocation to a person who knows of the illegality: s 245.

10 Under s 16(1) of the *Criminal Investigation Act 2006* (WA) a police officer exercising a power in the Act, including the power of arrest, may use any force that it is reasonably necessary to use in the circumstances to exercise the power and to overcome any resistance that is offered, or that the officer reasonably suspects will be offered. The use of force under s 16(1) is subject to the *Criminal Code* ch XXVI. Under the provisions in ch XXVI, a person making a lawful arrest may use such force as may be reasonably necessary to overcome any force used in resisting such execution or arrest, or to prevent the escape or rescue of the person arrested: s 231, s 235. If the force used by the police was reasonably necessary, the use of that force was lawful and could not be provocation for an assault.

### **The defence case**

11 In closing, counsel for the appellant said that the defence case was that from a particular time, identified on images taken by various cameras as about 18:51:07, Sergeant Dawson lost 'the protection of his office'. It is clear from the closing that to establish provocation the defence relied upon the following conduct, starting from 18:51:07. At this time, the appellant was already under arrest with his hands handcuffed behind his back. Sergeant Dawson:

1. grabbed the appellant to the throat and pushed him to the ground;
2. pushed the appellant's face into the ground;
3. told the appellant he was 'fucked', 'going to go to jail for six months', and 'going to be bashed black and blue'.

12 Counsel submitted that the force then used in taking the appellant to the police van was 'at the very end of the process' of the provocative conduct of Sergeant Dawson, in particular, but also his fellow officer, Constable Kandic. The defence did not rely only on the conduct of Sergeant Dawson immediately preceding the assault.

### **The decision**

13 The magistrate found that he had a reasonable doubt regarding the first charge of assault. He accepted that Sergeant Dawson believed that the appellant attempted to elbow him, and was justified in then bringing him to the ground and placing him under arrest. But the magistrate also found that he had a reasonable doubt about whether the appellant's explanation, that he was merely putting his hands in the air and not attempting to elbow the officer, was correct. As a result, although he acquitted on the first charge, the magistrate found that Sergeant Dawson was acting in the execution of his duty when he handcuffed the appellant and moved him to the spot where the next events occurred.

14 The magistrate then found, largely on the basis of CCTV footage:

What is apparent is that at one point Dawson reacts with a hand to the accused's upper chest, pushing the accused to the ground. It is unclear exactly where the hand is placed. As a result of the push the accused's head is thrown back, making contact with [Constable Kandic]. The accused is then subdued on the ground. While on the ground the two officers at various points have the body weight on the accused to prevent his movement.

There is CCTV footage which shows that at one point the accused, who was on his stomach with Dawson on his back, raised his head off the ground. At that point of time Dawson forcibly forces the head back down to the pavement ...

- 15 Having set out Sergeant Dawson's explanation for why he acted in this way, the magistrate continued:

In my view, that explanation was, I have to say, somewhat bizarre. He agrees he also stated in his statement that one of the reasons for pushing the accused was he thought the accused might escape, which in the circumstances I have to say that it would seem to be somewhat fanciful. It is of note that at one point when viewing the CCTV from the William Street direction the accused has been raising his head off the ground and having his head forcibly - back with force back into the pavement.

Based on the footage alone, in my view, that force was excessive and reflects poorly on Officer Dawson, an experienced officer, as it was somewhat likely to cause injury. Further, in my view, the pushing to the ground of the accused by Dawson is not consistent with his explanation, namely the accused was attempting to assault him, although he was about to escape. *When one views that portion of the altercation, I take the view that Dawson was not actually in the execution of his duty in pushing the accused to the ground or pushing his head into the pavement.* (emphasis added)

- 16 While the appellant was being taken to the police van, he hit Sergeant Dawson in the cheek with his head. This was the second charge of assault.

- 17 The magistrate then posed the question whether Sergeant Dawson's acts vitiated the lawfulness of the arrest, and held that they did not. He said 'it would have grounded a defence [of provocation] if the accused had reacted to those acts, but if the initial arrest is lawful, as I found it, it remains so'. Accordingly, his Honour found that at the time the police were escorting the appellant to the police van they were acting in execution of their duty.

It would only be the case if I was to find that at the time of the escorting the accused to the van that the officers weren't acting in the execution of duty would the accused be entitled to rely on provocation as the assault would be on the basis of a common assault.

- 18 The magistrate also found, from his assessment of the CCTV footage, that the appellant's evidence that Sergeant Dawson was leaning in close to his face while escorting him to the van was not true. He found that Sergeant Dawson was escorting him in a normal manner, at a normal

distance. He rejected that it was the police officer who was 'initiating the confrontation, being in the accused's face and threatening him'. On that basis he found that the prosecution had satisfied him beyond reasonable doubt that the police officers were acting in the execution of duty, and hence the defence of provocation had not been 'grounded'.

### **The appeal**

19 The appellant filed two amended grounds of appeal, and sought leave to include a third ground. Grounds 1 and 2 allege that the magistrate erred in law in finding that Sergeant Dawson was performing a function of his office at the time that he was assaulted by the appellant. They differ in their particulars. Ground 1 alleges that the magistrate erred in concluding that the appellant was lawfully under arrest at the time he assaulted Sergeant Dawson, despite the finding that Sergeant Dawson had used excessive force. Ground 2 alleges error in concluding that at the time of the assault the appellant was no longer reacting to the excessive force that had been earlier used on him.

20 Ground 3 alleges that the magistrate erred in law in finding that the appellant could only rely upon the defence of provocation in the circumstances of the case if at the time of the assault Sergeant Dawson was not acting in the execution of his duty.

21 I will make some general comments regarding the magistrate's findings, before turning to the grounds.

22 The magistrate found that Sergeant Dawson was reacting to the appellant 'being verbal ... and swearing at him', in pushing the appellant to the ground but was not acting in execution of his duty. He did not say whether he accepted Sergeant Dawson's evidence that the appellant threatened him, although he described some aspects of that evidence as bizarre. While not expressed in those terms, the magistrate's findings can only be that Sergeant Dawson acted unlawfully and used excessive force in pushing the appellant to the ground, and when he pushed the appellant's face into the pavement.

23 The magistrate made no finding about the conduct of both officers in putting their body weight on the appellant while he was on the ground, and whether that was the use of reasonable force.

24 In considering the question of provocation, the magistrate did not refer to those earlier events as they might relate to the assault. He considered only whether the officers were acting in the execution of their

duty at the time of escorting the appellant to the police van. Although the defence complained about their conduct then - in particular the appellant alleged Sergeant Dawson was then goading him - the defence of provocation was clearly not confined to that period.

25 On the findings that Sergeant Dawson was not acting in the execution of his duty when he pushed the appellant to the ground, and when he pushed his face into the ground, those acts of Sergeant Dawson were unlawful. The magistrate appears to have accepted that they could amount to provocation, when he said that conduct would have grounded the defence if the accused had reacted to them. As I understand his reasons, he excluded provocation because at the time the appellant assaulted Sergeant Dawson, the police were then acting in the execution of their duty and not using excessive force.

26 Whether Sergeant Dawson was acting in the execution of his duty at the time the appellant assaulted him is not, however, the relevant question in this case. Nor is it necessary to decide whether the arrest became unlawful because of the use of excessive force. If the earlier conduct of Sergeant Dawson was unlawful, s 246 required the magistrate to consider whether that conduct was such as to be likely to deprive an ordinary person of the power of self-control and to induce him to assault Sergeant Dawson; whether the appellant was in fact deprived by the provocation of the power of self-control, and acted upon it on the sudden and before there was time for his passion to cool; and whether the force he used was not disproportionate to the provocation.

27 The magistrate did not make findings on those matters.

### **Ground 3**

28 It is convenient to deal first with this ground. The magistrate said that the appellant would be entitled to rely on provocation only if the officers were not acting in the execution of their duty at the time of escorting him to the van. That, in my opinion, is an error of law. The question posed by s 246 is not whether the Sergeant Dawson and Constable Kandic were acting lawfully at the time of the assault, but whether the acts which were provocation for the assault were lawful.

29 I have considered carefully whether the reasons of the magistrate, properly understood, were intended to refer to the time which elapsed between the use of excessive force and the assault. But in my opinion that is not a reasonable construction of what he said.



30 Leave is granted for ground 3, and I would uphold that ground.

### **Grounds 1 and 2**

31 Ground 1 relies on the proposition that the excessive use of force to a person who has been arrested renders the arrest unlawful from that time.

32 The magistrate found that the initial arrest was lawful, and that Sergeant Dawson was acting lawfully when he handcuffed the appellant, and moved him to the wall area adjacent to the Boheme Hotel. He identified two acts by Sergeant Dawson that involved the use of excessive force. Both occurred after the initial arrest. The magistrate made no finding about whether the appellant was then 'kicking out and thrashing around', as alleged by the police, or whether the restraint of the appellant, by the two police officers sitting and kneeling on him while he was on the ground over some minutes, was the use of excessive force.

33 The magistrate expressly found that in escorting the appellant to the van the officers 'were acting in execution of duty relevant to reasonable arrest'. By implication, that is a finding that excessive force was not used at that time.

34 I am not aware of any authority, and none was cited to me, that an initially lawful arrest becomes unlawful because one of the arresting officers performs an unlawful act, perhaps a transitory act, while the person arrested is in custody. In performing the unlawful act, the officer would not be performing a function of his or her office. A person resisting the unlawful act would not be obstructing a public officer in the performance of his or her functions, contrary to s 172(2) of the *Criminal Code*. If that resistance involved an assault, it would not be an assault under s 318(1)(d). But that is a quite distinct issue from whether the arrest is lawful.

35 I am not satisfied that the magistrate made the error of law asserted in ground 1.

36 Ground 2 alleges an error of law. The particulars complain that, having found that Sergeant Dawson used excessive force at 18:51:07, the magistrate erroneously concluded that the appellant was no longer reacting to that excessive force at 18:55:20. There are three difficulties with this ground. First, it is not what was argued either at trial or on appeal. The appellant complained that the conduct of the police continued and was not confined to the events immediately before and at 18:51:07. Second, the magistrate made no such finding. Third, whether the

appellant was reacting to the excessive force, and whether he was actually deprived of the power of self-control and acted on the sudden, are questions of fact. The magistrate may have erred in failing to consider whether the assault was a reaction to the earlier conduct, but that is covered by ground 3.

37 I am not satisfied that the appellant has established the error of law complained of in ground 2.

38 In my opinion, it is appropriate that leave be granted for all grounds, but I would uphold only ground 3.

### **Substantial miscarriage of justice**

39 The *Criminal Appeals Act 2004* (WA) s 14(2), provides that even if a ground of appeal might be decided in favour of the appellant, the court may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

40 The principles governing the application of s 14(2) are not in dispute. The appellate court must assess whether the error of law gives rise to a substantial miscarriage of justice. This assessment is undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. The court must make its own independent assessment of the evidence and determine whether, making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record, the guilt of the appellant was proved beyond reasonable doubt: *Weiss v The Queen* [2005] HCA 81; (2005) 224 CLR 300 [41]; *Challis v The State of Western Australia* [2014] WASC 8.

41 In the present case, there was evidence which raised the defence of provocation. The court may only find there was no substantial miscarriage of justice if it is satisfied that the prosecution negated provocation and thereby proved the appellant was guilty beyond reasonable doubt.

42 I have carefully considered the transcript of the trial, and reviewed the exhibits containing the CCTV record of events. One of the difficulties for the court on appeal is that not all of the material that was before the magistrate was before me. For example, some video taken by the witness Jessie Robertson on his mobile phone was played in the Magistrates Court but was not before the appeal.

43 The CCTV record is useful, but limited. The camera in exhibit A was positioned so that vehicles on the street and onlookers obstruct the vision at various times, sometimes very seriously. Exhibit A provides good visual evidence of the period while the appellant was being taken to the police van, and when the assault occurred, but not the earlier events.

44 The film record from exhibit B offers better vision of the events while the appellant was being restrained. It is not close enough nor detailed enough to see whether the appellant was conscious at all times. There is a short period when he is very still. Again there are times when vision is obstructed, although not as significantly as for exhibit A.

45 The first of the eyewitnesses called by the prosecution was Danish Nawaz, a crowd controller at the Boheme Hotel. These events occurred immediately outside those premises. Mr Nawaz gave evidence relevant to the first alleged offence, but not regarding the events when the appellant was pushed to the ground and restrained.

46 A security officer from a nearby building, Rohan Wendt, also gave evidence. Mr Wendt said that he saw the appellant thrashing around on the ground. He said that one of his guards jumped on the appellant's legs because the appellant was becoming increasingly violent. He described the appellant as 'kicking out' and 'thrashing around'.

47 In cross-examination, Mr Wendt said that the first time he had made a statement about this matter was on 10 June 2013, almost eight months after the events. He had made no notes of the incident, and had not seen the footage from the CCTV.

48 The magistrate made no findings about the reliability of Mr Wendt's evidence. Simply on consideration of transcript, it is difficult to determine to what extent his evidence should be accepted. It is directly relevant to the defence claim that the unlawful conduct of the police, and thus the provocation, did not end when the appellant was pushed to the ground. On the basis of the CCTV evidence, I have doubts about whether the appellant was thrashing and kicking in the manner described. But the evidence of Mr Wendt is one of those instances where the judicial officer conducting the trial, with the opportunity to see and hear the evidence as it is given, has a distinct advantage.

49 Constable Daniel Hunuki gave evidence about what he saw immediately before and after the assault on Sergeant Dawson. He was not present while the appellant was being restrained on the pavement.

50 Sergeant Dawson gave evidence. In examination-in-chief, Sergeant Dawson gave his account of how the appellant was pushed to the ground. He said that he pushed the appellant because he feared he was going to be assaulted, and the appellant threatened to 'smash him'. He said he was aware that there were people behind him and he could not step backwards so 'the best tactic was to move forward. My main aim was to get his head as far away from mine, because I believed he was going to head-butt me'.

51 Sergeant Dawson described the appellant's behaviour when he fell to the ground as 'kicking out with both legs quite violently and thrashing around from side to side'. He described Constable Kandic as 'positioned on him, holding down, I believe, onto the side and to the right side of him'.

52 In cross-examination, Sergeant Dawson agreed that he had not said anything about the threat to 'smash him' in the statement he made about these events. He said that was because he believed 'that will be covered in my evidence in chief and cross-examination and re-examination'. He said, 'I cover the points that I need to cover and it gets covered in court'. The magistrate described that explanation as bizarre.

53 On the other hand, it is clear that the magistrate accepted some of Sergeant Dawson's evidence, and, in relation to the period when the police were taking the appellant to the van, preferred it to the evidence of the appellant. The court on appeal is not well placed to make its own credibility findings save where it can do so by reference to the exhibits.

54 The other police officer involved was Constable Djordje Kandic. He described the events in these terms:

The accused was abusive towards us. I remember him saying, 'You fucking pigs, you're nothing.' He was also threatening us. I remember him saying, 'I will smash you'. The accused was taken to the ground and was therefore restrained on the ground ... At this time, the accused continued to thrash out with his legs, kicking out with his legs on the ground. We told the accused, Senior Constable Dawson and I, numerous times, to calm down. The accused continued his behaviour on the ground, threatening us, abusive.

55 Later in his evidence, Constable Kandic described the appellant as 'actively resisting us, kicking out his legs' while he and Sergeant Dawson were trying to calm him down.

56 In cross-examination, Constable Kandic agreed that he also had said nothing in his statement about the threat to 'smash you'. He described his statement as a 'broad overview of the events'.

57 Constable Kandic agreed that he did not see what caused the appellant to go to the ground. For some time he continued to speak on his phone, calling for the police van. He then knelt on the appellant, while the appellant was lying face down on the ground. He justified this as restraining him. When asked to show on the CCTV footage where the appellant was thrashing out and kicking, he said that the appellant went through spurts when he tried to kick out, and then would go quiet again. When it was put to him that none of the footage showed the appellant kicking, other than moving his legs slightly, the constable said 'I think we did a good job restraining him'.

58 First Class Constable Mitchal William Ainsworth gave evidence, particularly relating to the interview of the appellant on the night. He was also present earlier when the appellant was put into the police van, but not when he was being restrained on the pavement. Constable Ainsworth agreed, in cross-examination, that the appellant was anxious to get him to take photographs of the injuries that he had suffered, some of which were obvious to Constable Ainsworth. He also agreed that the appellant was in some discomfort with his chest or his arm or his shoulder.

59 The appellant gave evidence. He described the action which led to him being on the ground as Sergeant Dawson grabbing him by the throat. He denied attempting to kick anybody or thrashing his limbs, although he did say he resisted a little initially when he was pushed to the ground. The appellant agreed that he used foul language towards the police officers, but denied calling them 'fucking pigs'. He denied threatening to 'smash' Sergeant Dawson.

60 The appellant had little memory of the occasion when he was taken to the ground by Sergeant Dawson. He remembers being on the ground with both officers on him, and his face on the ground, totally unable to move. He thought that he had blacked out, as it was quite a hard hit to his face and head area. The appellant said that while being taken to the police van he complained that he was in pain, his arms were hurting and he could not feel his fingers. He says that at that stage Sergeant Dawson abused him and it is then he said that Sergeant Dawson was 'in his face'.

61 Crucially, the appellant said of his behaviour then,

[It] doesn't normally happen, but it's just all too much after everything that happened previous on the ground and I was feeling like an absolute dog. You know, shirt ripped, phone, everything gone. No shoes. Blood on my face. I could see blood on my T-shirt. And I just jumped up and sort of to get him out of my face and our heads collided ... I just - I just wanted him out of my face. He was just poking and prodding me the whole time and I just - I just couldn't take it. After everything like previous to that was pretty - it was very full on'.

62 Asked what he couldn't take, he said 'the abuse basically. The - I've already been - I'm bleeding, physically abused'.

63 In cross-examination he said again that he had blacked out on the ground, but not for the whole time. He could not in his evidence recall anyone restraining his legs. He could not remember how the injuries to his face occurred.

64 The appellant's lack of recollection is not fatal to his defence. All of the evidence must be considered. Loss of self-control can be established by inference: see, for example, *Donovan v Mason* [2012] WASC 151 [15], [16]; *Ellis v Ellis* [1999] WASC 30.

65 Jessie William Robertson, one of the appellant's friends, gave evidence. He was one of the people who saw the appellant on the pavement, but did not see how he ended up on the ground. He said that when he saw the appellant, he was already on the ground with two police officers on top of him at that point. One had his knee on the appellant's back and the other one was holding his lower body around the thighs. The appellant was yelling and telling them to get off him.

66 Jaimi Marie Travia, another of the appellant's friends, gave evidence. She saw the appellant when he was 'on the floor' and had two police officers on his back. When she saw the appellant, he had blood on his face and from the look on his face, it looked like he was hurt.

67 The last of the defence witnesses was Harry Roy Ricketts Smith. He also saw the appellant when he was, as the witness described it, 'being pinned to the ground ... in quite a lot of distress'. He described the appellant as struggling, or 'writhing in pain' while he was on the ground. He also saw blood on the appellant's face and blood on the pavement. Mr Smith moved in to try to straighten the appellant's legs because he appeared to be in pain.

68           In short, there is evidence on which the magistrate might find that the prosecution had not proved to the criminal standard that the assault by the appellant was not provoked by unlawful force used by the police. I am satisfied that there has been a miscarriage of justice. I am not satisfied, however, that I can make the necessary findings of fact to determine whether the magistrate should have acquitted, without making findings of credibility.

69           The conviction should be set aside and a new trial ordered. I will hear the parties as to the orders to be made to give effect to this decision.