

CITATION: [2006] NTMC 058

PARTIES: KIM TREVENAN CHAMBERS
INFORMANT

v

COOPER JAMES KERR
DEFENDANT

AND:
LESTER KELLY KERR
DEFENDANT

AND:
RODNEY ERNIE KERR
DEFENDANT

TITLE OF COURT: SUMMARY JURISDICTION

JURISDICTION: CRIMINAL

FILE NO(s): 20600527, 20531298 & 20531787

DELIVERED ON: 23 JUNE 2006

DELIVERED AT: ALYANGULA (BY V/C)

HEARING DATE(s): 16.3.06, 17.3.06, 18.5.06 & 19.5.06

JUDGMENT OF: D. TRIGG SM

CATCHWORDS:

Criminal Code: s 188(2)(a)

REPRESENTATION:

Counsel:

Informant: Ms Mather & Ms Kemp
Defendant: Ms Coroneo

Solicitors:

Informant: DPP
Defendant: NAAJA

Judgment category classification: B
Judgment ID number: [2006] NTMC 058
Number of paragraphs: 146

IN THE COURT OF SUMMARY JURISDICTION
AT ALYANGULA IN THE NORTHERN
TERRITORY OF AUSTRALIA

[2006] NTMC 058

BETWEEN:

KIM TREVENAN CHAMBERS
Informant

No. 20600527

AND:
COOPER JAMES KERR
Defendant

No. 20531298

AND:
LESTER KELLY KERR
Defendant

No. 20531787

AND:
RODNEY ERNIE KERR
Defendant

REASONS FOR DECISION

(Delivered 23 June 2006)

Mr D. TRIGG SM:

1. The defendant Cooper James Kerr (hereinafter referred to as "Cooper") was charged that he:

On the 5th November 2005

At Angurugu in the Northern Territory of Australia

1. unlawfully assaulted Justin Wayne King.

AND THAT the unlawful assault involved the following circumstance of aggravation, namely:

(i) That the said Justin Wayne King suffered bodily harm.

Contrary to Section 188(2)(a) of the Criminal Code.

2. The charge was read before me on 16.3.06 in Alyangula and Cooper pleaded not guilty to the charge and the circumstance of aggravation. Cooper was not jointly charged with any other person.

3. I am referring to the defendant (as I will to the other defendants and some of the witnesses) by his first name as there were a number of witnesses who had the same surname who gave evidence (2 x King; 3 x Donnelly; and 3 x Kerr).
4. At the same time two of Cooper's brothers were also before me facing charges arising out of the same incident. These charges were as follows:

On file 20531298

Lester Kelly Kerr (hereinafter referred to as "Lester") was charged that he:

On the 5th November 2005

At Angurugu in the Northern Territory of Australia

1. unlawfully assaulted Robert James King.

AND THAT the unlawful assault involved the following circumstance of aggravation, namely:

(i) That the said Robert James King suffered bodily harm.

Contrary to Section 188(2)(a) of the Criminal Code.

Lester pleaded not guilty to this charge and the circumstance of aggravation, and a further charge (charge 2, of unlawfully causing grievous harm to Robert James King) was stood aside.

On file 20531787

Rodney Ernie Kerr (hereinafter referred to as "Rodney") was charged that he:

On the 5th November 2005

At Angurugu in the Northern Territory of Australia

1. unlawfully assaulted Robert James King.

AND THAT the unlawful assault involved the following circumstance of aggravation, namely:

(i) That the said Robert James King suffered bodily harm.

Contrary to Section 188(2)(a) of the Criminal Code.

He was further charged that on the 5th November 2005

At Angurugu in the Northern Territory of Australia

2. unlawfully assaulted Justin Wayne King.

AND THAT the unlawful assault involved the following circumstance of aggravation, namely:

(i) That the said Justin Wayne King suffered bodily harm.

Contrary to Section 188(2)(a) of the Criminal Code.

Rodney pleaded not guilty to each of charges 1 and 2 and the circumstance of aggravation on each charge, and a further charge (charge 3, of unlawfully causing grievous harm to Robert James King) was stood aside.

5. Again, neither Rodney nor Lester were jointly charged with any other person. There was no application for a separate hearing in relation to any of the three defendants before the court. The three separate files proceeded together as a joint hearing. Because of the way the prosecution opened their case this appears to have been a sensible and practical approach from counsel. Mr Bellach appeared as counsel for Cooper and Rodney, and Ms Coroneo appeared as counsel for Lester.
6. In summary, the charges and prosecution allegations were that:
 - Cooper assaulted Justin only;
 - Lester assaulted Robert only; and
 - Robert assaulted both Justin and Robert.
7. Ms Mather appeared as counsel for the informant for the initial hearing in March of 2006. The evidence did not conclude (despite extending the court sitting for an extra day in order to try and conclude the evidence) and the hearing had to be adjourned part heard before me until the May sittings in Alyangula. Ms Mather was absent on extended leave at that time, and Ms Kemp (who fortunately had been present throughout all the evidence in March) took over as counsel.
8. Ms Mather opened the prosecution case on the basis that there was an incident at the Alyangula Recreation Club (hereinafter referred to as "the ARC") on the evening of 4.11.05 involving Cooper and Justin. It was no part of the prosecution case that Lester or Rodney were present or had any involvement in this incident. Accordingly, evidence in relation to this incident is, in my opinion, not evidence against either Lester or Rodney in relation to the charges that they face, and I will disregard it when I turn to consider the charges against them in separate judgements. Further, Cooper has not been charged with any offence arising out of what occurred on 4.11.05, but this evidence is relevant to the charge against Cooper as it is, in my opinion, part of the "res gestae". It provides the background history as to what happened thereafter.

9. Ms Mather then opened that after the incident at the ARC, Cooper attended at the compound where Justin was residing at Angurugu, and yelled for Justin to come out and finish the "fight". Justin did not oblige. Cooper left but re-attended the compound on 5.11.05 with Lester and Rodney. Robert (Justin's cousin) was present at the compound, and after an initial conversation with Cooper, Justin appeared. Cooper went up to Justin and shortly thereafter a "fight" ensued between Cooper and Justin. Justin managed to get the upper hand in that fight, and allegedly Cooper then called out to Lester for help. This is when Lester allegedly attempted to get involved, but Robert tried to stop him from doing so, and then Lester allegedly turned on Robert and began to assault him. At this point the prosecution allege that Rodney joined in the assault by Lester on Robert (either as part of a common purpose under *s8 of the Criminal Code*, or aiding and abetting Lester under *s12 of the Criminal Code*). The prosecution then allege that Justin ran away from the compound in order to avoid being assaulted but Cooper gave chase. It is further alleged that Rodney broke off from his assault on Robert and also chased after Justin. The prosecution case is that Justin was caught a number of times and then assaulted by Cooper and Rodney, and at other times assaulted only by Cooper. It is alleged in relation to the involvement of Rodney in the assault upon Justin (away from the compound) that again this was either part of a common purpose under *s8 of the Criminal Code*, or aiding and abetting Cooper under *s12 of the Criminal Code*.
10. In the course of the joint hearing various evidence was given in relation to the injuries received by Justin and Robert. It is only the evidence in relation to the alleged injuries of Justin that is admissible and relevant to the charge against Cooper. It is only the injuries to Robert that is admissible against Lester. The injuries of both are admissible against Rodney.
11. I also disregard all evidence given in the prosecution case relating to what happened to Robert, after Robert attempted to stop Lester joining in to help Cooper, in deciding the issue as to whether Cooper unlawfully assaulted Justin. However, to ignore it totally is not practical as it is all part of what was going on. For example, to exclude from my mind everything that was allegedly happening to Robert would necessarily exclude Rodney's alleged involvement in that. It is, in my view, necessary to consider that evidence when deciding whether the evidence of Justin (that Rodney cut him off in a motor vehicle as he was running away and joined in an assault upon him by Cooper) was credible. Further, it is relevant to decide what Justin could see going on near him in order to make sense of his actions. However, I bear in mind that it is no part of the prosecution case that Cooper had any culpability in relation to what allegedly happened to Robert.
12. Likewise what happened away from the compound concerning Justin is no part of the case against Lester, but is relevant to the cases against Cooper and Rodney.

13. No records of interview were placed into evidence in respect to any of the three defendants.
14. Each of the three defendants elected to give evidence in their own defence. An issue arises as to whether this evidence can be used, either for or against the other defendants. As noted earlier Mr Bellach appeared as counsel for both Cooper and Rodney. Accordingly when he called each of his clients to give evidence he did not seek to then cross-examine them on behalf of his other client. However, Ms Coroneo did have the opportunity to cross-examine both Cooper and Rodney on behalf of Lester, but she chose to ask no questions. Mr Bellach did take the opportunity to ask Lester some questions in cross-examination on behalf of his two clients.
15. In the circumstances of this case it is clear that Cooper did not call either Lester or Rodney to give evidence in his case and vice versa. However, it is also clear from the written submissions of Mr Bellach that he wishes to rely upon the evidence that Lester and Rodney gave in their own cases. He did not address the issue as to whether he can do this. Accordingly, I emailed and faxed all three counsel on 15 June 2006 and invited written submissions from them on this point.
16. On 16.6.06 I received these written submissions, and I thank all three counsel for their diligence and alacrity. All counsel submit that the evidence of each defendant is evidence in the case and may be used either for or against each defendant. I will adopt this submission and proceed accordingly on the assumption that the evidence of Cooper, Lester and Rodney is evidence in the case for or against each of them.
17. Hence, I will now proceed to write a joint judgement in relation to all three defendants, but I will still keep those matters of evidence that clearly do not relate to a particular defendant (the events at the ARC are not relevant to Lester or Rodney, but what they were told of the events is; the injuries to Justin are not relevant against Lester; the injuries to Robert are not relevant against Cooper; what Lester and Rodney allegedly did to Robert is not relevant against Cooper; what happened to Justin is not relevant against Lester etc) separate in my mind.
18. Before turning to consider the evidence in greater detail, there are some facts which are not in dispute and which provide, in my view, an important insight into the personality and mind of the two original players (Cooper and Justin). In my view, these facts help explain what happened thereafter, and also help to resolve the parts of the evidence that are in dispute.
19. I have read the written submissions of Ms Coroneo and Mr Bellach, and I acknowledge their efforts in each providing a well argued submission. They have each pointed out some inconsistencies in the evidence of the two main prosecution witnesses, and

consistencies in the evidence of the three defendants. However, in my view, it would be easy in this case to concentrate on, and thereby get lost in, the small detail and overlook the bigger picture.

20. The important undisputed facts are:

- That following the events at the ARC on 4.11.05 Justin showed no intent or interest in seeking out Cooper, or carrying on the trouble with Cooper, but rather he went home to the compound in Angurugu;
- That following the events at the ARC Cooper was not prepared to let the matter end there (and his response was therefore the opposite of Justin's);
- That following the events at the ARC (and late on the evening of 4.11.05) Cooper got Renice to drive him some 25 kms from Alyangula to Angurugu to seek out his brothers as back-up;
- That after getting at least one of his brothers (Lester) as back-up they then drove to the compound in Angurugu to find Justin;
- Whether Cooper went there to try and "fight" Justin then and there, or to tell Justin he would be back to finish it in the morning is in dispute on the evidence, but it is clear that Cooper went there for one of these two reasons only;
- Justin knew that Cooper was at the compound, and he could have chosen to go outside and confront Cooper if he wished to, but he did not;
- Justin chose to pretend he wasn't there and to turn off the lights;
- In effect Justin chose to hide from Cooper;
- This is consistent with a finding that Justin did not want to continue the trouble any further with Cooper;
- The next day, Justin did not go seeking out Cooper, but rather went on with his ordinary routine (albeit that he was feeling a bit hung over);
- Unlike Justin, Cooper still had no intention of letting the matter lie;
- Early in the morning of the following day (5.11.05) Cooper got Renice to again drive him the 25kms to Angurugu to see his brothers about again acting as back-up;
- Cooper collected Lester and Rodney as back-up;

- Renice drove Cooper, Lester and Rodney to the compound to look for Justin;
- Cooper found Robert at the compound and asked him where Justin was;
- Robert could clearly see that there could be trouble (given what happened at the ARC, followed by Cooper attending the compound late the night before, and attending again) and lied to Cooper that Justin was in the shower;
- Justin was nearby, and hearing voices put his head around the corner to see who it was;
- Cooper saw Justin and approached him;
- Whether Justin also approached Cooper is in dispute;
- Cooper said words to Justin (as put in XXN to Justin) to the effect of "I'm here to have a go because of what happened last night, let's finish it off";
- Cooper was still keen to continue the trouble from the previous night;
- On the contrary, there was nothing in Justin's behaviour up to this point to suggest that he had any similar desire. On the contrary, his behaviour would in fact suggest the opposite.

21. Accordingly, it is clear, and I find, that from the moment the incident at the ARC ceased until Cooper confronted Justin at the compound on 5.11.05 the only one who displayed an intent to carry the matter on was Cooper. It was Cooper (not Justin) who went out of his way to force a confrontation at the compound on the morning of 5.11.05. At no stage did Justin seek out Cooper at all. It was Cooper who was the protagonist and the aggressor, not Justin. It was Cooper who had twice gone to the trouble to get physical back-up before he went seeking out Justin.

22. In my view, it is important to bear these facts in mind, as they give an insight into the character of both Cooper and Justin.

23. Cooper's version of the facts was heavily premised on the following factual assertions:

- That Justin wanted to fight Cooper on 5.11.05;
- That Justin consented to fighting Cooper in the compound;
- That Justin threw the first punch in the compound; and

- That even though Justin kept running away from Cooper, Justin still wanted to keep fighting Cooper.

24. In my view, the first of these factual assertions is not consistent with Justin's actions from the time he left the ARC. All the evidence clearly points to Cooper being the aggressor from the time that the incident at the ARC was brought to an end. I find accordingly.

25. On these fact I find that Justin had no particular wish or desire to continue the trouble with Cooper from the ARC. I find that Cooper was and remained determined to "finish the fight off".

26. There are also some facts in relation to Robert that do not appear to be in dispute, namely;

- At the ARC, Robert's only involvement was to help separate Cooper and Justin, and to leave with Justin;
- There was no suggestion that Robert attempted to get involved in the altercation at the ARC;
- Robert's only involvement at the ARC was to attempt to stop the trouble once it had begun;
- When Cooper attended the compound late on 4.11.05, Robert was inside with Justin and joined in pretending that they weren't there;
- When Cooper came up to him in the compound on 5.11.05 asking for Justin, Robert pretended that Justin was in the shower (I infer that he did this either to buy time, or in the hope of Cooper leaving);
- Once Cooper and Justin came together on 5.11.05, Robert did not seek to intervene between them;
- Once Cooper and Justin began to fight at the compound Robert was calling upon them to stop (I find that he did this);
- Once Lester started moving towards Cooper and Justin, Robert told Lester not to join in;
- Robert was there at the wrong place at the wrong time;
- Robert was not there to back-up Justin;

- Lester was there intentionally to back-up Cooper
- Rodney was there intentionally to back-up Cooper.

27. Accordingly, all of the actions of Robert up to this point in time were to avoid a physical confrontation, or to stop it once it had commenced. Yet it was suggested by Lester (who looked far larger than Robert, and who was physically imposing whereas Robert was not) that Robert put some “move” on him. It was never suggested to Robert that he had any martial arts training or expertise.

28. I now turn to consider the evidence. In doing so, I have prepared a six column table in which I have attempted to set out what I consider to be the most important bits of evidence by each witness on a given topic. I have not attempted to be exhaustive and include everything said as this would have been prohibitive. But I have read the whole transcript of the evidence and given consideration to all of it. Hereafter Column 1 deals with the evidence of Justin; Column 2 deals with the evidence of Robert; Column 3 deals with the evidence of Cooper; Column 4 deals with the evidence of Rodney; Column 5 deals with the evidence of Lester; and Column 6 refers to the evidence of other witnesses in the case (and I have identified the respective witness in each instance).

29. I start by considering the evidence as to what transpired at the ARC on 4.11.05.

Justin King	Robert King	Cooper Kerr	Rodney Kerr	Lester Kerr	Witnesses
		I went down about 1/4 to 6, 6			
4.11.05 arrived ARC about 8pm	Arrived at ARC about 6pm, it was getting dark				Ryan Donnelly: arrived probably 7:30 or 8
Had 6-8 rums	Had about 6 heavy beers	I had 6 or 7 MB and I had about 2 glasses of rum after that... Just drunk, not that drunk... Not blind drunk.			Ryan: I the designated driver, so I only had 2 or 3...Justin had not many...Robert's not much of a real big drinker
I was a little bit intoxicated/i ntoxicated		...all getting slowly drunk			
I don't remember Kiera being there – she's only 16		Justin was talking to Catisha (18) and Kiera (about 16 turning 17)			Ryan: Catisha, Kiera and Justin were talking
I did not make any hand gesture		I seen Justin make sign language like			Ryan: I did not see any hand signal

towards one of Cooper's nieces		was going to get her later on for the night... that's what offended me. Q---so you were pretty fired up then? A---Yeah I got offended by it...			
Confronted by Cooper					
Seemed a little bit angry and said I sleeping with one of his nieces (I heard you going with one of my nieces)		I told him what I seen. He got real tempered up with me.			Ryan: something going on about something, about his nieces or something
Told him to talk to another niece and get story straight		He told me to go away, making a show of it. He said "go away, I'll talk to you later on about this". I said yeah I'll walk away, but the way he spoke to me is like, wasn't a good manner.			Ryan: Justin replied we're friends or something with them..... I think Justin was going along with him....not being rude...not being a hard prick
Cooper walked away	I had been o/s and came back in	Q---there was only one confrontation? A---Yep.			
Cooper confronted me again, face to face, within half a metre	Cooper come over Cooper 15 centimetres from Justin				Ryan: Justin on a bar stool... Cooper seemed a bit aggressive with Justin.... Pretty much close face to face... Justin didn't get aggressive...
Cooper asked if I wanted to have a go	I turned when I heard muffled shouting coming from Cooper at Justin	When I was talking to him I raised my voice he raised his voice as well. Q---so you raised your voice first? A---Yep.			
I did not say		Justin/s I don't			Ryan: no, not at

“what, do you want to have a go” to Cooper		care, what do you want to go			all
I did not grab Cooper’s shirt, pull it above his face and punch him	I did not see that	All I did was put my hands on Justin’s chest, I pointed at him, Justin grabbed my shirt, I grabbed his shirt, he had my shirt over me and we was both on the ground and he was punching me up cause he had my shirt over my head.			Ryan: No, he was sitting on the bar stool... Q---Justin has pulled Cooper’s shirt up over his eyes, so he can’t see, and then he’s thrown a punch and he’s connected with his forehead, and it was on after that? A---Nope.
Cooper put his fist in my jaw and pushed me back	Cooper had Justin on the shirt around the collar with both fists pushed up towards the face area, and they was still yelling and Justin was nearly falling off his stool	The stage when I pointed, he must have thought I was gonna hit him, that’s when he hit me. Q---who threw the first punch? A---Justin.			Ryan: they had turned into a bit more of an argument then had Cooper grabbed him by the shirt and then they were, punches were thrown... I say that Cooper chucked the first punch... I seen him chuck the first punch I was watching... the girls were trying to stop Cooper from doing it
I grabbed Cooper by the shirt and pushed him onto pool table	Justin pushed forward so he wouldn’t fall off the stool				Ryan: Justin was sitting on his bar stool, and then Cooper then attacked him and then I think Justin pulled himself up off the chair by Cooper and then they were fighting.... Like Justin was falling back off his chair and still had hold...
It didn’t happen that	They were on the ground,	He hit the pool table a couple of			

Cooper was pushed into the leg of a pool table	they were very close, they could have both hit the pool table for all I know	times			
Scuffle	Scuffle, they've just like thrown each other around	Then we both got up and started fighting...it was like wrestling around throwing, we was just throwing each other around...			✓
We were split up	✓	✓			✓
I hit from side by Coopers g/f	I seen pool ball hit the wall and the ground from Cooper's g/f				
Escorted o/s	✓	Two police officers off duty walked me o/s			Ryan: I pretty much escorted them myself
	Justin was sort of shocked				
	Justin had a shiner on his cheek bone				

30. There was no evidence to suggest that there had been any problem or history between Justin and Cooper prior to this incident at the ARC.
31. I found Ryan Donnelly (hereinafter referred to as "Ryan") to be an honest and reliable witness. I saw no obvious exaggeration in his evidence. He was the witness who had the least to drink on 4.11.05, and therefore his memory is the least likely to be effected by alcohol. He was a work colleague of Justin and Robert at the time, but there was no suggestion of any particular friendship or ongoing contact since. Ryan continues to live and work in Angurugu, and therefore is more likely to have ongoing contact with the Kerr brothers. There was no suggestion of any basis for any possible bias by Ryan for or against Justin, or for or against Cooper. I find that Ryan was effectively an independent witness. His evidence was clear and unshaken in cross-examination. I accept his evidence.
32. When his evidence is compared with the other evidence as to what happened in the ARC on 4.11.05, his evidence supports the evidence of Justin and Robert on the important aspects, and is contrary to the evidence of Cooper on those same aspects. There are differences in the evidence as to what occurred, but generally (with the exception of Cooper's evidence) the differences are in the detail rather than in the important aspects. I therefore generally prefer the evidence of Justin and Robert, and am unable to totally

accept the evidence of Cooper as to what happened in the ARC. This does not mean that I accept everything that they said. On some things they are mistaken or confused (such as: the time they went there; whether Kiera was there etc), but I did not consider these matters of much relevance.

33. I make the following findings as to what occurred at the ARC on 4.11.05:

- Justin, Robert and Ryan were workmates. After work and after eating they attended at the ARC between 7:30 and 8pm.
- They were socialising, drinking and playing pool.
- Robert was not a big drinker and had about 6 heavy beers over the course of the night. He was not drunk.
- Ryan was the designated driver that night. He had only 2 or 3 drinks. He was sober.
- Justin had 6-8 rums and was on the way to being intoxicated.
- Cooper was there also. He was generally known to Justin and Robert, but there had been no trouble or history between them. Cooper had 6 or 7 full strength beers plus about 2 glasses of rum. He was on the way to being intoxicated.
- Justin was friends with 2 young females (Catisha and Kiera) who may have been related to Cooper in some way. There was no relationship (as in boyfriend/girlfriend) between Justin and either girl. The 2 girls were present this night and had joined in playing some pool.
- Late in the evening Cooper believed that he saw Justin make a hand-signal that he believed was directed towards Kiera, and that he took offence to. I do not find that Justin in fact made any such hand signal. I do not find that Cooper had any right to intervene even if I am wrong and a hand gesture was made.
- Cooper confronted Justin.
- Cooper was verbally aggressive towards Justin and was looking for trouble.
- Justin did not know what Cooper was on about and told him to go away and get his facts right. He was telling Cooper that the girls were just friends. Cooper was not listening.
- The girls tried to get Cooper to leave it, and were telling him that they were just friends. Cooper was not listening. Cooper kept persisting and his voice was getting

loud. Justin raised his voice in return, and this is what first attracted the attention of Robert and Ryan.

- Justin was not being rude or aggressive back towards Cooper, but was being forceful in telling Cooper to go away. Justin was sitting on a bar stool whilst Cooper was standing up. Cooper moved closer towards Justin (he was in his space).
- Without provocation Cooper grabbed Justin by the front of his shirt with both fists and pushed his fists up and under the chin of Justin. As a result of this Justin almost fell back off the stool but he was then able to grab Cooper and pull himself up off the stool.
- A scuffle then broke out between Justin and Cooper. As no charges arise out of this incident (but it is still possible for charges to be laid) I will refrain from making any finding as to who did or did not throw punches in this scuffle, and in particular who threw the first punch.
- I reject the evidence of Cooper in relation to Justin pulling his shirt up over his head at any stage.
- I reject the evidence of Cooper that Justin was the aggressor. On the contrary, I find that Cooper was the aggressor in this incident. I find that Cooper started the altercation, would not leave the matter alone, and it was him who moved it from a verbal altercation to a physical one.
- I find that Justin and Cooper were struggling and wrestling around, both on their feet and on the floor. They were pulled apart and separated fairly quickly.
- After Cooper and Justin had been separated, Renice (who was variously described as Cooper's girlfriend, missus or wife) got involved and hit Justin from the side. She also threw a pool ball at Justin, but it missed and hit the wall.
- I did not hear any evidence from Renice as to the incident on 4.11.04 or the events of the next day, even though it is clear from the evidence that she was present and witnessed both incidents. It is clear from the decision in **Dyers v R** (2002) 192 ALR 181 @ 184-5 that:
 1. It cannot be said that it would be expected that the accused would call others to give evidence. To form that expectation denies that it is for the prosecution to prove its case beyond reasonable doubt;

2. Any conclusion about who would be expected to call a person to give evidence must take account of the obligations of the prosecution. If persons are able to give credible evidence about matters directly in issue at the trial, those facts, standing alone, would ordinarily suggest that the prosecution should call them; and
3. The jury should not speculate about the evidence that might have been given by those who were not called.

- Accordingly, I draw no inference one way or the other from the failure of Renice to give evidence either for or against the prosecution (as no point was attempted to made of this either during the evidence or in closing submissions), or for or against Cooper.
- Justin was escorted immediately outside of the ARC, and Robert and Ryan went with him.
- Ryan drove them back to the compound where they were living in Angurugu. Justin was upset about what had happened and confused as to why it had occurred.
- I find that the evidence of Cooper is substantially untrue on the key aspects (as to who was the aggressor and who started the physical altercation), and I therefore treat all of his evidence hereafter with an element of caution.

34. The evidence as to what happened after the incident in the ARC was:

		<p>I got my missus, jumped in the car, went to see Lester and Rodney, told Lester and Rodney what happened...and I told him I gonna go see Justin and we went to see Justin... I don't remember Rodney that night, but I know Lester in the car with me...in case I get double banked or something... I went that night to tell him that we was going to have a go in the morning but he wasn't there... To tell him that I'd see him in the morning so we can finish our fight</p>	<p>No mention</p>	<p>No mention</p>	
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Drove back to compound	✓				Ryan: I drove them back to the compound
Cooper pulled up	✓	✓			
Cooper yelling for me to come o/s and we'll sort this out now	Cooper shouting from the front gate for Justin to come o/s	I wasn't yelling. A fella at the gates...l/s where's Justin that (tattooed) cunt from Mt Isa. He's not here. And I says well tell him I want to see him about what happened about half an hour ago...I'll come back in the morning			Ryan: Cooper was yelling for Justin... Offering him out
Ignored it	✓				✓
Cooper left		✓			

35. It is clear, and I find that Cooper was still angry after he also had been escorted out of the ARC. The matter wasn't finished as far as he was concerned. He wanted to "fight" Justin. He decided to go looking for him.
36. Cooper got Renice and got into their car and immediately drove to see his brothers Lester and Rodney. Lester was living with Rodney in his house in Angurugu. Angurugu is a community near the airport and is approximately 25 kilometres from the ARC. It was not close by. Cooper was living in Alyangula, which was where the ARC was situated.
37. Neither Lester nor Rodney were asked any questions about this, or gave any evidence of having any involvement on the night of 4.11.05 as suggested by Cooper. Either Cooper's evidence in this regard was not truthful, or the evidence was not led through inadvertence, or because it was not beneficial to the case of some or all of the defendant's. As noted earlier, Lester was represented by Ms Coroneo, and Rodney by Mr Bellach. I am less likely to infer inadvertence on the part of two counsel. Having not been raised in evidence in chief I see no obligation on the prosecution to raise it in cross-examination.
38. I find that Cooper told Lester what had happened (it is unclear whether Rodney was also present, and I'm unable to find that he was) and Renice then drove Cooper and Lester to the worker's compound in Angurugu. Lester went as back-up, and I find that Cooper wanted him there to lend physical assistance if this was required.
39. I reject the evidence of Cooper that he made all this effort simply to tell Justin that they were "going to have a go in the morning". It makes no good or logical sense. It is also inconsistent to all the other evidence. I find that Cooper wanted to "fight" Justin there and then, and was "calling him out" for that purpose. If Cooper had said anything about

being back in the morning, the Justin may well have taken some precautions the following day. He did not.

40. I find that Cooper was loudly offering Justin out to “fight”, but Justin did not want to and stayed inside. They turned the lights out, and eventually Cooper left as he could not get into the locked compound.
41. Whilst alcohol may have played some role in Cooper’s aggressive behaviour on the night of 4.11.05, the effects of this should have worn off overnight. However, Cooper did not cool down overnight. He was still determined to “fight” Justin. The next day Cooper returned. The evidence proceeded as follows:

<p>5/11 I told boss I wasn't too well and I didn't feel like working</p> <p>In my statement I said I went back to compound to get more materials for work</p>	<p>We needed a few more screws so we decided to go back to the compound</p>				<p>Josh Donnelly: they said they had a bit of a fight the night before, then they said they were sick and wanted to go home..I let them</p>
<p>Went home to compound with Robert</p>	<p>✓</p>				
<p>I was walking to the toilet block</p>					
		<p>Next morning we got up, went out seen Lester and Rodney, got there to where Justin was...</p> <p>Q---and what did you do that for?</p> <p>A---in case the other boys jumped in, into a fight.</p>	<p>(131)Cooper pulled up...he had a bit of a worried look on his face at the time. So I knew there was something wrong by the look on his face.</p> <p>Q---So what happened?</p> <p>A---So if, if Cooper told us, told me had a bit of trouble up town, bit of</p>	<p>Cooper pretty mellow, pretty usual, for a Saturday morning. Cooper coming around home (it's Rodney place, I'm staying with him) in the morning. Told me that he had a fight up</p>	

			<p>mischief up there, but night before, or like last night, yeah. (135)XXN – Q---did he tell you what happened the night before? A---Yes.... Q---but what did he say happened the night before? A---He didn't say anything to me.... (136)Q--- what did he say? A---we just, we, I need to go and see a contractors. Q---did he say why? A---No... (137)Q--- You found out there had been a fight the night before, is that right? A---No, only to when I went back home. Q---Did Cooper on the way out to the compound tell you that he'd been in a fight the night before? A---Yes, only there been a bit of trouble up town. (138)Q---But</p>	<p>in town the night before. I offered to come to make sure, you know see me brother through, being me older brother, being concerned and all. I said I'll come and see you, make sure no one double banks you or anything like that... He just told me he got into a bit of strife the night before.</p>	
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			<p>you knew there was a fight the night before? A---Yes.... Q---You need to listen to my question okay. You were aware that you were going in the car? A---Yeah. Q---To speak to some boys? A---Yes. Q---About what Cooper had said to you about a fight? A---Yes. Q---Do you understand that? A---Yes. (139)Q--- Cooper told you about a fight that happened between him and Justin King the night before? A---Yes... Q---You also went down to protect your brother in the case that you got involved in a fight, is that right? A---And to protect the others too. Protect the other boys as well? A---Yeah. Like a mediator,</p>	
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			you know.		
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42. I reject the evidence of Lester that Cooper was “pretty mellow”. It makes no good or logical sense given the reason that Cooper was there. Rodney noted “**he had a bit of a worried look on his face at the time. So I knew there was something wrong by the look on his face**”. I find that this is more credible and more likely to be the case.
43. I find the evidence of Rodney as to what he was told about the incidents on 4/11 to be not credible. He was very evasive in his evidence about what he did or did not know about what Cooper said happened the night before and it took quite some effort to drag anything out of him. In the prosecution case Josh Donnelly was called and he spoke to Rodney just after all the trouble had stopped. Rodney told him “he said the boys had been smart arses the night before at the pub.” In addition, Paul Donnelly also spoke to Rodney around the same time and Rodney said to him “he’s got a smart mouth or something and disrespectful, I took it to be one of Rodney’s brother’s wife or girlfriend, the night before”. It is clear that Rodney knew a lot more than he was prepared to concede in evidence. His evasiveness does him no credit.
44. His evidence that he went there “like a mediator” I find not credible, given that he suggests he never got out of the car, he never went into the compound, and he never tried to talk to anyone present. I reject this evidence.
45. Rodney also suggested in his evidence that he didn’t go into the compound as he was scared of the “big fella”. He was referring to Justin. Justin was short. He was shorter than Rodney, Cooper, Lester and Robert. Whilst he had a good build he was not “big”, and there was nothing physically imposing about him. Just comparing Justin and Robert with the three defendants if you were picking teams for a fight based on physical appearance, in order I’d have gone Lester, Cooper, Justin, Rodney and then Robert.
46. I find that Lester and Rodney had been told some of what had happened the night before in the ARC before they got into the motor vehicle with Cooper and Renice. Lester had already been told the night before when he went to back-up Cooper initially.
47. I find that Cooper was determined to teach Justin a lesson for being cheeky. He was looking for him. He did not know where or with whom he might find Justin, so he took his brothers as physical back-up in case they were needed. He did not want anybody to prevent a “fight” occurring. In addition he wanted Lester and Rodney to give him physical help if he needed it. I find that both Lester and Rodney were aware of what their roles were to be, and both voluntarily accompanied Cooper. The three brothers went off looking for Justin. Cooper was fired up and determined to have it out with Justin, and Lester and Rodney were there to help.

48. There was no evidence to suggest that either Justin or Robert had any dealings (let alone any adverse ones) with Lester or Rodney prior to this day.

49. The evidence continued:

Car pulled up	4wd pulled up with Cooper, Lester, Rodney and his g/f	I was with Rodney, Lester, my g/f	Cooper, me, Lester and Cooper's missus		
Robert talking to someone	Cooper got out and was walking towards me asking where Justin was Cooper was angry I/s Justin in the shower	I jumped out of the car and walked up to where Rob was and asked where Justin was R/s Justin in the shower	I opened the door and Cooper jumped out.	Cooper jumped out...had a couple of words with Robert.	
	Cooper got out first and Lester and Rodney got out afterwards		Lester got out.		
I walked to side of house	✓	I looked over... seen Justin coming down the steps from the other house		Justin popped his head around the corner.	
Cooper was there. Cooper was not wearing a shirt	I'm guessing Cooper was wearing a shirt	I wearing a dark blue shirt with adidas on it			
Cooper yelled "you come here now, we'll finish this now"					
Cooper coming at me aggressively	(56)Cooper walked up to Justin... I seen him go real close together and start, start talking and yelling... They were ready, ready for fighting, they were, he was hot, they were ready to fight Justin	Q---when you walked up to Justin in the compound what was in your mind? A---Just to finish the fight, what we made it that night.			

50. I find that Cooper went there to "fight" Justin and was going to "fight" him whether Justin wanted to or not. Cooper wanted Lester and Rodney to be there to ensure he got to have a go at Justin, and to provide help if needed.

51. I don't find that they went there initially with the common purpose (s.8 of Criminal Code) of all assaulting Justin. Rather they went to see how things developed, and then they would react accordingly. I find that Cooper wanted a physical altercation, and he expected Lester and Rodney to provide whatever physical assistance he might need as the situation unfolded, and to ensure that he won.
52. When Justin was seen by Cooper he was not very far from him. There was just Robert and himself in the compound. Cooper was there and as soon as he saw Justin he started moving towards him in a verbally and physically aggressive manner.
53. At this point Justin appeared to have a number of options:
1. he could have tried to run inside one of the buildings and secure it;
 2. he could have turned and run off somewhere;
 3. he could have tried to talk Cooper down and avoid a "fight"; or
 4. he could have agreed to finish the "fight" there and then.
54. It is the prosecution case that Justin opted for option 3. It is the evidence of Cooper and Lester that Justin opted for option 4.
55. The compound appears to have been surrounded by a high wire fence. There was the main entrance through which Cooper had come, and near which the motor vehicle (and Coopers "back-up") were situated. There was also a back entrance (which came into evidence later). It appears that the compound was reasonably isolated. There was no suggestion that there was housing or other buildings in close proximity. There was certainly no suggestion that there might be any help close at hand.
56. I do not find that Justin walked up to Cooper. I find that it was Cooper who moved immediately towards Justin. I find that Cooper was angry and ready for a fight. I find that it was Cooper who was the aggressor.
57. The evidence continued:

I did not walk towards him	Justin was still up, sort of the corner of the house... Justin's just standing there and Cooper walks up to him	I walked over to Justin, Justin walked over to me.		Cooper and Justin approaches each other, they're pretty close, couple of words are exchanged.	
I put hands up and said I didn't want to	I didn't hear what was being said	Q---Did he say to you that he didn't want to fight?			

fight him		A---No... Q---if he had've said to you that he didn't want to fight, what would you have done? A---Wouldn't have fought him.			
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58. I find this suggestion (in bold) from Cooper to be unbelievable, and I reject it as a deliberate untruth. Cooper had gone all the way there on the night of 4.11.05 to “fight” Justin (with back-up) but was unable to get near him. He went to all the trouble to go there again early on 5.11.05, and to round up Lester and Rodney as back-up. To suggest that he would then have just walked away without laying a hand on Justin I find beyond belief. That was the sole reason that he was there. As he also said in his evidence when he went into the compound what was in his mind was “**Just to finish the fight, what we made it that night.**”
59. I find that Cooper was determined to “fight” Justin whether he wanted to or not. Cooper did not care what Justin wanted. No issue of consent troubled Cooper.
60. I find that Justin did not consent to any “fight” with Cooper and told him that he did not want to fight. It is to Robert’s credit that he stated he did not hear what was being said. If he was wanting to lie or exaggerate in order to make the case against Cooper worse, then this would have been an easy opportunity for him to do so. He did not. I accept Robert as a witness of truth.

(37)XXN- Q--- And you speak? A---Yes, I told him I did not want to fight him. XXN-Q---He said something to you like this “I’m here to have a go because of what happened last night, let’s finish it off”? A---Yes, I remember, I recall something like that.	I didn’t hear what was being said	I said to Justin about the fight we had last night... He started getting aggressive and we both was in the same stage, we were both face to face... We was talking and that was it we was into it.	Cooper jumped out, then I seen Justin they was talking and that.		
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61. As was put to Justin in cross-examination Cooper was there “to have a go”. He was not there to talk. He was there to “finish it off”, and by that he meant finish the “fight”.

62. I find that Cooper was not listening to Justin, and did not care what Justin wanted.
63. I find that Cooper was the aggressor throughout.
64. I find that Justin was trying to avoid a “fight” with Cooper but he quickly realised that this might not be possible. I find that at no time did Justin consent to “fighting” Cooper, but he was tensing up in anticipation, and in case he had to defend himself.
65. I find beyond all reasonable doubt (hereinafter referred to as “b.a.r.d.”) that Justin opted for option 3 (as mentioned above). I find b.a.r.d. that Justin at no stage opted for option 4, and on the contrary was keen to avoid option 4. I find b.a.r.d. that Justin ultimately defended himself against Cooper but this was not the same thing as agreeing to take part in a consensual fight.
66. Assault is defined in *section 87 of the Criminal Code* as follows:

187. Definition

In this Code "assault" means –

(a) the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of bodily harm or by means of false and fraudulent representations as to the nature of the act or by personation; or

(b) the attempted or threatened application of such force where the person attempting or threatening it has an actual or apparent present ability to effect his purpose and the purpose is evidenced by bodily movement or threatening words,

other than the application of force –

(c) when rescuing or resuscitating a person or when giving any medical treatment or first aid reasonably needed by the person to whom it is given or when restraining a person who needs to be restrained for his own protection or benefit or when attempting to do any such act;

(d) in the course of a sporting activity where the force used is not in contravention of the rules of the game; or

(e) that is used for and is reasonably needed for the common intercourse of life.

67. Fight is defined in the Concise Oxford Dictionary (eighth edition) to mean: “contend or struggle in war, battle, single combat etc; contend with (an opponent) in this way”.
68. In any assault there is an element whereby it is a “fight” whether a victim tries to fight back, or defend himself. It is the absence of consent that turns what might otherwise be a fight into an assault. The law and the community expect it’s citizens to be civilised and not go out of their way to seek or provoke “fights”. If confronted with an inevitable

confrontation however, the law does not require a person to be passive and accept a role as a punching bag.

69. When Justin appeared Lester got out of the motor vehicle and entered the compound and walked in the general direction of Cooper. This path took him also towards Robert.

70. I find that Rodney also then got out of the motor vehicle and started moving into the compound as well, but he was some distance behind Lester.

		When I was talking to Justin that's when seen Lester standing with Robert Q---Did you see Rodney get out of the car? A---No. Q---At any time? A---Nope, didn't see Rodney.	Q---you saw them getting involved in an argument is that right? A---No, not I don't think that one. Q---you didn't see them get involved in an argument...yes or no? A---No.	I jumped out of the m/v walked up...Robert walks up close to me.	
Cooper struck me to L-side of face with a full punch	I didn't see who threw the first punch	...and the next minute I pushed him...	Q---and did you see the fight between Cooper and Justin? A---I saw just a bit then I saw Cooper looking around for Josh to tell Josh what was going on, cause I really needed to see him just to let him know about the situation.... Q---you saw them throw punches, is that right? A---Nope... Q---what did you see? A---not much.	Justin threw the first hit, Cooper reacted as in blocking, blocking Justin's hit... me brother Cooper had time to actually defend himself to block that hit and from there it was on I guess.	
I did not grab his shirt and pull it over his face	Q---is it possible A---No	...and then he grabbed my shirt and he did the same thing exactly what he did at the pub at me, put my shirt over...		Cooper threw a hit back, Justin tried to pull the shirt over Cooper's, Cooper's head, pull from the	

				front over to the back of his head, and he tried to do that but Cooper broke, smacked his hand away and then...	
I did not throw the first punch		...and then got stuck into me... he started punching me up			

71. I find the evidence of Justin pulling Cooper's shirt over his head (being virtually identical to the evidence he gave as to what happened on 4/11, and which I do not believe) as being untrue. I am unable to accept the evidence of Cooper and Lester in this regard.
72. I also reject the evidence of Cooper and Lester that Justin threw the first punch. This would have been a most unwise thing for Justin to do, in the situation that was confronting him. Cooper was right in front of him wanting a fight. Lester was approaching (and he was an imposing and dangerous looking man) and Rodney was coming over as well. The only possible support that Justin had was Robert, and I find that he was not a fighter.
73. On the evidence of Cooper it was he who made the first physical contact this day, but he said it was a push and not a punch. I find that Cooper made it clear to Justin that he was going to fight him then and there. Justin did what he could to avoid a "fight" by telling Cooper that he didn't want to fight him. Cooper would have none of it. Cooper was determined to have his "fight" whether Justin fought back or not.
74. Even if Justin did punch Cooper first after Cooper pushed him (which I do not find to be the case) this would not have prevented Justin's action from being in self defence. A person when confronted by the inevitable (as I find Justin was on this occasion) does not have to wait to be hit before they can defend themselves. I would not have found that this action (if it had occurred) would have been unreasonable in the circumstances.
75. I find Rodney's evidence that he didn't see anything happen in the compound to anyone to be incredulous. I reject his evidence. Rodney would have me believe that he didn't really know what had happened the night before (I reject this); he didn't really know why he was going to the compound (I reject this); he thought he might be able to mediate (but he says he didn't move from the car, so I reject that); he was there to protect his brother (which I accept, and therefore he couldn't do this from the car, so he didn't stay in the car) and to protect the others too (I reject that, as no evidence to suggest he did anything like this by words or actions). Rodney would have me believe that he was the brother who heard no evil, saw no evil and did no evil. I reject his evidence.

76. It is the clear and credible evidence of both Justin and Robert that Rodney joined in on the assault of Robert at the compound. It is the clear and credible evidence of Justin that Rodney later joined in on the assault of him away from the compound. All three defendants say that Rodney was not involved at all. The two versions cannot be both right. Either Justin and Robert are lying, or Cooper, Lester and Rodney are lying. From my observations and from listening to all the evidence and watching the demeanour of all witnesses I much prefer the evidence of Justin and Robert. I was generally unimpressed with Cooper, Lester and Rodney as witnesses.
77. The evidence of Lester was less than credible. When he was being cross-examined on 18.5.06 it was clear that he was getting caught out on what he had told the court previously. Lester then claimed that he couldn't think as he was still intoxicated from drinking all the night before. I note that Ms Coroneo raised no concerns about her client before he returned to the witness box. I would have expected her to do so if she had any reservations about her client's condition. I did not observe any outward signs to raise any concerns in my mind that Lester may be under the influence of alcohol, either before or after he raised the matter. In order to ensure that Lester had the fairest opportunity to give his evidence the matter was stood down at 1040. When I recalled the matter at 1350 I was informed that Lester still needed more time. I recalled the matter again at 1513 and I was informed that Lester still was not ready. Accordingly, I adjourned the matter overnight. Lester's evidence resumed at 1047 on 19.5.06. The quality of his evidence did not improve and he continued to be caught out. At times he gave side glances towards the prosecutor during his cross-examination, and I formed the view that he was a person who was struggling to keep himself under control. Anger was lurking very close to the surface. I did not form a favourable impression of him as a person or a witness. I find that Lester was prepared to say whatever he thought might get himself or Cooper or Rodney out of trouble. I do not accept him as a witness of truth.
78. I generally accept the evidence of Justin and Robert, and prefer this evidence to that of Cooper, Lester and Rodney generally when the evidence is in conflict. In doing so, I proceed on the basis that it is no part of the judicial function to have to prefer one version of the evidence to another (*Towner v R* (1991) 56 A Crim R 221 @ 228-9). However, in the instant case I find aspects of the evidence of each of Cooper, Lester and Rodney to be sufficient for me to find that they are each telling deliberate untruths on some of the crucial aspects. On the contrary I found both Justin and Robert to be honest witnesses who were trying their best to tell the truth, despite the alarming circumstances they found themselves in. Given what transpired it is not surprising that they weren't paying attention to everything that was going on around them as the assault unfolded and escalated. I would expect differences in their stories, but these differences did not adversely effect my view as to their general credibility.

79. I find that Cooper initiated the physical confrontation with Justin by throwing the first punch.
80. I find that this was without the consent of Justin.
81. I find that Justin never by his words or actions consented to fight Cooper, and on the contrary expressly told him that he did not want to fight.
82. I find that Justin did not want to fight Cooper, but was aware that Cooper was there for trouble. He was prepared to defend himself if he had to, but told Cooper that he did not want to fight him.
83. I therefore find that Cooper assaulted Justin by punching him with a full force fist to the left side of his face. I find b.a.r.d. that this assault was unlawful, in that it was without authorisation, justification or excuse.
84. To the extent that provocation was raised I find it is negated b.a.r.d. in that it was Cooper who was the aggressor throughout in seeking out Justin on 4/11 and again on 5/11 to assault him. If Justin did anything provocative the night before (which I find he did not) I satisfied b.a.r.d. that given the time delay Cooper did not act on the sudden. I find that nothing that occurred on 4/11 could (on the facts of this case) have amounted to provocation, and if I am wrong on this I find b.a.r.d. that an ordinary person similarly circumstanced to Cooper would not have gone looking to fight Justin on 5.11.05, and would not have demanded that they finish off what had started the night before, and would not have struck Justin.
85. I find that an ordinary person similarly circumstanced to Cooper would not have gone looking for Justin on 5/11, with his brothers as back-up, determined to hit Justin.
86. I find that self defence is not open, as I satisfied b.a.r.d. that Cooper was the aggressor on 5/11 and it was he who threw the first punch. Even on Cooper's evidence it was he who made the first physical contact (which he said was a push). I find in fact that it was a punch.
87. I find that after Cooper unlawfully assaulted Justin, that Justin then fought back in order to defend himself, and his actions were not only justified but reasonable and necessary in the circumstances.

After he attacked me first, punches were exchanged. I had to defend myself	Both of them started punching and fighting...it went in and around a little circle	...and I took my shirt off and then we had, we had a fight then. We both throwing punches.		...and then doing so well from there Cooper ripped off his shirt and they strucked it out from there	
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		This was a good fight.		didn't they.	
	I saying "stop, stop"				
We wrestled towards and around a quad bike				My view got obscured.	
I holding one of Cooper's arms and holding his head down	Then they were on the ground together	Q---he was holding you so you couldn't swing anymore? A---no I couldn't swing at all.			
I trying to cool Cooper down					
Cooper/s "Lester grab hold of him"	Cooper/s "Lester, Lester get him"	I didn't call out to Lester at all.		Q---did Cooper yell out "Lester come and help me" at any time? A---No, no, not at all.	

88. I find the comment by Cooper that "this was a good fight" as showing a further insight into his character. Cooper clearly was not adverse to physical confrontation, and believed in his own mind that there were fights that were capable of being "good". I do not share his view.
89. I find that Robert was wanting the "assault" to stop and was calling out to them to stop. At no time did Robert seek to intervene physically,
90. I find that Justin managed to tie Cooper down such that Cooper couldn't continue his assault upon him.
91. It is interesting to note that Rodney who supposedly heard nothing else was able to say that Cooper didn't call out to Lester. I reject his evidence.
92. I find that Cooper did call out to Lester, who was already in the compound and near by. I find that Cooper did this because he wanted Lester to get Justin off him so that he could win. Cooper was still angry and was even angrier now that Justin had managed to get the upper hand. I find that Justin was not using his advantage to land any blows on Cooper, but rather he was attempting to subdue him. This action is wholly consistent with Justin's evidence that he did not want to "fight" Cooper.
93. As found earlier, Rodney also was out of the m/v and approaching the scene at the time.

	(57)Lester and Rodney started walking towards them... I believe they				
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	were walking in to help him bash Justin				
Someone grabbed hold of my back and pulled		Q---Did Lester get involved in the altercation between you and Justin? A---Nope.		Q---did you get involved in the altercation b/w Justin and Cooper at any time? A---not at all. Q---did you go and grab Justin by the shoulders at any time? A---No, no.	
Robert stepped in	I put my hand on Lester's shoulder		Lester jumped out and talked to Robert.	Robert extends his right arm out in front of me.	
Robert/s "let them fight one on one, no double banking"	(57)Q---What did you do? A---I'd, I said to Lester "no, one on one fight, just let it go", like you know, trying to make you know, best of the situation" (77)XXN- Q---I'll suggest to you that you put your hand on his shoulder and that you and Lester both agree, yeah, it's a one on one fight, let them have it out, and that Lester actually, you and Lester had agreed, you exchanged that? A---No, no I was suggesting, I was trying to make the best of a worst situation, like they were both. I believed that they were walking in to help him bash Justin. (78)I was trying	Q---when you and Justin were fighting in the compound, were you able to know or see what anyone else was doing? A---Nuh.		Robert did say to us as well, listen mate this is a fair go, let them have a fair go. And I said yes exactly, that's what I'm here for to see out me brother gets a fair go.	

	to talk reasonably, to, to diffuse, like, like it already was a really bad situation and didn't want it to escalate any more.				
	XXN- Q---Lester said something...he'd agreed with you, he said "I'm only looking to make sure he has a fair go" and later he said he had no trouble with you A---No, he didn't say that.				

94. After Cooper called out to Lester, Lester started to move in. I accept the evidence of Robert that he was trying to make the best of a bad situation.
95. On the evidence I am unable to be satisfied b.a.r.d. that anyone grabbed Justin to try and pull him off Cooper. It is possible that this occurred.
96. Mr Bellach sought to rely upon the evidence of Robert as confirming that it was truly a consensual fight. However, I find that Robert wasn't trying to suggest that it was a consensual fight, but rather he was wanting to stop Lester from joining in to help Cooper assault Justin. They were out-numbered. He was trying to stop a bad situation escalating further. At least at that point in time Justin had Cooper temporarily under control. I consider his actions to be fully understandable in the circumstances. He was trying to stop any escalation.
97. I find that at no time was there a consensual one on one fight between Cooper and Justin.

Lester hit Robert (I never seen the initial punch)	Lester pushed my hand away with a backhand, turned and punched me with his R-hand in my head XXN- Q--- suggest he didn't punch you, that he grabbed your arm to throw it away, and at the same time you	At Basil's when Robert walked up the steps and I asked Lester, I said what happened to the other fella and Lester said me and him had a go back there, that's all he told me. I didn't see them fight at all.	Q---were you able to see if there was anything happening b/w Robert and Lester, did you know if there was anything happening b/w Robert and Lester? A--- No, no, no, I couldn't	View was blocked and I couldn't see bugger all... take another step towards to even just to catch a view, but from there Robert puts his hand... out again in front of me and well	
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	pulled his wrist and flung him to the ground A---No, no, that's wrong.		see nothing.	basically I didn't like that ...so I grabbed, with my L hand I chucked his, I chucked his R hand away, but in doing that Robert grabs a hold of me wrist... does this ... twisting move ...I've got a crook leg see...me leg buckled on me.	
	I did not put my hand on Lester's shoulder a second time...				
Robert fell over the steps	Afterwards it was, it was just, I didn't know, I was punched and kicked everywhere....I was on the ground and I was up again, and I was, I was on the staircase			I fell to the ground and Robert was on top of me. He had his two hands on me collar on the front of me shirt. His knee was sitting on top of me chest, I couldn't get up at all...I had sand and stuff and at that point I couldn't see bugger all. I had one of my hands up on his L hand side sleeve and me other hand was on his collar. So ...put me R foot up on his chest and gave him a good push... and push kicked him off me and that result he landed on the steps.	

<p>Lester was over the top of Robert punching him pretty violently, full force</p>	<p>I was on the ground and ...Lester was over me punching me... I believe it was just Lester, then, then when I was on the staircase I did look over and see Rodney beside.... I was getting punched and kicked and I looked over and seen Rodney there as well... I was getting punched and kicked by Lester and Rodney</p>		<p>No, that's not true. When I came out I seen the big fella (Justin), hey, and I didn't, I was scared to go in there anyway in the first place.</p>	<p>I went to get up and I fell down...cause of sharp pains... running up and down my leg (I've got a crook leg see). Stood there for about 10 seconds, caught me breath back... He did land pretty hard and I was kind of worrying about him too as well</p>	
<p>(16)I seen Robbie laying over the back of the steps and Lester over the top of him and Rodney coming in from the side</p>	<p>I did look over and see Rodney beside</p>		<p>Nah, it's not true.</p>	<p>I know for a fact Rodney wasn't there.</p>	
	<p>I was getting punched and kicked and I looked over and seen Rodney there as well... I was getting punched and kicked by Lester and Rodney</p>			<p>Q---at any time during that altercation did Rodney get involved? A---No.</p>	

98. I find that Robert put his hand on Lester's shoulder in order to try and stop Lester from going to help Cooper. I find that Lester immediately turned and started to punch into Robert in a flurid attack that left Robert virtually unable to do anything to defend or protect himself.
99. I find that the assault by Lester was unlawful. I reject Lester's evidence of Robert initiating the incident by putting some "twisting move" on him. My impression of Robert was that he was not a fighter, and would not have initiated any physical altercation. His only interest was to stop it.

100. I find that Robert's action in putting his hand on Lester's shoulder and telling him not to get involved was reasonable in the circumstances and was b.a.r.d not provocation. If it was provocation (which I find that it was not) I would be also satisfied b.a.r.d that it was Lester who had incited it by making to move towards intervening in the altercation between Justin and Cooper, at the request of Cooper. Further, I am satisfied b.a.r.d that an ordinary person similarly circumstanced to Lester would not have turned and assaulted Robert as I find that he did.
101. I find that Lester was in total control over Robert and was beating him up. He did not need any help, but I find that Rodney came in and landed some punches and kicks as well.
102. I find that Rodney's joining in and punching and kicking Robert was an unlawful assault. No issues of provocation or self defence were reasonably raised on the evidence before me. I find that his assault was gratuitous and cowardly. He was taking the opportunity to lay some cheap shots on Robert.

I turned and ran out the back entrance of the compound	When I stood up and looked I seen them chasing Justin....to belt him	The compound we was still fighting and then Justin turned around as I tripped back and I didn't fall I was stumbled back and Justin just started running, I was running away.		I turned to see to have a look for Cooper and I can just see Cooper down the back road.	
	I'm not sure where Rodney was then				
	Lester went to throw me, like pick me up by the shirt and throw me and...I sort of landed on top of him				
	Lester choked me				
	I tried to get away				
Cooper chased me	Justin was already out of the yard, and so was Cooper, and yeah, Lester was first and then Rodney, and	Well I chased after Justin. Q---why did you chase him? A---well I wanted to know what why he ran	Q---and so did you run after Justin? A---Nah. Q---at any time along that track?	It was at that point that I turned around and looked for the m/v...the m/v was	

	Rodney wasn't very far behind me.... I know for a fact Rodney was running, like with Lester just behind him, to go, to go and catch Justin. They (Lester, Rodney and Cooper) chased him all the way to Basil's house.	off, ran away.	A---Nope. Q---did you chase him at all? A---no... Q---how did you know where Cooper went? A---because Renice was seeing Cooper run down that way.	gone.	
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103. It is clear, and I find that Justin saw Lester and Rodney assaulting (and beating up) his cousin Robert.

104. He would appear to have had only three options available to him.

1. He could have done nothing and stayed subduing Cooper. This was not a reasonable option as it may have only been a matter of time before Lester and Rodney turned on him;

2. He could have let go of Cooper and tried to help Robert. This would have possibly meant he would have to take on Cooper, Lester and Rodney. This would almost inevitably mean he would get hurt; or

3. He could run away as fast as he could to try and avoid getting hurt, and then hopefully get help for Robert.

105. He opted for option 3, which was not unreasonable in the circumstances. It was after all the only option which had the potential of him not getting hurt, and he was unlikely to be able to really help Robert other than by having the assault turned onto himself. In addition, I find that his action in running away was wholly consistent with his desire not to engage in a fight. I also find that Justin was scared for his own safety (and that of Robert), and this fear was totally justified in all the circumstances.

106. I reject totally the evidence of Cooper that he chased after Justin because "I wanted to know what why he ran off, ran away." It would have been obvious to any reasonable person that Justin ran away because he didn't want any part of what was going on.

107. I find that Cooper chased Justin because he still wanted to finish the assault, and didn't want him to get away.

108. If I am wrong and the initial physical confrontation in the compound between Cooper and Justin was a consensual fight (which I find it was not) then any consent had been withdrawn by Justin, and this withdrawal was clearly evidenced by his running away. I can think of nothing else that he could reasonably have done in the circumstances to evidence his wish not to fight.

	<p>Q---Is it possible that Rodney, once he got outside of that compound area, jumped into a car? A---Possibly, after I seen them running I was looking for my keys</p>				
	<p>I looked around for my car keys so I could follow them but found my phone instead. I called 000. It took a little while because I didn't know how to spell Angurugu and while I was trying to do that Paul Donnelly pulled up in the yard. I told him.... I spoke to Alyangula police and reported it. Paul drove past the job site and yelled out.....</p>				<p>Paul Donnelly: I seen one of the boys laying down below the steps...when I got there Robbie gets up and gets his phone out... and he said I got beat up... they're chasing Justin across the paddock... I drove around and picked up a couple of the boys</p> <p>Ryan: 10 minutes later my father comes up and says the boys have been in a fight</p>
<p>I did not stop about 6 times while running and face Cooper and throw punches... I begged him to I did not want to fight him I pleaded with Cooper</p>		<p>Q---was he begging you to stop? A---Nuh, he wasn't begging me.</p>			
<p>I did not stop, turn and face</p>		<p>...Justin stopped and we had another go,</p>			

Cooper and say "what, you want to have another go" – I was running from the situation, why would I turn and keep at it		it's about 50 metres away from the compound... we both started swinging each other, fighting again... ...I'll chase after him, he turned back, he stood up shaping up and then we had another go to finish it off... ...just wanted to finish the fight off.			
4wd cut me off.		Nope.	Nah it didn't, never happened.		
I don't know who driving it			Renice driving 4wd.		
Rodney got out of 4wd		Nope.	Nah.		
I back peddling saying I did not want to fight		Q---when he was running and you were running as well, did he say at anytime along that track to stop or that he didn't want to fight? A---No, no, he didn't say that at all.			
Cooper/s he was going to teach me a good lesson		I didn't say I was gonna teach him a lesson.			
I punched to the ground by Cooper and Rodney		Q---At anytime while you were fighting Justin was Rodney involved? A---No. Rodney wasn't even involved in it, from the compound to Basil's house, Rodney wasn't involved at all.	I say that's not true. Never happened.		
Cooper and Rodney both		Q---At any time during the	Nah, that never		

punched and kicked me to stomach and head on the ground		fighting did you kick? A---I didn't kick him at all.	happened.		
My head was down, I was out of energy, I was submitting					
I grabbed Cooper's leg and got up and tried to run again					
I ran again		Justin took off again Q---you've run after him? A---Yep... Q---what did you chase after him for again? A---to try to sort it out, that's when Basil came out.			
Cooper and Rodney caught me again		And I got near the school and we had another go at the school... He did the same thing, stop, and we had another go at the school... He fell down.			
They danced around me taunting me and they both kept punching me in the face					
I ran again					
Cooper pushed me to the ground					
Cooper gives me a couple of punches in the side of the face					
I got up and ran to		I was winded... he started			

Basil's house		walking to Basil's and halfway he ran to get to the road...			
Before Basil's house Cooper pushed me down into a little floodway		...as I got there ...all we was doing was pushing each other then he went down a little ditch Q---You pushed him down that did you? A---No, I didn't push him, I run behind him and he fell down in that hole, in that creek, he got up, come up and that's when Basil come out and said that's enough. Q---you disagree then that you pushed him? A---No I didn't push him.			
I was punched lots of times (over 50)					
I was kicked probably about 4 or 5 times					
I called out to Basil					Basil Mamarika: I heard someone calling my name
Basil came outside		✓			Basil: I come out...I see Justin on my steps...he holding his ribs
I ran into Basil's house					
Cooper came inside the house and wanted		I didn't go into Basil's house.			Basil: Cooper didn't come in

to keep going on with it					
Basil turned and stopped Cooper and told him to get o/s		Basil came out and said in language that's enough you're in my yard now and I said yeah I respect you.			Basil: I said Cooper, no more fighting... I walked down stairs and told Cooper to calm down, no more...
	There was quite a time period before Paul picked me up and when we found them				
	We ended up seeing Lester's car out the front of Basil's so Paul pulled up near there		Me and Renice we drove straight to Basil's.		
	Lester and Cooper were o/s the car yelling it's not the end of it, they're going to bash him.... Rodney was still in the car Cooper's g/f must have drove around	I didn't say that at all Rodney and Lester were standing near the Toyota		By the time I got to Basil's place was where Cooper was standing o/s...Renice and Rodney were already there with the m/v... Q---any yelling by Cooper towards Justin? A---No, no not at all. Q---any yelling out of "we're not finished with you yet, we're going to get you again"? A---No, not at all.	Ryan: I just seen Cooper and Rodney pretty much yelling and hopping in the car when we pretty much pulled up... Paul: the 3 boys were out the front...I recognised Rodney
Josh arrived	As they drove		We (Josh	I	Josh: I had a

	off Josh pulled them up and was talking to them on the road		and I) had a bit of a chat. (134) Q---do you remember if he asked you what the trouble was about? A---No, he asked me but I said I didn't, don't know anything... Yeah we had a talk, just it was a small, just a quick talk, and I told him I didn't even know what was going on at the time myself, yeah.	remember old Donnelly jumping out.	talk to Rodney, he said the boys had been smart arses the night before at the pub. Paul: Rodney/s he's got a smart mouth or something and disrespectful, I took it to be one of Rodney's brother's wife or girlfriend, the night before.
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109. Cooper denied pushing Justin down into a ditch near Basils house, having earlier volunteered that there had been pushing and Justin did go down a little ditch.

110. By the time Justin got to Basil's house he had been badly beaten. He would have had difficulty having a clear head about anything that was going on.

111. There are similarities between the evidence of Justin and Cooper as to what happened away from the compound. It is not disputed by Cooper that he chased after Justin. I find that he did so in order to continue his assault upon Justin. I consider this to be the only reasonable inference that is open on the evidence. I reject Cooper's explanations and find them at best not worthy of serious reflection.

112. Cooper does not dispute that he had several physical altercations with Justin along the track and after each one Justin tried to run away and each time he pursued him. Cooper does not disagree that Justin eventually made it to Basil Mamarika's house and sought refuge there.

113. All this evidence is consistent with Justin trying to get away from Cooper and trying to avoid any further violence. In my view, it is also inconsistent with Justin wishing to continue a "consensual fight" with Cooper.
114. I find that Justin was unlawfully assaulted by Cooper at the compound where he was punched several times. Justin ran away to save himself.
115. I find that once Cooper ran after Justin, Rodney broke off from assaulting Robert and went after Justin and Cooper in order to help Cooper. Meanwhile Renice was still in the motor vehicle. Renice saw the three run out the back gate and she pursued in the motor vehicle.
116. I find that shortly after this time Lester had stopped assaulting Robert and went out the back gate as well, leaving Robert dazed and hurt in the compound. I accept that Lester's leg may have been causing him difficulty such that he was unable to catch them up. Lester eventually made his way to Basil's house as that was where their motor vehicle ended up. It was here that eventually all three defendant's met up again.
117. I find that Renice picked up Rodney and they then drove in front of Justin to cut him off. At this stage Rodney got out and Cooper arrived as well. Justin was then confronted by Cooper, and Rodney was blocking his exit. Justin was backing away again saying that he did not want to fight, but Cooper was saying that he was going to teach him a lesson. Cooper and Rodney together punched into Justin, punching him to the ground. On the ground Justin was trying to cover himself up, but Cooper and Justin continued to punch him, and also kicked him several times each. I find that Cooper was the main aggressor in this assault upon Justin, but that again Rodney landed some blows and kicks when he could.
118. I find that Justin managed to grab hold of Cooper's leg and get up. He tried to run again but was again quickly caught by Cooper and Rodney. They danced around him taunting him and punching him. Justin tried to run away again. By this stage he was tired and beaten.
119. Rodney ceased his involvement at this stage and returned to the motor vehicle.
120. Thereafter Justin was beat. He was too tired and punched out to offer any real resistance, yet Cooper continued to stalk him. Cooper pushed Justin down into a little ditch and again punched him at least twice to the face. It was at this time that Justin was able to call out to Basil and make his way to his house.
121. I reject the evidence of Cooper as to what occurred after the compound and accept the evidence of Justin in this regard. I reject the suggestion by Cooper that Justin (who kept trying to get away) would stop, turn to Cooper and then stand there shaping up again,

before running off again. I accept that once caught by Cooper, Justin would have tried to defend himself. He would have been reckless not to have done so. However I find b.a.r.d that none of this was consensual.

122. It is inconsistent with the action of running away to suggest that Justin was in fact keen to continue and “finish it off”. I find that the only person who was keen and determined to “finish it off” was Cooper. Rodney was helping Cooper to do so. Cooper clearly had the upper hand from the time that Justin ran away from the compound, and I find that Cooper was keen to take advantage of it. I find that Cooper wanted to beat Justin up, and he wouldn’t be satisfied until he achieved that end.
123. It was while this was going on that Paul Donnelly found Robert. They then went to collect some boys from the work site in case they needed to protect Justin. Eventually they all arrived at Basil’s house as well.
124. I find b.a.r.d that each of these assaults by Cooper outside of the compound were unlawful as being without authorization, justification or excuse. There was no consensual fight, and if there ever was one (which I find there wasn’t) it stopped once Justin ran away from the compound. There was no need for Cooper to use defensive conduct (on the contrary it was Justin who needed this) as Cooper was the aggressor throughout.
125. If provocation is raised I find b.a.r.d that it is negated in relation to each of these ongoing assaults. I find that it was Cooper who had been the provocative one throughout. It was Cooper who went to Justin determined to “fight” him. Further, I am satisfied that an ordinary person (being a person not quick to temper or prone to violence) would not have chased Justin down, taunted him, and continued to punch into him.
126. I find that Cooper punched Justin to the head and body at least 50 times in the course of his ongoing unlawful assault upon him, and kicked him to the body at least twice.
127. Cooper denies that Justin was ever cut off by their motor vehicle and further denies that Rodney ever got involved in the “fight” between himself and Justin. This is not something that they could be mistaken about. One of them must be lying. Rodney (not surprisingly) supports Cooper’s version. I reject the evidence of Cooper and Rodney in this regard. I simply don’t believe either of them.
128. I find that Rodney was involved in two assaults upon Justin outside of the compound, but these were part of an ongoing assault. I am satisfied b.a.r.d that this was an unlawful assault, as being without authorisation, justification or excuse.

129. No issue of self defence or provocation is raised on the evidence. It was Rodney's assertion (which I reject) that he wasn't there, and that he did nothing (which I also reject).

130. At T134 in evidence in chief Rodney is still asserting that he didn't know what it was all about, which I find was untrue. Rodney told both Josh and Paul what it was basically about in separate discussions at the time. I find that his evidence is untrue. Rodney knew what it was about at the time. Rodney knew that there had been trouble in town the night before involving Cooper and one or both of Justin and Robert. Rodney believed that one or both of Justin and Robert had:

- Been "smart arses" the night before;
- A "smart mouth"; and/or
- Had been disrespectful.

131. As a result of what Rodney told Josh and Paul, it is open to infer (and I do), that Rodney was indicating that Justin and Robert got no more than he thought that they deserved. This is completely different to the picture that he tried to paint of himself in court. I reject his evidence.

I got into Josh's car and went to clinic	Josh drove us to the clinic				
I had: 2 cuts beside R-eye needing butterfly clips; lot of bruising around face; sore jaw; lots of bruising and lumps on the back of head; very sore ribs on L-side; grazing on back; had 5 weeks off work; on painkillers for 2 weeks; anti-inflammatory	Justin had: He was covered in blood, mainly along his face; Bruises all over his face; Just really badly beaten up; Dazed; He couldn't work his ribs were too sore;				Josh: Justin was bent over...and he had blood coming out of his head... Ryan: Looked like he'd had the shit kicked out of him... ...when you're holding your ribs and your heads down and your coughing up some blood and that... Paul: Justin was bleeding... Bleeding very much around the face... I think he might have been holding his, holding his ribs

					<p>and everything else, like he looked like he'd been fairly well done over...you know been beat up a bit</p> <p>Visser: He had some swelling at the base of his skull and behind his L ear. He had two small lacerations above his R eye, just at the edge of the eyebrow (that needed to be pulled together with tape). There was some bruising around his L eye and his L cheek and he was complaining of tenderness of his 2nd or 3rd lower rib on the L side, there was some bruising there, some pain on deep inspiration and I actually suspected he might have actually fractured that rib.</p>
<p>I didn't really want to work over here again I was a little bit scared it might happen again</p>					
<p>Photos-ExP1</p>					

132. I accept the evidence of Justin as to the injuries that he received. The photos, ExP1 did not make Justin's face look too bad, but he had been cleaned up of blood by this stage, the facial wounds closed by butterfly stitches, and the full extent of bruising and swelling had not been given time to develop. The descriptions by Ryan and Paul I found

convincing and compelling. I find that the description of the injuries by Justin, Robert, Josh, Ryan and Paul are consistent with the evidence of Justin of an extended assault by both fists and kicks.

133. I find b.a.r.d that the injuries that Justin suffered in the unlawful assault from Cooper amounted to bodily harm. He was unable to work for many weeks due to his injuries and his health was clearly, in my view, interfered with.

134. I find that kicking was involved. The allegation of kicking is consistent with the injuries that I accept Justin had. And in particular the serious injury to his ribs is consistent with kicks in that area. It may also be consistent with other blows, but I consider kicking to be more likely.

<p>I saw Robert. He had bruising on the side of eye and indentation on the side of face</p>	<p>I had: Bruises around the top half of my body; I couldn't move my R jaw properly, it was really paining; My face wasn't healing after 2 weeks so I went to Darwin and was told it was a burst blood vessel...it was bulging out from my face, it was swollen and sore; I lost 15 kilos; I had to go out and buy soup, I tried chewing but it was too painful; I believe it's dented on R cheek, I can feel it</p>	<p>I had lumps on my head (on back of L side, across the top and R temple forehead area) and that, My jaw was a bit sore for about a week.</p>		<p>My leg was paining.</p>	<p>Ryan: seen the boys look, been beaten up or whatever... He seemed pretty busted up... He had a black eye and he looked like he had his bloody jaw broken, it was already swollen up and torn ... From what I could see he had been pretty much punched in, all over to me, so. I can't really say, it just, you know, looked like he had been flogged, so, as well, looked like he'd been punched out. Paul: he looked...very puffy around one side of the face...he was obviously shaken and white as a ghost</p>
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					<p>Visser: he was a bit upset...he was complaining of tenderness around his R cheek, there was some swelling there, there was a bit of a graze. Around his R eye there was some bruising and swelling and just below the eye. He was also complaining about his jaw being sore but he was moving that fine.</p>
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135. I accept the evidence of Robert as to the injuries that he received. The photos, ExP2 are not particularly graphic but the evidence of Ryan and Paul confirms, in my view, the evidence of Robert as to what happened to him. I again find the descriptions of Ryan and Paul convincing and compelling. Their descriptions support the evidence of Robert as to what happened to him and not the version of Lester. I do not accept that Robert could have received the injuries that he did by simply being push/kicked onto some steps (even if he landed hard).
136. I find b.a.r.d that the injuries that Robert suffered in the unlawful assault from both Lester and Rodney amounted to bodily harm. He was unable to eat solid food and had to survive on soup for some time. His health was clearly interfered with. He lost some 15kgs as a result.
137. I find that the evidence of Cooper and Lester as to the injuries they received (none of which required any medical attention) confirms that they were far more on the giving end than the receiving end of the conflict.
138. In his evidence Lester denied that he choked Robert at all, yet I find one of the photos in ExP2 clearly shows marks on Robert's neck. This photo provides some corroboration for Robert's version as opposed to Lester's.

139. I had the opportunity to observe and listen to each of the prosecution witnesses and each of the defendants during the course of the case. I made the following general observations.

166cm tall weighed 67 kg then, now weighs 70kg He had a strong build for his height	172cm tall slender build His demeanour was matter of fact and passive	Physically imposing. He looked like a fighter	Slender/wiry build. He did not appear to be particularly physically imposing	The most physically imposing of all the witnesses	
Found him to be generally a truthful witness. Obviously upset at what happened. No obvious exaggeration.	Found him to be completely credible as a witness. I accept his evidence.	I find he untruthful about Justin pulling his shirt over him both at ARC and in the compound. I find he untruthful about Justin being aggressive at ARC and throwing first punch. I find he untruthful when he suggests that if Justin didn't want to fight he wouldn't have. I find he untruthful when he says he chased Justin to find out why he ran away. I find he untruthful about Justin stopping while he running to have another go.	Completely un-credible. He supposedly "saw no evil, did no evil and heard no evil". His evidence in XXN was evasive, not logical, and at times contradicted by himself. He suggests that he didn't really know why they going to the compound and yet o/s Basil's he made it clear to both Josh and Paul that he knew what it was about. I find he lying. I reject his evidence	In XXN on 18/5 he was getting caught out and he then claimed to still be intoxicated. His appearance, speech or mannerisms did not support this. When XXN resumed on 19/5 he continued to get caught out. At times he was struggling to control himself. I do not accept him as a witness of truth and reject his evidence.	Josh ✓ Ryan ✓ Basil ✓ Paul ✓ Visser ✓
Did not appear to be overly aggressive in his mannerisms or speech. Found him to be a person of average temperament, who would not go out of his way to look for a fight.	My impression was in accord with the evidence of Ryan. I do not accept that Robert would have been the aggressor in any of the events that day.	His physical bearing, his eyes, his manner in the witness box left me with the clear impression that he had the potential to be "scary". He looked like he could be personable at times, but not a	He didn't strike me as being particularly aggressive. I would not expect him to be the primary instigator (and this is in line with the evidence).	His eyes, appearance and bearing were all imposing, bordering on dangerous. Not a person you would want to meet in an alley... or compound. He looked	Ryan: if you kind of know Robbie he's a real peacefu I fella...

		person to get on the wrong side of.		like a fighter.	
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140. I find Cooper guilty of the charge of unlawful assault upon Justin by:

- Confronting him in the compound and insisting on a “fight”;
- Punching Justin full force to the head and following up with further punches during the struggle that ensued;
- Chasing Justin down (outside the compound), punching him to the ground (with the assistance of Rodney) and punching and kicking him when he was on the ground;
- Chasing Justin again, and again punching him (with the assistance of Rodney) several times; and
- Pushing Justin into a ditch and punching him two more times to the head.

141. I also find Cooper guilty of the circumstance of aggravation.

142. I find Lester guilty of charge 1 by punching and kicking Robert numerous times to the head and body.

143. I find Lester guilty of the circumstance of aggravation.

144. I find Rodney guilty of charge 1 (by joining in to punch and kick Robert whilst he was being assaulted by Lester) and the circumstance of aggravation.

145. I find Rodney guilty of charge 2 (by blocking off Justin’s escape, assisting to punch Justin to the ground, then joining in punching and kicking Justin on the ground; then when Justin tried to run away again, helping to run him down and again punching him in the head area several times) and the circumstance of aggravation.

146. I will hear from counsel on the question of priors if any, and then hear any submissions on sentence.

Dated this 23rd day of June 2006.

D. TRIGG SM
STIPENDIARY MAGISTRATE