CITATION: *Miles v Northern Territory of Australia* [2006] NTMC 044

PARTIES: BRETT VERNON MILES

v

NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: LOCAL COURT

JURISDICTION: APPELLATE

FILE NO(s): 20324681

DELIVERED ON: 11.5.06

DELIVERED AT: DARWIN

HEARING DATE(s): 31.3.06, 5.4.06, 24.4.06.

JUDGMENT OF: D. TRIGG SM

CATCHWORDS:

Appeal from Judicial Registrar a rehearing.

Appellant must show some legal, factual or discretionary error.

If an error is found to exist, the appeal proceeds as a rehearing but only on any error found.

Crimes (Victims Assistance) Act – section 12 – failure to assist.

REPRESENTATION:

Counsel:

Appellant: Ms Spurr

Respondent: Mr Morris

Solicitors:

Appellant: Halfpennys

Respondent: DeSilva Hebron

Judgment category classification: B

Judgment ID number: [2006] NTMC 044

Number of paragraphs: 153

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

No. 20324681

[2006] NTMC 044

BETWEEN:

BRETT VERNON MILES
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
Respondent

REASONS FOR JUDGMENT

(Delivered 11 May 2006)

Mr D. Trigg SM:

1. This is an appeal from a decision of Acting Judicial Registrar Day which was made under the *Crimes (victim's assistance) Act* (hereinafter referred to as *"the Act")*, and delivered on 7 September 2005.

2. In that decision Ms Day found, in paragraph 21 of her reasons, that:

> …if the applicant were entitled to the issue of an assistance certificate I would assess damages in accordance with the Act in the sum of $8,000 in respect of the heads of damage allowed in sections 9(2)(e), (f) and (g) of the Act. In addition I would allow an amount of $2,600 in respect of future medical expenses under s.9(2)(d), giving a total of $10,600.

3. However, Ms Day went on to find, in paragraph 32 of her reasons, that:

> Accordingly I find that the applicant has failed to assist the police with the investigation of the offence committed against him and accordingly his application for an assistance certificate must be dismissed.

4. It was against both these findings that the appellant has appealed. The Notice of Appeal herein was filed on 5 October 2005. The grounds of appeal were stated to be:

    1. That the Judicial Registrar was in error in determining that there was no disability to the Applicant's cervical spine caused or contributed to by the assault in any assessment of damages.

    2. That the Judicial Registrar was in error in determining that there was no injury to the Applicant's left shoulder caused or contributed to by the assault in any assessment of damages.

    3. That the Judicial Registrar was in error in determining that there was no injury to the Applicant's right shoulder caused or contributed to by the assault in any assessment of damages.

    4. That the Judicial Registrar was in error in finding that the failure by the Applicant to pass on rumours constituted a failure to assist.

5. The respondent filed a notice of appearance to the appeal herein on 13 October 2005. No cross-appeal has been filed.

6. The appeal herein came before me on 31 March 2006 out of the general hearing list for that day. As such I had not seen the file until shortly before I entered court. The hearing commenced at about 1050 hours. Ms Spurr appeared to represent the appellant, and Mr Morris to represent the respondent.

7. Ms Spurr wished to rely upon the following documents which were on the court file:

    Affidavit of appellant sworn 13 May 2004 and the annexures thereto, which I marked ExA1;

    Affidavit of appellant sworn 6 June 2005 and the annexures thereto, which I marked ExA2;

    Affidavit of appellant sworn 25 August 2005 (which had no annexures), which I marked ExA3; and

    The annexures to an affidavit of Garraway that the respondent would be tendering.

8. Mr Morris wished to rely upon the following documents which were on the court file:

> Affidavit of Wayne Brian Newell sworn 28 July 2004, which I marked ExR1;
>
> Affidavit of Peter Squire Kennon sworn 28 July 2004, which I marked ExR2;
>
> Affidavit of Matthew Charles Garraway sworn 12 August 2005 and the annexures thereto, which I marked ExR3; and
>
> Affidavit of Fredrick William Huysse sworn 12 August 2005 and the annexures thereto, which I marked ExR4.

9. Apparently this was the same evidence that was before Ms Day. Neither party sought to place any additional evidence before the court. Given the large volume of material it was the request of both counsel that I read the various materials relied upon before they commenced their submissions. Accordingly, the matter was stood down until 1400 hours, at which time Ms Spurr made her submissions on the appeal. Mr Morris was unable to complete his submissions by the end of the court day, so he resumed those at 1400 hours on 5 April 2006. When the hearing resumed I raised some concerns as to how the appeal should proceed. I identified the issues on which I requested assistance from counsel to be:

> Assuming that the appeal is by way of rehearing (as decided in Gibson's case, referred to later in these reasons):
>
> 1. Does the appellant have to demonstrate some legal, factual or discretionary error in the judgement of Ms Day?
>
> 2. If yes to question 1, is the error limited to the four grounds of appeal?
>
> 3. If an error is not needed to be identified, is the appeal a rehearing of only the four matters in the Notice of Appeal, or all issues?
>
> 4. If an error is needed and found to exist, does the appeal proceed as a rehearing only on the error found or everything?

5. Is the respondent required to cross-appeal in order to raise issues for determination (if all issues are not alive)?

10. The matter was adjourned to 24 April 2006 at 1430 before me to enable both counsel to consider these issues and how the matter should proceed from here. Mr Morris provided written submissions on the questions that I posed, and I thank him for his assistance. Mr Morris' submissions were in accord with the preliminary view which I had reached. Ms Spurr did not seek to challenge the submissions of Mr Morris. At the end of submissions I reserved my decision (on these questions and generally), which I now publish.

11. It was submitted by both counsel that the appeal herein was by way of rehearing. In support of that submission they relied upon the decision of Ms Blokland SM in the case of *Gibson v Northern Territory of Australia & Unknown* [2004] NTMC 021. It is to be noted that a decision of a fellow magistrate is persuasive but not binding upon this court. However, both counsel accepted that I should proceed on the basis that the appeal herein is by way of rehearing.

12. The right of appeal under *the Act* is created in *section 15A* which states as follows:

> (1) A party to proceedings in respect of an application under section 5 may appeal to the Court constituted by a magistrate against a determination made by a Judicial Registrar that an assistance certificate is, or is not, to be issued.
>
> (2) A party to proceedings commenced under section 21 may appeal to the Court constituted by a magistrate against a determination made by a Judicial Registrar –
>
> (a) that the Territory is entitled to recover from an offender a specified amount; or
>
> (b) that the Territory is not entitled to recover any amount from an offender.
>
> (3) An appeal under subsection (1) or (2) is to be in accordance with Part 37 of the Local Court Rules.

> (4) A party to proceedings under this Act may appeal to the Court constituted by a magistrate against an order in those proceedings made by a Judicial Registrar or Registrar.
>
> (5) An appeal under subsection (4) is to be in accordance with rule 4.04 of the Local Court Rules.
>
> (6) A party to proceedings under this Act is not entitled to appeal to the Supreme Court against a determination or an order to which this section applies.
>
> (7) An appeal under this section does not operate as a stay of the determination or order appealed against unless a magistrate orders otherwise.

13. It is apparent that the matters in *subsections (1) and (2)* appear to deal with appeals from final orders, and these must be in accordance with *Part 37 of LCR*. The problem with this is that *LCR 37* is silent as to the nature of the appeal, and hence Ms Blokland after an analysis of the legislation and authorities in the case of *Gibson* (supra) decided that the appeal was by way of a rehearing. It is interesting to note that *LCR 37* requires an appeal to be filed within 28 days (*37.04(1)*); to be in accordance with *Form 37A* (*37.04(2)(a)*); and state specifically and concisely, the grounds of appeal (*37.04(2)(b)(v)*). This is to be contrasted with an appeal under *subsection (4)* which presumably deals with all appeals not covered specifically in *subsections (1) and (2).* In that case *subsection (5)* dictates that such an appeal is to be in accordance with *LCR 4.04*. This type of appeal is to be by application under *Part 25 (4.04(2)(a)*); and "is to be by way of a hearing de novo" *(4.04(2)(c)).*

14. Mr Morris referred to a number of the well known authorities on determining the nature of appeal (*Traut v Faustman Bros Pty Ltd* (1983) 48 ALR 313 A 322; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616; *Turnbull v New South Wales Medical Board* [1976] 2NSWLR 281 @ 297). In addition he referred to *Tourism Holdings Australia Pty Ltd v Commissioner for Taxation* [2005] NTCA 3. Based upon those cases (which I accept as good authority) he submitted:

> In this case the hearing before the Judicial Registrar was not (a) hearing before an administrative body and was a hearing in which evidence was called in accordance with the Crimes (Victim's Assistance) Act and was, for all intents and purposes, a hearing before the Local Court. The appeal, therefore, is not a case where it is expected that the Court hearing the appeal would be exercising "original" jurisdiction.

15. I accept this submission. I respectfully agree with the decision of Ms Blokland SM in *the case of Gibson* (supra), that the appeal herein is by way of rehearing.

16. However, that is not necessarily the end of this issue. In *Williams* loose leaf Butterworth's service "*Civil Procedure – Victoria"* in paragraph 64.01.130 it is noted:

> The characterisation of an appeal as in the nature of a rehearing as opposed to an appeal in the strict sense does not necessarily resolve how the appeal will be heard if the appeal raises a question of fact: see *Builder's Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616; *Bradshaw v Medical Board of Western Australia* (1990) 3 WAR 322 @ 334. "Appeal by way of rehearing" does not have a single well-established meaning. Primarily it is a question of elucidating the legislative intent: see *Ex parte Currie; re Dempsey* [1968] 2 NSWR 378…….(and the other cases referred to therein).

17. At paragraph 64.01.135 the learned author went on to add:

> Standing alone, however, the words (sic appeal by way of rehearing) are not to be likely taken to mean that there is in effect a re-trial of the issues between the parties: see *Traut v Faustmann Bros Pty Ltd* [1983] 48 ALR 313 @316.

18. In an appeal by way of re-hearing "the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error" (*Allesch v Maunz* (2000) 203 CLR172 @ 180). In the same case Kirby J went on to say at page 187:

> The appeal from the primary judge to the Full Court was by way of rehearing (59). But in a legal proceeding loosely described as an "appeal" (60), such a "rehearing" does not involve a complete

> reconsideration de novo of all of the matters determined by the primary judge. Error must be shown. It is then for the appellate court, within it's own statutory powers, to decide whether to set aside the orders which it finds to have been made in error and, if so, whether to remit the matter for redetermination at first instance or, on the materials ultimately before it, to re-exercise the discretion for itself.

19. There is no power to remit the matter for rehearing before the judicial registrar contained in either section *15A of the Local Court Act* or *Part 37 of the LCR*. Accordingly, I must re-exercise the discretion for myself in relation to any orders which I find to have been made in error.

20. It follows, in my view, from this decision (and I find) that the appellant must firstly demonstrate that, on the evidence now before me, the decision of Ms Day was in error on one or more of the four grounds of appeal.

21. If the appellant is able to do this then this court will try the case again on the evidence used below, together with such additional evidence as it thinks fit to receive (in this case there was no additional evidence that was sought to be adduced by either party) and by reference to the law as it then exists (*In re Chennell; Jones v Chennell* [1878] 8 ChD 492 @ 505; *Ex Parte Currie; Re Dempsey* [1968] 70 SR (NSW) 1; *Edwards v Noble* [1971] 125 CLR 296 @ 304; *Turnbull v NSW Medical Board* (1976) 2NSWLR 281 @297; *Builders Licensing Board v Sperway Constructions (Syd.) Pty Ltd* [1976] 135 CLR 616 @ 619-620).

22. However, in *Messell v Davern* (1981) 9 NTR 21 @ 28 the Full Court of the NT Court of Appeal noted: "<u>It is</u> a rehearing, ie <u>a new trial of the issue raised by the notice of appeal</u> using the evidence in the court below with a discretion to receive further evidence. In the exercise of that discretion the court may in special circumstances hear the whole case again." (emphasis added)

23. Accordingly, unless there is some "special circumstance", if an error is found to exist, then it is only a rehearing on any successful grounds of appeal. The respondent had contended that this may cause some problem for them as there is no cross-appeal provision in *Local Court Rule*

*(*hereinafter referred to as *"LCR") 37*. However, there is nothing to prevent both parties from filing a Notice of Appeal if they were aggrieved by a decision. The respondent has not sought leave to file a Notice of Appeal out of time.

24. In relation to the questions that I posed earlier, I would answer these:

    1. Yes.

    2. Yes.

    3. Not applicable.

    4. Only on the error found.

    5. Yes.

25. I now turn to consider each of the grounds of appeal in turn to see if the appellant can establish some legal, factual or discretionary error. In doing so it is necessary to consider the evidence on each.

26. **Ground 1** states that "the Judicial Registrar was in error in determining that there was no disability to the Applicant's cervical spine caused or contributed to by the assault in any assessment of damages." I turn to consider the evidence on this aspect.

27. The starting point is to ascertain what the appellant says about any alleged injury to his cervical spine. In paragraph 3 of ExA1 he states:

    I received the following injuries from the assault:

    - Loss of consciousness;
    - Retrograde amnesia;
    - Trauma to my head and face;
    - Trauma to my chest;
    - Cuts and bruises to my head;
    - Cuts and bruises to my left ear;

- Cuts and bruises to my right eyebrow; and
- Swollen and painful right elbow and thumb.

28. Accordingly, there is no specific mention of any injury to his neck. The appellant goes on to give more detail about his ongoing complaints in paragraphs 26 to 40 inclusive of ExA1. However, there is no mention of any problem with his neck at all in that affidavit, which was sworn on 13 May 2004.

29. The appellant's next affidavit is ExA2 which was sworn on 6 June 2005. This affidavit refers exclusively to shoulder pain. His final affidavit (ExA3) deals with the issue of his co-operation with police, and does not touch upon any injury that he may have sustained.

30. That is the full extent of the evidence from the appellant as to what injuries he say he received in the assault on 28.11.02.

31. Accordingly, at no time does the appellant assert in any of his affidavits that he has ever had any problem with his neck. He is in the best position to know.

32. What do the medical records disclose? The first medical record in time was the nurses review summary by the Alice Springs corrections medical services (part of BVM1 to ExA1). This records that she was asked to see the appellant about 1650 hours. This entry makes no reference to the neck at all.

33. The next entry in time is the St John ambulance report. This is part of annexure A to ExR3. The ambulance officers appear to have been with the appellant from 1751 hours on 28.11.02 until they arrived at the hospital at 1820 hours. In relation to anything to do with the neck they state:

> "Pt c/o nil neck/back pain.......
>
> Pt treated as spinal due to mechanism of injury."

34. Accordingly, it appears clear that the appellant was specifically asked whether he had any neck pain and complained of “nil” neck or back pain. Despite this the ambulance officers took precautionary measures, and apparently applied a hard collar. The next medical record in time appears to be the nursing department’s nursing assessment. This notes an arrival time of 1840 hours and notes “neck brace in place”. There were no presenting complaints relating to the neck otherwise noted.

35. The next entry appears to be by a Dr Haina, part of annexure A to ExR3, in the emergency department medical record. The time the appellant was seen is recorded as 1840. There is no reference to the neck in those two pages of notes.

36. The next entries are after the appellant has been admitted and comprise nursing notes and doctor notes, again part of annexure A to ExR3. These overlap somewhat in times.

37. The first nursing note has the time 1840 also. That does have a reference to the neck, but unfortunately part of the entry was obliterated by what appears to be a hole punch. I sought the assistance of counsel in this regard. On 28 April 2006 the court received a letter signed by the solicitors for both parties which annexed a better photocopy of this entry. In accordance with the agreement reached between the solicitors, I also find that this entry notes:

> Patient in neck pain

38. The next nursing entry is for 1900 and notes “seen by Drs”.

39. The first “inpatient clinical progress” note does not have a time (but may correspond to the time on the nursing note of 1900), but the next note thereafter is noted to be 2100, so presumably it was written sometime between 1840 and 2100 on 28.11.02. In this entry under “disability” is recorded:

> “neck – no tenderness…….

Spine – no bony tenderness."

40. Despite this notation Dr Haina ordered x-rays of the appellant's cervical spine. In his request form under clinical notes he noted "suspected neck injury" amongst other notations. Why he suspected a neck injury is unclear. The x-rays of the cervical spine were taken on 28.11.02 and reported on 29.11.02. This report stated:

> There is straightening of the cervical spine. There are mild endplate and uncovertebral osteophytic changes through the lower cervical segment. Visualisation of the lower cervical spine has not been optimal in the lateral projection. No gross pathology is identified through this segment on the series provided. The prevertebral soft tissues are within normal limits. The need for further imaging would depend on the clinical findings.

41. There is nothing in this report which would necessarily indicate any injury to the neck at that time. In the nursing notes for 2010 is recorded:

> Pt alert + orientated. Hard collar in situ. Denies pain."

42. The next nursing entry for 2020 notes:

> Attending x-ray. Spinal precautions

43. There is a "tick" after the word precautions.

44. The next entry in time is in the inpatient clinical progress notes for 1900. Here it is noted that the x-rays were reviewed with Dr Warne with "all views normal". Then under "P" which had a circle around it there are four numbered entries. Number 2 is "remove collar".

45. The nursing notes have no other reference to the neck. At 0115 on 29.11.02 there is recorded "nil c/o pain". At 0410 is recorded "uncomfortable. Given panadeine". At 0530 is recorded "feeling slightly more comfortable". The last nursing note was at 0630 and had the plan of "breakfast, review by morning doctors". There is nothing to indicate that any of this was in any way related to the neck, and the appellant does not suggest in any of his affidavits that he had any neck problem whilst in

hospital (but as will be noted later he was suffering some memory problems in hospital).

46. This review appears to have taken place at 0820 according to the inpatient clinical progress notes. There was no reference to the neck at all in these notes, and the plan was to discharge the appellant. There is then a hand written discharge letter dated 29.11.02 to “prison services” signed by Dr Wearne (part of BVM1 of ExA1). This letter makes no reference to any neck problem whilst in hospital or ongoing.

47. As noted later in these reasons the appellant was suffering memory problems in hospital due to his head injury. Accordingly, one needs to be careful not to put too much emphasis on a lack of complaints during a period when the appellant was suffering from a closed head injury. However, the same does not apply after his discharge from hospital.

48. The appellant was returned to Alice Springs prison on 29.11.02 and there is a nurses review summary from that day from corrections medical services. There again is no reference to anything to do with the neck in that note. It is noted however that the appellant was “at risk” and was being prepared for a “move to Darwin”.

49. The first medical report in time is that of Dr Walton (psychiatrist) of 15.7.03 (annexure BVM9 of ExA1). Dr Walton saw the appellant on 8.7.03 at Berrimah prison. Whilst this clearly was for a mental state evaluation, there are some physical aspects of injury referred to in the “history”. However, these relate to other parts of the body and there is no reference to the neck.

50. The next report in time is from Mr Reid (psychologist) dated 13.4.04 (annexure BVM10 of ExA1). In the “background history” there is reference to physical injuries, but no reference to the neck.

51. The next report in time is that of Mr Croker (physiotherapist) dated 10.8.04 (annexure A to ExA2). He first saw the appellant on 20.7.04 in relation to right shoulder pain. His report makes no reference to any complaint about

any symptoms with the appellant's neck. If the appellant was having neck problems I would have expected him to have mentioned this to a physiotherapist. It does not appear that he did.

52. The next report in time is that of Professor Marshall (professor emeritus of surgery) dated 10.12.04 (annexure B of ExA2). He saw the appellant on the one occasion only on 10.12.04. Under "introduction/background" on page two of his report he notes as follows:

> He now gives a history of persisting right shoulder pain on movement in his dominant right arm, with lesser discomfort in his left shoulder. He notes also clicking on movement of his right shoulder. He believes his right metacarpo-phalangeal joint was dislocated at the time and it remains stiff and sore and he notices difficulties holding things. His neck also remains painful and stiff and pain radiates from his neck, to his shoulder and into the fingers of all of his right hand. He also has funny feelings in his feet. (emphasis added)

53. This is the first reference to the neck since the entries on the date of the incident. There is a two year gap without any mention of the neck. The appellant does not seek to explain this. Nowhere in the appellant's affidavits does he seek to confirm that what he told Professor Marshall was true. Professor Marshall goes on in this report to note his findings on Physical examination" in relation to the neck as follows:

> He had a full range of movement of his cervical spine and there were no deformities to be seen or felt on examination of his spine. Movement of his cervical spine was painful at the extremes of movement.

This is therefore a purely subjective complaint. Later in this report under "diagnosis" he states:

> Bilateral shoulder and neck pain.

Finally, under the heading "summary & opinion" he states:

> His main persisting symptoms are some minor chest pain in his lower left chest and persisting neck and shoulder pain, particularly right shoulder in his dominant right hand.

54. That was the extent of it. Accordingly, there is the single entry (supra) in the nursing note of 28.11.02 at 1840. Apart from this there is no further reference to any neck pain or stiffness, let alone any ongoing symptoms until over two years after the incident when he sees Professor Marshall. Whilst he may not have thought it relevant to tell Dr Walton and Mr Reid all of his physical symptoms, no such explanation can explain the absence of complaint to Mr Croker of anything to do with the neck. It is to be remembered that Mr Croker is a physiotherapist, and he appears to have treated the appellant on 20 and 29.7.04, but only for right shoulder pain. There is no reference to any complaint about the neck at all.

55. Further, in paragraph 4 of ExA2 the appellant confirms that his solicitor arranged for him to see Mr Croker because of right shoulder pain.

56. Despite the fact that ExA2 was sworn by the appellant on 6.6.05, and annexed the report from Professor Marshall, the appellant remained completely silent about any neck pain or stiffness. He does not seek to confirm what he apparently told Professor Marshall about his neck symptoms. Nor does he attempt to explain the onset and duration of these symptoms.

57. Further, and in my view importantly, nowhere does Professor Marshall express any opinion that the neck complaints which he noted were in any way related to the incident on 28.11.02. In my view, on the history as set out in the report of 10.12.04, he would have been unable to properly come to such an opinion in any event. The appellant gives no history to Professor Marshall of when he allegedly noticed any problem with his neck in relation to the incident on 28.11.02. All Professor Marshall notes is that his “neck also remains painful and stiff”. He does not record when this was first noticed after 28.11.02. He does not record whether there had been any pain or stiffness with the neck prior to 28.11.02, and is so, when and in what circumstances. He does not record whether this pain and stiffness had persisted since he first noticed it, or how it had progressed. In my view, absent this detail, it was not possible for any expert to express any opinion as to the likely (let alone probable) cause of the “neck pain and

stiffness" subjectively complained of on 10.12.04. Accordingly, it was not possible for a court to make any finding that any "neck pain and stiffness" that the appellant complained of on 10.12.02 was on the balance of probabilities causally linked to the incident on 28.11.02.

58. Subsequently Professor Marshall provided a further report, not based upon a further examination, but after receiving the various imaging investigations that he had requested. This report of Professor Marshall is dated 3.5.05 and is annexure C of ExA2. As an annexure to that report Dr Gribbin provided an x-ray report of the cervical spine having supposedly been given a history of "persisting neck and shoulder pain following assault in late November". On the evidence I am unable to find that that history was correct or true. Dr Gribbin's findings were:

> There is some straightening of the lower cervical lordosis. There is narrowing of the C5/6 and C6/7 disc spaces with osteophytosis of vertebral end plates in keeping with disc degeneration and this most likely accounts for the loss of cervical lordosis. There is some minor osteophytic narrowing of the right C5/6 and C6/7 intervertebral foramina. Left sided intervertebral foramina are normal. No fracture or subluxation demonstrated.

59. As a further annexure to that report there was a report from Dr Burgin following MRI imaging of the cervical spine. The "clinical details" proved to Dr Burgin were "neck and shoulder pain after assault 20/11/02? Bilateral rotator cuff tendonitis". On the evidence (and ignoring the mistake on the date) I am unable to find that this is correct or true. Dr Burgin's report stated:

> There is narrowing of the disc spaces at C5/6 and C6/7 with prominent anterolateral osteophyte formation at both levels. Minor disc bulges at both levels minimally encroach upon the central canal, but do not completely efface CSF anterior to the cord and there is no cord deformity or compression. Degenerative uncovertebral and facet arthropathy produces bilateral foraminal stenosis at C5/6 and C6/7, more severe on the right and more severe at the lower level, with probable compression of the existing C6 and C7 nerve roots, and also possibly the corresponding nerve roots on the left.
>
> There is no other cervical foraminal stenosis.

> There is no evidence of any ligamentous injury or previous fracture. Facet joint alignment is normal.
>
> At T2/T3 there is a prominent osteophytic ridge encroaching on the central canal and producing mild cord deformity.

60. Based on these reports (which he agreed with) Professor Marshall assessed a whole person impairment due to “cervical disorders” at 8% whole person impairment. Again he expresses no opinion that this impairment is causally linked to the incident on 28.11.02. In my view, on the history he was provided he was right not to do so.

61. The reports of Dr Gribbin and Dr Burgin would be consistent with the appellant having some symptoms in his neck, but these symptoms being due to natural degenerative change rather than to any injury, let alone any incident on 28.11.02. If the appellant had complained (in any of his affidavits before me) of neck soreness (which commenced on or shortly after 28.11.02) which he had not noticed before the incident, and which continued thereafter, then the case would be completely different. He has not. There is simply no evidence from which I could find that this was the case on the balance of probabilities.

62. I note *section 15(3) of the Crimes (Victims Assistance) Act*, whereby the court is not bound by any rules of evidence, but, in my view, if a court had made such a finding on the evidence in this case, then any such finding would have been an appellable error.

63. The appellant gives no history of noticing any problem with his neck at any time in his affidavit evidence before me. He does not even suggest that he did have any pain and stiffness in his neck when he saw Professor Marshall on 10.10.04.

64. In paragraphs 17 and 18 of her reasons Ms Day states as follows:

> The radiological investigations were done and Prof. Marshall reports on these in his report of 3 May 2005. His diagnosis is degenerative change of the lower cervical and upper thoracic region with stenoses of the nerve root foramina at C5/6 and C6/7, particularly on the right. The MRI imaging showed no rotator cuff injury but a

> tearing of the capsule of the shoulder joint on the left and mild degenerative change in the rotator cuff tendon on the right.
>
> 18. In his report of 3 May 2005 Prof. Marshall finds that as a result of the cervical spine disorder the applicant has an 8% whole person impairment, based upon the AMA Guide (referred to above). There is insufficient evidence upon which to base a finding that any disability related to the applicant's cervical spine was caused or contributed to by the assault. The applicant does not mention neck pain or injury to his neck in any of his affidavits. Dr. Marshall does not give an opinion as to whether the neck pain is connected to the assault. Therefore I would exclude any current disability related to the applicant's cervical spine from the assessment of damages.

65. Rather than finding that Ms Day might be in error in this finding, I agree with it. The appellant could have sworn a further affidavit setting out the full history of his physical complaints since the incident on 28.11.02. He has not done so. **Ground I of the appeal is dismissed**.

66. **I turn to consider grounds 2 and 3 together**, as these concern the left and right shoulders respectively. What Ms Day said in relation to this was in paragraphs 19 and 20 of her reasons, as follows:

> 19. Similarly in relation to the left shoulder injury, there is no evidence that there was any injury to the applicants left shoulder as a result of the assault. Again, the applicant does not mention it in his evidence and Dr. Marshall does not state that the current difficulties with the left shoulder were caused by or materially contributed to by any injury suffered by the applicant in the assault. In the circumstances I would also disregard any disability of the left shoulder for the purposes of assessing damages.
>
> 20. Prof. Marshall's evidence is that the applicant's right shoulder impairment equates to a 6% impairment of the right arm, based upon the AMA Guides. Whilst recording the applicant's complaints of pain in the shoulder, however, Prof. Marshall does not make any statement linking the right shoulder pain or the findings on radiological imaging with the assault. Combining this fact with the evidence of Mr. Croker that the applicant told him that he had had no serious problems with shoulder pain until mid 2004, some 18 months after the assault, I have come to the view that the applicant has failed on the balance of probabilities to prove that the current disability of the right shoulder is related to the assault.

67. In relation to the finding in paragraph 19, Ms Spurr did not point to any part of the appellant's affidavits to suggest that Ms Day was mistaken, and to

suggest that he had made some reference to his left shoulder. There was good reason for this, namely that Ms Day was correct in this observation. Nowhere in any of his three affidavits does the appellant make any mention of his left shoulder at all, let alone any complaint of any symptoms from the left shoulder.

68. In respect to the right shoulder the appellant does give some evidence. This is as follows:

- In paragraph 3 of ExA1 he says: "I received the following injuries from the assault:………trauma to my right shoulder";

- In paragraphs 4-10 of ExA2 he says:

> 4. Whilst in custody I continued to complain to my solicitor about my right shoulder pain. As a result my solicitor made arrangements for me to see the physiotherapist contracted to the gaol, namely Cameron Croker.
>
> 5. As a result of that attendance Mr Croker prepared a report in relation to my physical injuries. Annexed hereto and marked with the letter "A" is a true copy of this report dated 10 August 2004.
>
> 6. Because Mr Croker had recommended that I have an orthopaedic opinion, together with some various scans, my solicitor made arrangements for me to attend upon an orthopaedic surgeon upon my release.
>
> 7. As a result my solicitor made an appointment for me to attend upon a Professor Vernon Marshall in Brisbane……
>
> 8. Because Professor Marshall also recommended that there needed to be imaging of my shoulder by way of x-ray and MRI, my solicitor made arrangements for me to attend for such scans. I had those scans…..
>
> 9. I note that Professor Marshall states that I have suffered a whole person impairment of 18% and that this impairment is likely to be permanent. I still continue to suffer pain in that injury and it makes me incredibly sad that the Professor believes that this is likely to be permanent. I feel sad that as a result of the actions of persons in the gaol I am now going to suffer on a permanent basis the injuries and problems I have for the rest of my future.

> 10. It is in these circumstances that I ask this Honourable Court grant me an Assistance Certificate for the injuries that I suffered as a result of the incident on or about 28 November 2002.
>
> (emphasis added)

69. Despite the fact that the appellant had imaging of both shoulders, the appellant has consistently referred only to one shoulder (being the right shoulder) in his affidavit evidence. The appellant has referred to complaints concerning his right shoulder allegedly made to his solicitor, yet there is no affidavit from his solicitor confirming this. With the consent of the appellant his solicitor could have confirmed this if it were true.

70. What do the medical records say in relation to any shoulder injury? Again, the first medical record in time was the nurses review summary by the Alice Springs corrections medical services (part of BVM1 to ExA1). This records that she was asked to see the appellant about 1650 hours. This entry makes no reference to the shoulders at all. There is a reference to the right elbow and thumb, but this is the only reference to the upper limbs.

71. The next entry in time is the St John ambulance report. This is part of annexure A to ExR3. The ambulance officers appear to have been with the appellant from 1751 hours on 28.11.02 until they arrived at the hospital at 1820 hours. There is no mention of either shoulder. In relation to anything to do with the upper limbs the notes state:

> “Neurological obs assessed with Pt having full movement and sensation to all limbs. Strength L = R.
>
> Pt also has ? dislocated R thumb and tenderness +++ to R elbow”

72. The next medical record in time appears to be the nursing department’s nursing assessment, part of annexure A to ExR3. This notes an arrival time of 1840 hours and notes “Rt hand bruised painful”. There were no presenting complaints relating to either shoulder noted.

73. The next entry appears to be by a Dr Haina, part of annexure A to ExR3, in the emergency department medical record. The time the appellant was seen is recorded as 1840. The nursing diagnosis was “injury to head, R

arm/elbow & hand". Despite this, Dr Haina makes no reference to either upper limb in his notes, and specifically says nothing about either shoulder.

74. The next entries are after the appellant has been admitted and comprise nursing notes and doctor notes, again part of annexure A to ExR3. These overlap somewhat in times.

75. The nursing notes cover the period from 1840 on 28.11.02 until 0630 on 29.11.02. There are some twenty separate recordings of complaints and events during this period, but no mention of anything to do with either shoulder. There is a reference to "Rt arm sore" at 1900 on 28.11.02, but this is more likely to be referring to the area below the shoulder.

76. The first "inpatient clinical progress" note does not have a time (but may correspond to the time on the nursing note of 1900), but the next note thereafter is noted to be 2100, so presumably it was written sometime between 1840 and 2100 on 28.11.02. In this entry under "disability" is recorded:

> R scapular swollen with superficial graze.
>
> Limbs – lower limbs normal.
>
> - R wrist tender
>
>   ? # $2^{nd}/3^{rd}$ metacarpal
>
> - L upper arm oedematous & tender
>
> Imp:……………
>
> Possible # R scapular

77. The scapular is the shoulder blade. This is consistent with a diagram (which appears as part of annexure BVM1 to ExA1) dated 29.11.02 and signed by Dr Wake (following an examination upon his return to prison) which shows 3 linear marks and 1 other mark on the right shoulder blade, but away from the shoulder joint itself. It is unclear which part of the left

upper arm is referred to, but “oedematous” simply means that there was swelling.

78. As a result of this examination Dr Haina ordered x-rays of the right scapula (amongst other areas) in order to ascertain whether there was any bony injury.

79. In his request form under clinical notes he noted “right scapular bruising” amongst other notations. The x-rays of the right shoulder were taken on 28.11.02 and reported on 29.11.02. This report stated:

> No abnormality is seen on the single AP projection.

80. The next entry in the inpatient clinical progress notes is for 1900. Here it is noted that the x-rays were reviewed with Dr Warne with “all views normal”. There is no mention of any problem with either shoulder.

81. The last nursing note was at 0630 and had the plan of “breakfast, review by morning doctors”. This review appears to have taken place at 0820 according to the inpatient clinical progress notes. There was no reference to either shoulder at all in these notes, and the plan was to discharge the appellant.

82. There is then a hand written discharge letter dated 29.11.02 to “prison services” signed by Dr Wearne (part of BVM1 of ExA1). This letter states “…had sustained blunt trauma to his face, head, ® shoulder and chest”. Looking at the notes as a whole, it is clear, in my view, that this reference to the right shoulder in fact should refer to the right shoulder blade.

83. As noted later in these reasons the appellant was suffering memory problems in hospital due to his head injury. Accordingly, one needs to be careful not to put too much emphasis on a lack of complaints during a period when the appellant was suffering from a closed head injury. However, the same does not apply after his discharge from hospital.

84. The appellant was returned to Alice Springs prison on 29.11.02 and there is a nurses review summary from that day from corrections medical services

(part of annexure BVM1 to ExA1). There is a reference to the shoulders in that note. It is "multiple bruising about head and right shoulder compatible with assault". Again, and given the drawing made by Dr Wake (referred to supra) it is apparent that this refers to the back of the right shoulder blade.

85. I therefore find that the reference to any shoulder injury in the various medical notes of 28 and 29.11.02 (as set out supra) is a reference to a blunt trauma to the back of the right shoulder blade, and there is no complaint of any actual injury to the right or left shoulder joint or mechanism.

86. The first medical report in time is that of Dr Walton (psychiatrist) of 15.7.03 (annexure BVM9 of ExA1). Dr Walton saw the appellant on 8.7.03 at Berrimah prison. Whilst this clearly was for a mental state evaluation, there are some physical aspects of injury referred to in the "history", where it is noted:

> Although there seems to be no reference to it in the Alice Springs medical record, Mr Miles was adamant that he had sustained multiple fractured ribs. There is documentation of the injuries which he sustained to his head, face and right shoulder, and in addition, he indicated that there had also been injuries to his right elbow as well as his right thumb and right forefinger.

87. It would have been helpful to know what the appellant actually told Dr Walton about his right shoulder. Again, there is no mention of the left shoulder at all.

88. The next report in time is from Mr Reid (psychologist) dated 13.4.04 (annexure BVM10 of ExA1). He saw the appellant on 6.4.04 in Berrimah prison. In the "background history" there is recorded:

> I note from the documentation from the Alice Springs Hospital that he was hit around the head and upper body, resulting in a number of lacerations and bruises to his head and face. He maintains he also suffered a number of broken ribs as well as injuries to his right thumb and his left shoulder. He advised that the initial pain was in his right shoulder, **but lately he has been troubled with pain in his left shoulder and between his shoulder blades**. (emphasis added)

89. Thus, for the first time after the incident on 28.11.02 we have a mention of the left shoulder, and this is over 16 months after the event. As highlighted, he claimed only to have been troubled with pain in his left shoulder "lately". As to how long before 6 April 2004 is not clear. The appellant has not assisted with any time frame, and, in my view, as he is the person asking for assistance, he should have. It presumably must have been after he saw Dr Walton on 8.7.03. Even if by lately he was referring to months rather than weeks or days, it is still likely to put the onset of symptoms in the left shoulder to probably at least one year after 28.11.02. Even if what he told Mr Reid is correct, it would be difficult to find any causal link between any purported left shoulder problem and the events of 28.11.02.

90. The next report in time is that of Mr Croker (physiotherapist) dated 10.8.04 (annexure A to ExA2). As noted earlier the appellant says that he saw him because "I continued to complain to my solicitor about my right shoulder pain". When he first saw Mr Croker on 20.7.04, this was 3 months after he had seen Mr Reid and complained also about the onset of left shoulder pain as well. Mr Croker saw the appellant twice in 9 days and it therefore appears (and I find) that on neither occasion did he complain of any pain or symptoms in his left shoulder. I therefore find that if the appellant had any problem with his left shoulder in 2004 it had resolved before he saw Mr Croker.

91. Mr Croker records:

> I saw Mr Miles on the 20th and 29th of July in relation to his right shoulder pain. Mr Miles stated to me that he had been experiencing increasing right shoulder pain over the last 2 months. The pain had become more constant and was particularly bad at night, waking Brett up if he rolled onto the right side at night.
>
> Brett does not recall an event that preceded this increase in symptoms. Brett has experienced discomfort in his right shoulder since shortly after the assault that occurred on the 28th of November 2002 at the Alice Springs Correctional Centre. However, the discomfort was, until 2 months ago, only associated with exercise for example push ups.

92. This is the most detailed history obtained in relation to the supposed onset and progression of right shoulder symptoms. However, for some reason (which is unexplained), the appellant has chosen not to confirm, in any of his affidavit evidence, that what he told Mr Croker was true. I am therefore unable to find on the balance of probabilities that it is true.

93. Mr Croker goes on to express the opinion that "it is quite feasible that either a labral or rotator cuff injury could have occurred in the above mentioned assault upon Mr Miles. A labral injury often occurs due to a compressive force such as falling on the shoulder or being struck hard on the shoulder". Whilst this opinion would appear to be reasonable it is based upon the history he received, which as I note above, I am unable to find to be true on the balance of probabilities.

94. The next report in time is that of Professor Marshall dated 10.12.04 (annexure B of ExA2). He saw the appellant on the one occasion only on 10.12.04 (over 4 months after Mr Croker saw the appellant twice). Under "introduction/background" on page two of his report he notes as follows:

> He now gives a history of persisting right shoulder pain on movement in his dominant right arm, with lesser discomfort in his left shoulder. He notes also clicking on movement of his right shoulder. He believes his right metacarpo-phalangeal joint was dislocated at the time and it remains stiff and sore and he notices difficulties holding things. His neck also remains painful and stiff and pain radiates from his neck, to his shoulder and into the fingers of all of his right hand. He also has funny feelings in his feet.
>
> Mr Miles told me that his right shoulder clicks and is painful on movement. His left shoulder also feels weaker, worse with push-ups and lifting when his arm is away from his body. The pain in his shoulders is present at all times and makes it difficult for him to sleep……
>
> Mr Miles was previously an active person who pursued an active fitness programme in the gymnasium. He now finds it difficult to sweep floors and in lifting activities. The symptoms have persisted and worsened since the original injury…..
>
> Recreationally he enjoys sports, weightlifting, rowing and surfing. (emphasis added)

95. The “metacarpo-phalangeal joint” is a reference to the hand. Nowhere in the appellant’s affidavits does he confirm any of this history. Importantly, in my view, he does not suggest that he had any problem with his left shoulder at any time, and the first mention of this shoulder comes from Mr Reid as referred to above. Professor Marshall does not suggest what the “original injury” allegedly was, or how he says this was sustained in the incident of 28.11.02.

96. Professor Marshall goes on in this report to note under the heading “sequence & current status”:

> Mr Miles told me that his right shoulder clicks and is painful on movement. His left shoulder also feels weaker, worse with push-ups and lifting when his arm is away from his body. The pain in his shoulders is present at all times and makes it difficult for him to sleep. He also has pain over his lower ribs posteriorly; he believes he had six fractured ribs at the time of injury.
>
> Mr Miles was previously an active person who pursued an active fitness programme in the gymnasium. He now finds it difficult to sweep floors and in lifting activities. The symptoms have persisted and worsened since the original injury.

97. Professor Marshall does not record when the symptoms first appeared in relation to either shoulder. Again, for some reason (which is unexplained), the appellant has chosen not to confirm, in any of his affidavit evidence, that what he told Professor Marshall was true.

98. Under the heading “summary & opinion” Professor Marshall states:

> His main persisting symptoms are some minor chest pain in his lower left chest and persisting neck and shoulder pain, particularly right shoulder in his dominant right hand.
>
> On physical examination he has a full range of normal movements of spine and of shoulders with crepitus during right shoulder movement and a painful arc of movement in both shoulders, particularly the right. In my opinion the most likely cause for his continuing symptoms is possible bilateral rotator cuff tendonitis. I believe he needs imaging by plain x-ray and MRI of the cervical spine and of his right and left shoulder in order to clarify more precisely the soft tissue diagnosis.

99. In the subsequent report of Professor Marshall done after receiving the various imaging investigations, and dated 3.5.05 (annexure C of ExA2) there is annexed an x-ray report of Dr Gribbin. He had supposedly been given a history of “persisting neck and shoulder pain following assault in late November”. On the evidence I am unable to find that that history was correct or true. Dr Gribbin’s findings were:

> Left shoulder
>
> No bony or joint abnormality demonstrated. There are no periarticular soft tissue calcifications.
>
> Right Shoulder
>
> There is no bony or joint abnormality. There are no periarticular soft tissue calcifications.

100. As a further annexure to that report there was a report from Dr Burgin following MRI imaging of both shoulders. The “clinical details” proved to Dr Burgin were “neck and shoulder pain after assault 20/11/02 ? Bilateral rotator cuff tendonitis”. On the evidence (and ignoring the mistake on the date) I am unable to find that this is correct or true. Dr Burgin’s report stated:

> MRI of the Left Shoulder
>
> Findings: Arthrography has been performed via an anterior approach…….
>
> The rotator cuff is intact. There is no evidence of tendonitis. Minimal thickening of the subacromial/subdeltoid bursa with a small amount of fluid is consistent with minor subacromial/subdeltoid bursitis.
>
> There is separation of the superior labrum from 12 o’clock down to approximately 4 o’clock with associated labral irregularity extending just posterior to the biceps labral anchor. Appearances are consistent with a SLAP tear.
>
> There is abnormal bone marrow signal. The acromioclavicular and glenohumeral joints are normal.
>
> Conclusion: Type II slap tear. Mild subacromial/subdeltoid bursitis.

MRI of Right Shoulder

Findings: Arthrography has been performed via an anterior approach. Similar sequences have been obtained on the right to the left.

There is mild thickening and hypersensitivity of the supraspinatus and infraspinatus tendons, consistent with old tendonitis. There is no evidence of a rotator cuff tear. The long head of biceps is normal in position and appearance. The labrum is intact. There is no abnormal bone marrow signal.

Conclusion: Mild supraspinatus and infraspinatus tendonitis.

101. Professor Marshall agreed with both of these reports of findings and went on to say in his report of 3.5.05:

> Plain x-ray of the shoulders does not show any abnormality. MRI of the left shoulder shows evidence of subacromial/subdeltoid bursitis without evidence of tear in the rotator cuff. There is, however, evidence of tearing of the capsule of the shoulder joint involving the superior labrum and extending anteriorly with separation (SLAP capsule tear). The right shoulder MRI shows mild degenerative change in the rotator cuff tendon but no evidence of a shoulder capsular tear.
>
> As noted in my previous report, Mr Miles has a maintained range of normal movements in the neck and shoulders, and he has bilateral shoulder pain, particularly in the right shoulder but with also weaknesses in the left shoulder, worse on push-ups and lifting with the arm away from the body. The results on imaging are as indicated.

102. Professor Marshall then went on to assess the appellants permanent impairments in relation to each shoulder as follows:

> Range of motion impairments:
>
> Right shoulder 0%
>
> Left shoulder 0%
>
> Impairment due to disability:
>
> Right shoulder 6%
>
> Left shoulder 12%

Total upper extremity impairments 18%, equivalent to whole person impairment 11%.

103. Hence, Professor Marshall is clearly of the view that the left shoulder (which I find was not injured in the incident on 28.11.02) is worse than the right shoulder (which would appear to be consistent with the MRI findings). Yet the appellant’s complaints predominantly refer to the right shoulder.

104. Nowhere in either of his two reports does Professor Marshall purport to express any opinion as to the likely cause of the damage that he noted to each shoulder. In particular, he does not suggest that any injury to either shoulder was caused by the incident on 28.11.02. In the absence of any medical opinion on this topic (based upon a properly proved history, and with clear reasoning) I am unable to come to such a conclusion on the evidence. If Professor Marshall did state such an opinion, I would have been unable to accept it anyway based upon the history as provided to him and to the court.

105. In summary, there is a lack of evidence of any problem with the left shoulder at all until he first complained to Mr Reid on 6.4.04 of such pain “lately”, and then no complaint of any problem with the left shoulder at all to Mr Croker on 20.7.04 and again on 29.7.04, and finally a further complaint to Professor Marshall on 10.12.04. I therefore am not satisfied on the balance of probabilities that the appellant suffered any injury to his left shoulder in the incident on 28.11.02. On the contrary I would be satisfied on the balance of probabilities that he did not.

106. I therefore find that ground 2 of the notice of appeal has not been made out and is dismissed.

107. The right shoulder is more problematical. It is clear from the medical records of 28.11.02 and 29.11.02 that the appellant did suffer some injury in the area of the right shoulder on 28.11.02. But on the balance of probabilities I find that this was a blunt trauma to the right posterior shoulder blade.

108. The appellant asserts that "whilst in custody I continued to complain to my solicitor about my right shoulder pain", yet he does not say when he first complained. I know from paragraph 7 of ExA1 that the appellant had a solicitor from at least 10.2.03. It would have been very helpful to have known when he first complained to his solicitor, and what the complaint was. No affidavit from the solicitor at the time was put before the court to assist. This was a matter entirely in the appellant's hands as no affidavit could be done unless the appellant expressly or impliedly waived his legal professional privilege.

109. I infer that any affidavit from his solicitor at the time would not have assisted his case (*Jones v Dunkel* (1959) 101 CLR 298). In any event, as the appointments with Mr Croker were arranged by the appellant's solicitor as a result of his complaints, it is likely that the complaints were in 2004, rather than in 2003.

110. The appellant is the only person who can tell the court what his symptoms were in relation to the right shoulder. Yet he does not give a history of the onset of symptoms and how they progressed. He has been very selective with the information he has given, and very vague. He does not tell the court when he first noticed any problem in the right shoulder, how long after 28.11.02 this was, and what he was doing when he first noticed any symptoms. Clearly the appellant was physically active during his time in prison including push-ups and weights. Since his release he has continued enjoy "sports, weightlifting, rowing and surfing" (page 3 of professor Marshall report, annexure B to ExA2).

111. On the evidence before me I find that the appellant made no complaint of any right shoulder problem (as opposed to a shoulder blade problem) at any time on 28.11.02 or 29.11.02. On the evidence I am unable to find on the balance of probabilities that the appellant complained of any right shoulder problem (as opposed to a shoulder blade problem) at any time in 2003.

112. The MRI findings in relation to the right shoulder would appear to be consistent with natural degenerative processes rather than any injury. I am not satisfied on the evidence (on the balance of probabilities) that the appellant suffered any injury to his right shoulder in the incident on 28.11.02.

113. **I therefore find that ground 3 of the notice of appeal has not been made out and is dismissed.**

114. The final ground of appeal is **ground 4**, which relates to the appellant's co-operation with police, or the lack thereof.

115. *Section 12 of the Crimes (Victims Assistance) Act* states:

> The Court shall not issue an assistance certificate –
>
> (a) where it is not satisfied, on the balance of probabilities, that the person whom the applicant claims was injured or killed was a victim within the meaning of this Act;
>
> (b) where the commission of the offence was not reported to a member of the Police Force within a reasonable time after the commission of the offence, unless it is satisfied that circumstances existed which prevented the reporting of the commission of the offence;
>
> (ba) where the commission of the offence has not been reported to a member of the Police Force before the date on which the Court considers the issuing of the assistance certificate, unless the Court is satisfied that circumstances existed which prevented the reporting of the commission of the offence;
>
> (c) where an applicant or victim has failed to assist the Police Force in the investigation or prosecution of the offence;
>
> (d) where it is satisfied that the applicant has made the application in collusion with the offender;
>
> (e) in respect of an injury or death caused by, or arising out of, the use of a motor vehicle except where that use constitutes an offence under the Criminal Code; or
>
> (f) in respect of an injury or death that occurred during the commission of a crime by the victim.

116. It is section 12(c) that the respondent seeks to rely upon.

117. In the case of *Wolfe v Northern Territory of Australia* [2002] NTSC 26, Thomas J said the following in paragraph 18:

> Counsel for the appellant referred to the decision of Mr Luppino SM in the matter of *Mark John Dobson v Northern Territory of Australia* No. 20104130 delivered 21 February 2002. In this matter Mr Luppino SM rejected the submission of the respondent that the applicant was required to take a pro-active role to satisfy the requirements of s 12(c). I would agree. Mr Luppino SM referred to the dictionary definition of "assist" and concluded that the applicant's role is secondary to the police and only requires the applicant to provide assistance as requested by the police. I would agree with this interpretation. The burden of proof on this issue is on the respondent.

118. I proceed to assess the evidence in accordance with this decision. In the case of *Tirak v Northern Territory of Australia, and Richard Gumbaduck and Warren Phillips* [2002] NTMC 35, Ms Blokland SM concluded in paragraph 11:

> In my view, s 12(c) Crimes (Victims Assistance) Act contemplates assistance by a victim throughout the various stages of the investigation and prosecution. One stage may be the making of the complaint. Notification to police is, of course, a separate requirement under s 12(b) of the Act. Assistance is contemplated and may be requested at other stages. In this case police requested assistance by way of a statement. It was not forthcoming from the applicant. Although the applicant was at times intoxicated and forgot about police approaches, importantly, she did have some comprehension of the request for assistance. Although s 12(b) of the Act which potentially excludes applicants when the offence has not been reported in a reasonable time allows the Court to assess whether there were circumstances which prevented the report, no such exempting is provided for in s 12(c). In other words, I am not directed by the statute to consider whether circumstances existed which prevented the applicant from assisting the police in the investigation or prosecution. That is not an assessment the Court is asked to make under s 12(c). I accept however that an applicant or victim must be given an opportunity, or, as in this case, opportunities to assist. They must be aware of the request to assist. This complainant had such awareness. The request for a statement was reasonable and could have been complied with. I conclude on the balance of probabilities the applicant failed to assist within the meaning of the section and is therefore disentitled to the scheme.

119. I respectfully agree with this.

120. The chronology of events appears to be as follows:

- on 28.11.02 the appellant was an inmate in Alice Springs Prison (paragraph 2 of ExA1);
- he was incarcerated for heroin supply and had been incarcerated for some time (just over 6 years as at April 2004 – Mr Reid's report as annexed to ExA1);
- the last thing the appellant can remember on 28.11.02 was "leaving my cell to go to work in the prison" (paragraph 2 of ExA1);
- at about 1645 on 28.11.02 the prison tower received a call from an unknown prisoner in Dorm 7, L Block stating that there was an injured prisoner (page 10 of NT Police case note, part of annexure B to Ex R3; and minute dated 28.11.02 from G Wood; and minute from SPO Pfrunder – both part of annexure BVM8 of ExA1);
- when prison officers attended the appellant was sitting inside Dorm 7 L Block (same minute of G Wood);
- the appellant was disoriented and had wounds to his left eye, right forehead and rear of head. He appeared to have been assaulted (same minute of G Wood). PO Donaldson noticed he appeared to be "disorientated and groggy", but suggests this occurred on Thursday 27.11.02 (incident report of Donaldson – part of annexure BVM8 of ExA1). PO Zijlstra noted that the appellant was unable to establish what had happened to him or where he was (incident report of Zijlstra – part of annexure BVM8 of ExA1). ASPO Anderson noted that the appellant "was on the ground with cuts to his face and seemed very dazed" (incident report of Anderson – part of annexure BVM8 of ExA1);
- other prisoners were in the dorm and had been giving the appellant first aid (same minute of G Wood);

- Wood attempted to speak to the appellant but he was having difficulty seeing Wood. The appellant stated he could not see anything (same minute of G Wood);
- Wood asked the appellant if he knew what happened to him and the appellant mumbled "I don't know" (same minute of G Wood);
- Wood asked the appellant if he had been assaulted and the appellant replied "have I been hit, I don't know" (same minute of G Wood);
- Nurse Curnow attended the scene and checked the appellant over (same minute of G Wood) at about 1650 (Alice Springs Corrections Medical Services nurses review summary as part of ExA1);
- Prison officers Anderson, Zijlstra and Barber checked all prisoners in L Block to see if any had any wounds on their hands. This produced negative results (correctional services minute of Wood dated 28.11.02 – annexure BVM8 of ExA1). In addition, footwear was also checked to see if any fresh abrasions on hands or blood on footwear (incident report of Zijlstra – part of annexure BVM8 of ExA1). There were 40 prisoners in L Block (page 10 of NT Police Case Report – part of annexure B to ExR3);
- Wood started to question all prisoners in the block, this proved negative as they all stated they saw or heard nothing (same minute of G Wood) except for one prisoner who stated that it had something to do with outside, but he would not say anything except he would tell the superintendent when he saw him (same minute of G Wood), but there is no evidence to suggest that this information was passed onto police or followed up on by the superintendent or anyone else within the prison;
- The appellant was taken to the medical section for treatment (same minute of G Wood) on a stretcher (Alice Springs Corrections Medical Services nurses review summary);

- When initially seen by nurse Curnow the appellant was initially not oriented to time and place, had some visual disturbance initially but that settled, the appellant stated he had no idea what happened to him, and unable to state whether he had any loss of consciousness (Alice Springs Corrections Medical Services nurses review summary);

- An ambulance arrived and saw the appellant at 1751. The appellant was found conscious and alert. He had nil recollection of the incident and possible loss of consciousness (St John report – part of ExR3);

- The appellant was conveyed to the Alice Springs Hospital, departing the prison at 1809, and arriving at Hospital at 1820 (St John report – part of ExR3);

- The alleged assault upon the appellant was reported to Sergeant Sattler of Alice Springs police by CPO Wood (correctional services minute of Wood dated 28.11.02 – annexure BVM8 of ExA1);

- The Alice Springs Hospital emergency department nursing assessment noted the appellant as having arrived at 1840 (I do not understand this 20 minute difference, but it is not relevant for current purposes)- (emergency department nursing assessment notes, part of ExR3);

- The appellant was seen by Dr Haina in A&E at 1840. He was conscious (emergency department medical record, part of ExR3). The appellant was admitted to hospital;

- After admission the appellant was seen by Dr Haina at about 1900 (nursing notes, part of ExR3). Dr Haina noted a history but it is unclear whether this came from the appellant (it may have come from accompanying warders as the first entry notes "found unconscious by warders") and within that is stated "no memory for up to 1 hour PTA" (patient clinical progress notes, part of ExR3);

- At 2010 on 28.11.02 the nursing notes (part of ExR3) record "Pt alert & orientated";

- At 2015 police officers Newell and Kennon arrived at the prison and were given copies of officers reports, medical report, day sheet, L Block accommodation sheet and a prison sheet in an evidence bag;

- At 2100 the appellant was again seen by Dr Haina. He decided to keep the appellant in hospital for neurological observations (patient clinical progress notes, part of ExR3);

- At 2123 detective senior constable Newell attended the hospital with detective senior constable Kennon. They spoke to the appellant. Newell says that the appellant stated he did not remember what happened to him, and he was unsure if he wished to make a complaint of assault (paragraph 5 of ExR1);

- Kennon's version was that he and Newell attended shortly after 2120, spoke to the appellant who stated he did not remember what happened to him, and he was unsure if he wanted to make a complaint of assault because he did not know if he had been assaulted (paragraph 7 of ExR2);

- The appellant states that he has no recollection of seeing the police on this day and has no memory of anything that was said (paragraph 5 of ExA1). I accept this evidence as true given what is recorded in the various medical notes;

- At 2225 the nursing notes (part of ExR3) record "experiencing amnesia, x1 vomit";

- At 2320 the same nursing notes record "Pt having difficulty recalling time. Knows place and person. Nil nausea.";

- At 2330 the same nursing notes indicates that the appellant was taken for a CT scan with a nurse escort, and then returned at 2345

- At 0030 on 29.11.02 the same nursing notes record "orient to T.P.P. Eyes PEARL";

- At 0530 on 29.11.02 the same nursing notes record "still no recollection of events";

- At 0630 the same nursing notes record "still has retrograde amnesia about incident";

- At 0820 the appellant was reviewed by an unknown doctor. His notes (patient clinical progress notes, part of ExR3) record that the appellant was "today – orientated T. Pl. + P …… mild headache" and it was decided to discharge him;

- I do not know what time the appellant was discharged from the Alice Springs Hospital but it would appear to have been some time in the morning (after 0820) of 29.11.02;

- Dr Wearne hand wrote a letter to prison services on 29.11.02 (part of ExA1). The relevant parts of that letter stated:

  > Thankyou for accepting Mr Miles back into your care. He presented to ASH following an assault resulting in loss of consciousness and retrograde amnesia.
  >
  > On assessment he was conscious, had obvious memory problems to recent event and had sustained blunt trauma to his face, head...
  >
  > Mr Miles underwent a CT scan of his head confirming no intracranial injury.
  >
  > Mr Miles was monitored and observed overnight with return to normal function and memory. He is able to be discharged today but should avoid any circumstances which will result in any further head injury.

- Upon his return to the prison the appellant was seen by corrections medical services and a nurses review summary was done (part of ExA1). It is unclear whether the appellant was seen by Dr Wake or a nurse only. The relevant parts of the note of this attendance is:

  > Returns from ASH post assault multiple bruising about head... Concious level normal now but some retrograde amnesia still measured in hours no recollection of how he came to in kitchen dorm. Discussed concussion....

- At about 1640 hours on 29.11.02 police officers Newell and Kennon attended the Alice Springs prison and again spoke to the appellant.

During this attendance the appellant declared a statutory declaration before Newell (part of annexure B to ExR3). This statutory declaration was clear and unambiguous, and stated as follows:

> 1. My full name is Brett Vernon Miles. I am 41 years old and I am currently a resident of Alice Springs Gaol.
>
> 2. On Thursday 28th November 2002, at about 4:30pm, the last thing I remember is leaving my room and waking up in hospital. I don't know what happened to me. The police that spoke to me say I was assaulted but I don't remember what happened. I don't know who may have wanted to do this to me.
>
> 3. I don't want to make a complaint of assault and I don't want the police to investigate what happened to me.

- In paragraphs 5 and 6 of ExA3 the appellant states:

> 5. I have now been provided by my solicitor an affidavit of Wayne Brian Newell and Peter Squire Kennon, each sworn on 28 July 2004. I note that in their affidavits they state that they attended upon me on 29 November 2002, I cannot deny what the police state in their affidavits, however I do not recall a visit by police only one day after the assault. As I have stated previously at paragraph 2 of my affidavit of 13 May 2004, I can only remember waking up about 2 days later in Alice Springs Hospital.
>
> 6. I still maintain that I recall seeing the police approximately 3 days after the assault because I had asked them to take a statement from me. I also maintain the matters set out in paragraph 6 of my affidavit sworn 13 May 2004.

- There is no suggestion in any of the evidence to suggest that the appellant saw any other police officers other then Kennon and Newell during this period. Accordingly, it is more probable than not that the appellant is mistaken about seeing police "3 days after the assault". I find that he is referring to the same incident that Kennon and Newell refer to as occurring on 29.11.02;

- In paragraph 6 of his affidavit of 13 May 2004 (ExA1) the appellant said:

> I believe I saw the police approximately 3 days after the assault. This was because I asked them to take a statement from me. I told

> them that I thought the offenders may be certain people, but I had no proof of this. I was not able to identify anyone for the police as I did not remember the incident. The police told me that because I could not identify anyone and because I had no memory of what had happened, they could not help me.

121. I again find that this occurred on 29.11.02, and not 3 days after. The appellant has been very vague in paragraph 6 of ExA1. He does not suggest that he told the police the name of any of the "certain people", or gave any clue as to who any of them may have been. Police officers Kennon and Newell do not respond to this paragraph at all in their affidavits (which were sworn some months after ExA1).

122. Ms Spurr submitted that if the police needed more information from the appellant it was up to them to request it. I accept this submission.

123. At no time does the appellant attempt to directly address, in any of his 3 affidavits, the statutory declaration that he made the day after the incident. He doesn't even refer to it. This statutory declaration makes two points very clearly. Firstly, that he doesn't want to make a complaint of assault. Secondly, that he doesn't want the police to investigate what happened to him. He may have had good reason for this, but he makes no attempt to explain the same.

124. The appellant has not been fulsome with the court. In paragraph 6 of ExA1 the appellant says "I told them that I thought the offenders may be certain people", yet he chooses not to give any particulars of what he allegedly told police. This evidence is vague and unhelpful, without some extra detail, which is not forthcoming, from the appellant.

125. The appellant is at pains to emphasise that his first memory is some two days after the incident on 28.11.02. His first memory after the incident is "waking up in hospital". Yet it is clear that this evidence is not correct. The appellant was only in the Alice Springs Hospital between 1820 on 28.11.02 and sometime in the morning of 29.11.02. Hence he was there for less than 18 hours, not even 1 day, let alone two days.

126. Mr Reid has based his opinion in part upon a "subjective opinion of a period of post-traumatic amnesia of at least forty-eight hours". He does go on to state "it is important to note that a period of post-traumatic amnesia can continue, despite the patient being conscious and talking". But, we know from the appellant's own memory returns when he is in hospital, so well less than half the time that Mr Reid was led to believe.

127. Mr Reid assessed the appellant's new learning and short term memory functioning, and concluded that the results (after a 30 minute period of delay) "is highly suggestive of some residual difficulty with the recall or retrieval component of the memory system". He concluded:

> Mr Miles describes a number of typical post-head injury symptoms including poorly sustained concentration, ongoing memory difficulties, balance difficulties, headaches and a general vagueness which lasted up to a period of three months. He reports that these symptoms gradually settled down over that period which is entirely consistent with what we would normally expect from a head injury of this severity. Despite this apparent improvement, he does report some mild but ongoing problems with his cognition. Such difficulties include difficulties with the consistent recall of memories including "going blank" on occasions. He acknowledges that these difficulties are mild, but he clearly differentiates these from his ability to cope prior to the assault.

128. I do not know what his opinion may have been if he had known that the appellant's memory returned within less than 18 hours. Nowhere, in any of his affidavits, does the appellant suggest that he had any difficulty recalling being returned to prison from the hospital. Nowhere, in any of his affidavits, does the appellant suggest that he had any difficulty recalling any events after his return to the prison.

129. I find that the appellant's memory (apart from a gap around the time of the incident) and mental functioning had returned prior to his discharge from hospital. Accordingly, I find that the appellant should have no reason for any memory difficulties at the time he signed his statutory declaration on 29.11.02.

130. On the evidence I would find, on the balance of probabilities, that the appellant failed to assist the Police Force in the investigation or

prosecution of the offence on 29.11.02. Given the clear and unequivocal terms of the appellant's statutory declaration it was not surprising that the investigation did not proceed further. However, in paragraphs 24 and 25 of her reasons Ms Day found:

> 24. I accept the evidence of the applicant that he did not know at the time and does not now know who it was that assaulted him. There are in the various affidavits a few matters which may at one stage have been sought to have been relied upon by the respondent to paint the applicant as generally uncooperative regarding the investigation of this matter. At the hearing however there was, in my view correctly, only one allegation of substance in relation to the alleged failure to assist namely the failure by the applicant to pass on to the police certain rumours which he heard whilst in prison.
>
> 25. The essential facts may be shortly summarised. The applicant initially reported the matter to police (via the prison authorities) but it was not proceeded with, for reasons which were disputed. I do not find any failure to assist on the part of the applicant in relation to the initial investigation.

131. That finding is not the subject of any appeal or cross-appeal herein, and accordingly, although I would have decided the matter differently, that finding stands. It is the finding as to what happened later that is in issue.

132. Subsequently the appellant contacted a solicitor in relation to seeking compensation under the Act. It is unclear when this occurred, but it appears likely to have been in about February of 2003, so a couple of months after the incident. As a result of this application the matter was re-opened with the police.

133. This is set out in paragraphs 25 to 32 of Ms Day's reasons as follows:

> 25. .....In about August of 2003 however the applicant, through his solicitor, caused the police to re-open the investigation and as a result on 1 October 2003 Detective Huysse attended Berrimah Correctional Centre where the applicant was then incarcerated. Detective Huysse had a conversation with the applicant at the prison. The conversation is deposed to in Detective Huysse's affidavit sworn 12 August 2005. Both Detective Huysse and the applicant agree that the police officer asked the applicant if he could remember who assaulted him and he said that he could not.

26. Detective Huysse's evidence is that he then asked the applicant whether there was anything else that he wanted to tell him about the assault. The applicant has sworn an affidavit (25 August 2005) in response to the affidavit of Detective Huysse. In that affidavit the applicant does not deny that Detective Huysse asked him the second, very general, question. I find that this second question was in the nature of an invitation or request by the police to the applicant to provide any further information whatsoever that he may have had in relation to the matter. I find that this amounted to a request for assistance.

27. The applicant admits in his affidavit of 25 August 2005 that at the time of his conversation with Detective Huysse he knew of two different rumours which had been circulating in Alice Springs Goal about who his assailants may have been. The first rumour was that the applicant was assaulted by a group of Aboriginal offenders, the second that he was assaulted by a group of other prisoners who 'took offence' when the applicant refused to become involved in some unidentified criminal activity. No particular individuals were identified to the applicant.

28. The applicant said that he did not pass on the rumours to Detective Huysse because it was very poor quality information. He says at paragraph 12 of his affidavit of 25 August 2005
"I never had the group of aboriginals identified to me, nor did I have these people who had tried to allegedly get me involved in further criminal offences identified to me. There are always rumours swirling in the prison as to who is doing what to whom. I didn't know what was true and I certainly wasn't prepared to tell Detective Huysse of rumours only, when <u>I had no other information whatsoever to identify these people to him</u> or any proof of the rumours let alone someone who would corroborate the rumours being said."

29. In my opinion the failure by the applicant to pass on the rumours does amount to a failure to assist in the circumstances. It is not for the applicant to decide which information may be probative in terms of a police investigation. An applicant is not to know what other information police might have which, when added to the applicant's rumours, might lead to a useful line of inquiry. It must often be the case that in the course of investigation information which is only rumour comes into the hands of police and, although such information is often worthless, sometimes it may be important. Further, in this particular case it is clear that the applicant thought that the rumours were sufficiently important to pass them on to Dr. Walton in July 2003 and Mr. Reid in April 2004. Clearly then the fact of the rumours and their gist (not their truth) was a piece of information which the applicant had and which he could have passed onto the police in order to assist the investigation. He deliberately chose not to.

> 30. The applicant states that the conversation with Detective Huysse took place in the general prison yard with other prisoners looking on and that he didn't want to "make bald face allegations" in that context. The applicant deposes that he expected trouble just for being seen talking to the police. I am of the view that this circumstance does not provide any excuse for the applicant. There is no exculpatory provision in s.12(c), rather the section is exclusionary in nature. Therefore any reason which the applicant may have had for failing to assist the police, even fear for his own safety, cannot provide an excuse once it is found that a request for assistance has been made and that the applicant has failed or refused to comply.
>
> 31. Further the applicant says that Detective Huysse appeared "entirely disinterested", even annoyed, particularly after the applicant asked that part of a written statement alleging a previous withdrawal of the complaint be altered. The only relevance of this evidence, if it is accepted, could be to call into question whether the police officer actually made a genuine request for assistance from the applicant. I am not satisfied on the basis of this statement by the applicant that the invitation by Detective Huysse was not a genuine request to provide assistance. The police were attending at the prison for the specific purpose of taking a statement from the applicant. They were there at the request of the applicant, on his own evidence. Therefore it seems to me quite disingenuous for the applicant to say that he was not aware that he should provide all information which he had in relation to the matter, including the rumours.
>
> 32. Accordingly I find that the applicant has failed to assist the police with the investigation of the offence committed against him and accordingly his application for an assistance certificate must be dismissed. (emphasis added)

134. On 1.10.03 the appellant declared a second statutory declaration before sergeant Huysse. In it he declares:

> On Thursday the 28th November, 2002 I was assaulted at the Alice Springs Gaol. I supplied a statement to police on 15.9.2003. I now wish to make a formal complaint and wish police to investigate the assault on myself and <u>prosecute the person</u> who assaulted me. (emphasis added)

135. Accordingly, the appellant is referring to "person" in the singular. In paragraph 3 of ExR4 sergeant Huysse states:

> On or about 1 October 2003 I met with Miles at the prison. I recall asking him words to the effect of whether he could remember

> anything about who had allegedly assaulted him. Miles told me words to the effect that he couldn't remember anything about the alleged assault. I also recall asking him words to the effect of whether there was anything else he wanted to tell me about the alleged assault. Mile(s) said words to the effect that he had nothing else to tell me.

136. The appellant gave no information of any kind to sergeant Huysse at all. In my view, the sole purpose in the appellant wanting to see the police was to make a formal complaint, and not to assist the police. Sergeant Huysse was seeking information and assistance from the appellant. As highlighted above in paragraph 28 the appellant asserts unequivocally "I had no other information whatsoever to identify these people to him". What, if anything did the appellant know? In order to ascertain this it is necessary to look at what he has told others. I know nothing of what he may have told his solicitors, as the appellant does not say. I therefore only have what he has told the various medical providers that he has seen from time to time. He has disclosed the following matters:

- To Dr Walton on 8.7.03 – "Mr Miles stated that he believes he was attacked because he had been resisting being cajoled into involvement in criminal activities by other prisoners. He stated "they took offence".

- To Mr Reid on 6.4.04 – "Mr Miles told me that he was in Alice Springs Correctional Centre when he was assaulted by eleven fellow prisoners………Mr Miles also described "bouts of anxiety" which he described as periods of fear, particularly of people of Aboriginal descent. I noted that the assault was perpetrated by eleven Aboriginal inmates. He is now much more wary of Aboriginal people and "how they think"."

137. Dealing firstly with what he told Dr Walton, the appellant states (in paragraph 15 of ExA3):

> I note that within the report of Dr Walton he states that I informed him that I believed the attack was because I "had been resisting being cajoled into involvement in criminal activities by other prisoners". I state that the reason I told Dr Walton about that is

> because he was asking me what I had heard about the matter and why I believed that I had been assaulted. Due to my time in prison it is my belief that it is far more likely that I would have been attacked for resisting being involved in further criminal activities, rather than being attacked by aborigines. But I do not know the truth.

138. The direct quote from the appellant "they took offence" does not sound like supposition. It sounds more like a statement of fact. The appellant would be fully aware (as his memory gap is only from 28.11.02 until 29.11.02) whether any prisoners had been cajoling him into involvement in criminal activities. He would know which prisoners and the nature of the criminal activities, but he has failed to provide any such information to the court or to police. Such information was, in my view, important information. It is clear, and I find, that the appellant did not give any of this information to police.

139. If the appellant had no memory of any such "cajoling" leading up to 28.11.02 then it would have been easy for him to have said so. He hasn't. The appellant is the person in the best position to tell police (and the court) what had been happening in the prison (involving himself) leading up to the incident on 28.11.02, but he has said absolutely nothing. I find on the balance of probabilities that this is deliberate.

140. Further with respect to Dr Walton it is surprising that he made no mention of any "fear" or being "much more wary" of people of Aboriginal descent. Dr Walton is a psychiatrist, and accordingly this type of information (if it were true) would have been extremely relevant to his opinion.

141. In relation to what he told Mr Reid, the appellant said in paragraph 16 of ExA3:

> I am also aware that at paragraph 2 of page 3 of the report of Mr Reid he notes that "the assault was perpetrated by 11 Aboriginal inmates". I do not know why Mr Reid only recorded the rumours regarding the aboriginals, but I do state that I told him what both the rumours were. My recollection is that I also told him about the rumour of other prisoners, but I do not take issue with what he has recorded.

142. I am unable to accept that the appellant did tell Mr Reid about the other "rumour" as well, as if he had it is more likely than not that Mr Reid would have referred to it. It is clear that the appellant chose to tell the police nothing about this matter also.

143. I note that the "rumour" about the aboriginal involvement goes into specifics that are surprising. The appellant does not say "a few" or "some", but rather a very specific number, "11".

144. It is not for the appellant to investigate the offence himself, but he has an obligation to assist the police by providing whatever information he does have, if they request it. It is not for the appellant to decide which information might assist police. It is not for the appellant to be selective about what information he does give.

145. I do not accept that the appellant had no information that he could have passed on to Sergeant Huysse. If the appellant was uncomfortable about talking to sergeant Huysse in the view of other prisoners, which would not be unreasonable, he could have requested to see him in private. Further, his lawyers could have provided a written statement from him to the police of everything that he knew at any stage.

146. In my view, the evidence does not suggest that the appellant had any real interest in assisting the police at all. I find that he was interested in getting some money if he could, but was not interested in the perpetrators being brought to justice.

147. I do not accept that the appellant knew nothing that he could have passed on to the police that may have been of assistance to them.

148. If he was being cajoled into partaking in some illegal involvement leading up to 28.11.02, then he would have known who by, when, and what the illegality was. This was relevant information. If he had heard rumours, he would at least know who had told him, and that may be relevant information. If he had been truly told that he may have been attacked by 11 aboriginals he should, in my view, have had a good idea of who at least

some of them were likely to have been. This would have been relevant information.

149. I find nothing from the conduct of the appellant to indicate that he was wishing to assist the police at all in relation to this matter. On the contrary, in my view, all the evidence strongly indicates that the appellant didn't want the matter properly investigated. As a long-term inmate he may well have had good reason for this. He may well know why he was assaulted and who by. His silence may be a part of the "culture" within the prison (similar to the 40 inmates who supposedly heard and saw nothing).

150. I find that it is more probable than not that the appellant did have relevant information that could have assisted the police in the investigation of the incident on 28.11.02, but that he consciously decided not to provide it for his own reasons.

151. Rather than finding that Ms Day was in error in relation to her finding that the appellant did not assist the police in the investigation of the incident, I would come to a similar finding myself on the evidence. **Ground 4 of the notice of appeal is dismissed**.

152. I therefore find that all four grounds of appeal have been unsuccessful. The appeal is dismissed.

153. I will hear counsel on any consequential orders.

Dated this 11th day of May 2006.

____

D. TRIGG SM
STIPENDIARY MAGISTRATE