

CITATION: *Eaton & Burgoyne v Kerrin, Cole, Cole-Manolis & Miller [2008]*  
*NTMC 054*

PARTIES: Donald John Eaton &  
Robert Roland Burgoyne

Informants

v

David John Kerrin,  
Owen William Cole,  
Jawoyn Cole-Manolis &  
Geoffrey Louis Miller

Defendants

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Justices Act

FILE NO(s): 20725077, 20724809, 20725286, 20724983

DELIVERED ON: 13 August 2008

DELIVERED AT: Alice Springs

HEARING DATE(s): 24 & 25 January and 28 & 29 May 2008

JUDGMENT OF: Mr V M Luppino SM

**CATCHWORDS:**

Criminal Code – Aggravated assault – Consent - Circumstance of aggravation of harm – Definition of harm – Causation issues and harm – Circumstance of aggravation of defenceless – Meaning of effectually defending

Defensive Conduct – Whether accused believed the conduct was necessary – Whether the conduct was a reasonable response

Evidence – Record of Interview – Questioning after accused declined to answer questions – Motive of police officer misrepresented – Exclusion on discretionary grounds

Evidence – Record of Interview – Challenge to admissibility for alleged failure to comply with s 140 Police Administration Act – Whether s 140 requires caution and advice at the time of arrest – Excusing non compliance pursuant to s 143

Evidence – Character Evidence – Evidence of good character by an accused – Relevance.

Criminal Code (NT) ss 1A, 18, 29, 188(2)  
Police Administration Act (NT) ss 140, 143

**REPRESENTATION:**

*Counsel:*

Informant:	Mr McMinn
Defendants Kerrin, Cole & Cole-Manolis:	Mr Jefferis
Defendant Miller:	Ms Collins

*Solicitors:*

Informant:	ODPP
Defendants Kerrin, Cole & Cole-Manolis:	John McBride
Defendant Miller:	CAALAS

Judgment category classification:	B
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IN THE COURT OF SUMMARY JURISDICTION  
AT ALICE SPRINGS IN THE NORTHERN  
TERRITORY OF AUSTRALIA

Nod. 20725077, 20724809, 20725286, 20724983

BETWEEN:

DONALD JOHN EATON &  
ROBERT ROLAND BURGOYNE

INFORMANTS

V

DAVID JOHN KERRIN,  
OWEN WILLIAM COLE,  
JAWOYN COLE-MANOLIS &  
GEOFFREY LOUIS MILLER

DEFENDANTS

REASONS FOR DECISION

(Delivered 13 August 2008)

Mr VM Luppino SM:

1. In this matter, the defendants David John Kerrin (“Kerrin”), Owen William Cole (“Cole”), Jawoyn Cole-Manolis (“Cole-Manolis”) and Geoffrey Louis Miller (“Miller”) are charged with offences alleged to have occurred at the conclusion of the Central Australia Football League grand final at Traeger Park in Alice Spring on 8 September 2007. The grand final was played between Wests and Pioneers. Wests won the match by a small margin as a result of a goal kicked in the last minute of the match. The relevant events occurred almost immediately after the match concluded.
2. Two of the defendants (Kerrin and Cole) are jointly charged on information with an aggravated assault on Blayne Cornford (“Cornford”). The

circumstances of aggravation alleged are that Cornford suffered harm and that Cornford was unable to effectually defend himself due to situation. Cole-Manolis is charged in precisely the same terms but on a separate information.

3. Miller is charged with a separate aggravated assault occurring at the same place and time. The victim of that alleged assault is William Smith (“Smith”). The circumstance of aggravation alleged is that Smith suffered harm. The essential allegation in relation to Miller is that he king hit Smith resulting in Smith falling to the ground and suffering injuries which satisfy the definition of harm in the Criminal Code.
4. Each of the foregoing defendants are also charged with a further offence on complaint namely engaging in violent conduct, contrary to section 47AA(1) of the Summary Offences Act.
5. At the close of the prosecution case I was of the view that the two charges faced by each defendant are based on the same actus reas. Accordingly Mr McMinn, counsel for the prosecution, was invited to elect as to which charges were to proceed. Mr McMinn obliged and in the case of each defendant he opted to proceed on the charges on information. The charges on complaint against each defendant are therefore destined to be dismissed pursuant to section 18 of the Criminal Code.
6. The opening also raised the spectre of latent duplicity in relation to the assault charge against Cole. According to the opening, which was subsequently to be borne out by the evidence, Cole is alleged to have assaulted Cornford effectively twice. Although the assaults occur in quick succession, they appear to be distinct incidents. Nonetheless the prosecution treated the charge as relating to the cumulative assaults and apparently the defence was prepared to meet this case and no issue was taken in relation to that. The case against Cole proceeded on that basis.

7. I was informed at an early stage that footage of the incident taken by an ABC cameraman would be put in evidence as well as an amateur recording of the incident. There were issues of chain of evidence regarding the ABC footage. These issues surfaced during the first two days of the hearing and were ultimately resolved following further inquiries conducted in the intervening period before the matter resumed for the final two days.
8. Speaking generally in regard to video evidence, subject to some obvious qualifications, video evidence can be very powerful evidence. The qualifications relate amongst other things to the integrity, quality and extent of the recording. Once those qualifications are satisfied, the objectivity and the probative value of such evidence is self evident. It is also very useful in assessing the reliability, accuracy and therefore the credibility of eyewitness testimony to the extent that it is depicted in any of the recorded scenes. It provides an excellent objective basis against which witness's versions of events can be scrutinised and assessed.
9. After hearing the evidence and comparing that evidence to the recorded footage, it becomes abundantly clear there are numerous discrepancies between the witness accounts and the recorded footage. Mostly that is in relation to minor or peripheral matters and does not necessarily result in any adverse credit findings. Subject to the qualifications I have mentioned, the version depicted on the recorded footage should be preferred to versions reliant on eyewitness accounts of events occurring in a highly volatile situation with much occurring within a short period of time and in a confined area as occurred here. It does not necessarily mean that a witness is not truthful. Rather it demonstrates why Courts accept that sometimes a witness's version of events may not be accurate without necessarily having an adverse impact on the witness's credibility. Courts accept that such discrepancies occur for reasons other than deliberate prevarication.

10. Often video evidence consists of CCTV or security camera footage which is of dubious quality and clarity, especially in the case of long range shots. The video evidence in this case, as would be expected of the ABC footage at least, is of excellent quality and with sufficient zoom to optimise the vision and the identification of persons involved and the actions they perform. The amateur footage was also of better than expected quality albeit that its quality is not up to the same standard as that of the ABC footage. As the amateur footage shows more of the events which precipitated the brawl, there is some separate value in the amateur footage.
11. Issues relating to the proof of the recorded footage were the subject of the evidence of the initial witnesses. These witnesses were firstly Constable Ross Martin, who first obtained the ABC footage by warrant, secondly, Mr Daniel Furber, the ABC cameraman who recorded that footage, and lastly Mr Nicholas Reuther, who recorded the amateur footage. Although there were many initial issues over the admissibility of both items of footage, these were resolved and both items were ultimately tendered.
12. Constable Darren Ferguson was the first factual witness called. He is a member of the Northern Territory Police and played for Wests in the grand final. He said that at the end of the game he began walking towards the grandstand wing where the rest of the team were congregating. He said that as he approached he noticed what seemed to be a fight developing but could not observe all the details. He said that when he got to within one to two metres of Cornford he saw that Cornford was being assaulted, was laying on his back face up, was “non-responsive” and not doing anything to defend himself. He said that he saw Cole on top of him. He said that he knew Cole and he identified him in Court. He did not elaborate on his recognition of Cole and he was not cross-examined about that. He said that Cole was punching Cornford to the head with closed fists with both hands and he said there were some three to four punches.

13. Constable Ferguson said that he pulled Cole away and as he did, someone interrupted him but apparently the trouble cooled down very quickly after that. He said that one of his Wests team mates, Ryan Sheridan, assisted him in getting Cole off Cornford. The ABC footage reveals that to be partly correct at least as it depicts that a person, who I believe to be Ryan Sheridan, does assist albeit that his involvement appears less than that of another Wests player. The ABC footage, including this aspect, is described in more detail later in these reasons. Constable Ferguson said that he saw injuries on Cornford consisting of a swollen lip and a swollen cheek.
14. In cross-examination, he conceded that he did not see any of the lead up events between Cornford and Cole and the first he saw was Cornford on the ground with Cole on top striking him. He said he could not recall the presence of Kerrin or Cole-Manolis. It was put to him in cross-examination that his statement made less than one week after the incident records him asserting that he had first seen Cornford when Cornford stumbled in front of him. After refreshing his memory from his statement, he conceded that his evidence in chief on this point was in error. The ABC footage reveals that from the time that Constable Ferguson appears in the footage, which is well after the time that Cornford is on the ground, no such stumbling is evident. The only scene which approaches a stumbling action by Cornford is the scene immediately before Cornford goes to ground, but that is due to the effect of the blows and that does not appear to be what Constable Ferguson was referring to, assuming he even saw that.
15. He was also asked in cross-examination whether he saw Cornford strike Cole-Manolis while holding him with his jumper pulled over his head. He agreed that he observed this. He also agreed that this had not been recorded in his statement and could offer no explanation for that admission. The omission of such a prominent event in a statement by a Police Officer made only one week after the observed incident is surprising. Overall, it is almost as prominent an event as his observation of Cole striking Cornford.

16. Shortly after, and despite not much earlier agreeing that he saw Cornford striking Cole-Manolis in the manner described, when it was put to him that Cornford struck Cole-Manolis some three to four times, he insisted that Cornford did not deliver any blows and only held Cole-Manolis with his shirt pulled over his head.
17. Constable Ferguson's earlier evidence that Cole used both fists when striking Cornford was then revisited. He was asked in cross-examination to confirm that he saw Cole using both fists. Constable Ferguson said that he now wished to "withdraw" that comment on the basis that he was now certain that Cole only used one hand, namely the right hand. The footage shows Cole only using his right hand, albeit there are scenes where the actions of Cole are obscured by the presence of others. His only explanation for this change in his evidence is that his recollection improved as he recited his evidence in Court. However, he was then asked and conceded that his statement records him saying that Cole struck three to four blows using both fists. There are therefore a number of concerns with the evidence of Constable Ferguson. I have reservations as to the reliability of his evidence at least on a stand alone basis. But for the existence of the ABC footage, Ferguson's evidence would have complicated the task of factual findings given my reservations regarding his evidence.
18. Cornford was next called to give evidence. He said that he was a spectator at the grand final and that with other members of the Wests B Grade team, he ran onto the ground at the end of the match to congratulate the successful A Grade team. He said that he was near Adam Taylor and Scott Taylor near the grandstand boundary. He said that Adam Taylor got into an argument with someone who had called him a "cheeky prick". He said that he got in between Adam Taylor and that other person to prevent any trouble developing. The ABC footage shows this as it shows Cornford attempting to separate Wests player number 3 from Pioneer players and later evidence revealed that Wests player to be Adam Taylor.



19. He said that he then saw Scott Taylor being assaulted and at about the same time, he felt a blow to the back of his head. The footage does show the Wests player wearing the number 4 jumper, who the later evidence revealed to be Scott Taylor, is punched and felled by a Pioneer player. However, the ABC footage shows that Cornford could not possibly have seen that by reason of the number of people between him and Scott Taylor at the time. Cornford was also clearly preoccupied with other events at the time. Moreover, the footage does not support the timing of events as Cornford described them, i.e., that he then felt a punch from behind leading to him turning and start to throw punches. There is nothing shown on the footage consistent with this. The closest scene depicted is where the Pioneer player wearing the number 58 jumper crashes into Adam Taylor. That impact causes Adam Taylor to bump Cornford from behind. Incidentally, Adam Taylor appears to have been injured from that secondary impact as he goes to ground thereafter. That secondary impact on Cornford however is shown to be more in the nature of a push than a blow. That cannot be the blow Cornford describes in any event as he appears to look towards Adam Taylor as that bump occurs and Cornford's evidence was that he then turned around and swung some punches after he felt the blow. However the punches he is seen to throw do not commence for a few seconds after that. There is a more detailed description of the scenes depicted on the ABC footage in this respect later in these reasons. Suffice to say for the moment that I have doubts concerning the accuracy of Cornford's recall of events at this point.
20. Cornford also said that he was not sure whether he connected with any punches. The ABC footage clearly shows that the punches connected. He said that his next recollection was lying on the ground trying to protect himself from a middle aged half caste man who was on top of him and punching him. This omits any reference to the other persons who are also assaulting him at about that time as is evident on the ABC footage. He said that he had his arms up in a defensive position to protect himself and was

also trying to defend himself by pushing his assailant off with his feet. He made an in Court identification of Cole as the middle aged half caste man who was assaulting him. He said that he could not recall too much after that and vaguely recalled that he noticed that his shirt had been torn off and that his thongs and sunglasses had been misplaced.

21. This version of events differs dramatically on this point with that of Constable Ferguson who said that Cornford was non-responsive and in an unconscious like position while Cole was assaulting him.
22. Cornford said that he went to Alice Springs Hospital later where his hands were x-rayed. He said that his injuries consisted of a cut lip, a very sore head for a few days and general soreness. He confirmed that he had no lasting effects.
23. In cross-examination by Mr Jefferis, he said that he could not recall Adam Taylor gesturing to persons towards the edge of the playing field in the lead up to the incident. He said that he did not know who had hit him in the initial contact, but agrees that despite that, he turned around and swung some punches. Cornford's version of that however is unreliable as I have indicated in the preceding discussion of this aspect of his evidence.
24. Cole-Manolis was pointed out to him and he was asked if he recognised him from that day. Cornford could not. It was put to him that he had been punching him on that day and he was quick to respond that he "may have" but couldn't remember.
25. In respect of his identification of Cole, it was revealed that his in Court identification was largely based on other persons having since pointed Cole out to him as the assailant. That identification evidence has no probative value. He also agreed that he made a statement contemporaneous with the events and that in that statement he said that his memory of the events was vague, that he did not know who his attacker was and that he did not know if

he could identify him if he saw him again. His recall cannot improve with time as to identification issues at least. With that background, his in court identification of Cole would have been suspect in any event.

26. Littered throughout Cornford's evidence is the suggestion that he was unconscious at some point. I query whether this might be with the intention of explaining his patchy recall of events. It is odd in that context that he recalls Cole's blows to him, but nothing in the lead up to that. Likewise, he recalls nothing thereafter. On that version, there are two separate periods of unconsciousness with recall in between which is unlikely. He confirmed that other than possible hand injuries, he did not report any other injuries to medical staff at the hospital and that therefore is contraindicative of unconsciousness. I therefore have reservations concerning the reliability of Cornford's evidence. As with Ferguson's evidence, but for the existence of the ABC footage, Cornford's evidence would have complicated the task of factual findings given my reservations regarding his evidence.
27. William Smith was next called to give evidence. He was also playing for Wests on the day in question. He said that he wore the number 12 jumper. He recited that immediately following the end of the game he moved towards his team mates. As he did so, he saw many people running onto the ground and a brawl quickly developing. He said that he was moving towards the group involved in the brawl when he was hit to the left side of his face. He said that he did not see the blow coming nor who had hit him. He said that he fell to the ground and he recalled someone helping him up and escorting him away from the pack where a trainer then cleaned the bleeding from a cut behind his left ear. He said that he was dizzy but remained conscious.
28. In cross-examination by Ms Collins, he elaborated that he was struck as he was reaching in to the pack and that his intention at the time was to assist Cornford. His evidence lacked specifics as to what was happening to

Cornford and who was around him on the ground. All he could focus on was that Cornford was outnumbered and that he therefore wanted to help. He did not recognise any of the other people involved, nor did he note any distinguishing clothing.

29. Although there was to later be some criticism of Smith's evidence on account of the absence of detail, I do not draw any adverse conclusions from his inability to detail the specifics in the circumstances described. In the context of the events at that time, that is understandable and does not affect his credibility. Despite Smith's vagueness as to certain aspects, he impressed me as a good, reliable and truthful witness, especially given his very spontaneous answers.
30. Ryan Sheridan was subsequently called. He said that he was at the far end of the oval at the end of the match and then moved towards where the melee occurred. He said that he saw Smith being punched to the head with a clenched fist. He volunteered that it was "unprovoked", something which I thought sounded rehearsed.
31. He said that at the time Smith was punched, both he and Smith were trying to break the scuffle up by pulling people apart. He said Smith was not looking towards the person who hit him. He gave a description of the assailant and said that he was an elderly male wearing a Pioneer jumper. He said that after Smith was struck and he fell to the ground, the assailant then approached him. He said that the assailant was menacing and appeared to want to fight him. Although there was no evidence from him as to the number of the jumper he wore on that occasion, I am satisfied from his evidence, and from all of the evidence that Sheridan is the person shown on the ABC footage wearing the number 8 jumper. His evidence describes almost precisely what the footage depicts in that regard. He identified the defendant Miller in Court as the assailant. He said that he backed away from Miller as he approached. All of that is very much confirmed by the

ABC footage, other than a minor point, i.e., that Sheridan was more to the right of Smith, rather than behind him as he said. That however is not material.

32. He said that as he backed away from Miller he saw Cornford on the ground about five metres away with Cole on top of him. He also identified Cole as he also said that Cole was a well known Alice Springs identity, albeit that he had not met him personally. He said that Cole was on top of Cornford and striking him. He estimated that he struck him four times to the face.
33. He said that he knows Constable Ferguson and said that he and Constable Ferguson tried to pull Cole off Cornford. He said that he heard Constable Ferguson tell Cole that he was under arrest, something that Constable Ferguson claimed he could not recall saying. The ABC footage indeed shows that the Wests player wearing the number 8 jumper did come back in to the scene, but the Wests player wearing number 9, who must be Constable Ferguson by all accounts, and another player wearing a Wests jumper (the entire number is not clear but it is a number in the 20s), to Ferguson's right are seen reaching in, apparently attempting to pull Cole off Cornford. The Wests player number 8 was to the left of Ferguson at this time but as the scene shifts it is not shown whether he also participates in pulling Cole off Cornford.
34. In cross-examination by Ms Collins, Sheridan maintained that Smith was only trying to break things up. He said that although Smith was reaching in, there was no sign of Smith throwing any punches. That is all confirmed in the recorded footage. Indeed the footage depicts that Smith had reached in only momentarily and was standing up when he was punched. Sheridan also said, again confirmed by the footage, that as Miller came towards him, Miller had his fists clenched and that he (Sheridan) backed away from Miller with his arms up.

35. In cross-examination by Mr Jefferis, it was put to Sheridan that Cornford had punched Cole-Manolis. Sheridan said that he did not see that but conceded that he did not see what occurred in the lead up to the attack on Cornford. Likewise, he said that he did not see Cole-Manolis with his jumper pulled over his head.
36. When cross-examined as to his line of sight at the time Cornford was being struck, he said that there was no one in between him and Cornford. That is not necessarily borne out by the recorded footage, at least not precisely. The footage shows that he was close enough for at least a momentarily clear view of the first attack by Cole on Cornford. However, at that point he then backs away as Miller menaces him and he is then seen coming back, largely as the assault on Cornford is concluding. The footage then shifts focus to another scene and what occurred immediately thereafter is not apparent from the footage.
37. The ABC footage shows that the blow by Miller to Smith occurs during the initial attack on Cornford. Smith, wearing the number 12 Wests jumper and Sheridan wearing the number 8 jumper, are seen to be moving towards where Cornford is being attacked. Smith is initially seen to be reaching in, but not in any way to suggest anything other than passive intervention. There are no signs that he is trying to do anything other than to assist Cornford who is being assaulted by a number of persons at that time. Miller is seen to skirt around the small group from Smith's left. He is seen to walk past a person in a blue checked shirt to get to Smith. Later evidence reveals that to be Mr Marc Loader. Relevantly, Mr Loader is doing much the same as Smith yet Miller only sees a need to take the claimed pre-emptive action against Smith. He is seen to walk relatively slowly to Smith and to throw a punch with his right fist which connects to the left side of Smith's face. Smith is no longer reaching in at the time of the punch is delivered. He is standing fully upright at the time. Mr Loader on the other hand is still reaching in then in much the same way that Smith was only moments before.

38. Although Smith is turning slightly to the left and therefore towards Miller when the blow is struck, it is apparent that Smith does not see the punch coming. Smith immediately falls to the ground and is motionless, at least momentarily. Miller is then seen to shape up and move towards Sheridan, who is seen to put both his arms up in a yielding and non-aggressive way and to back away. Miller keeps moving towards him still shaping up and with his right arm still cocked ready to punch as both of them move out of the scene. In his later evidence Miller claims that he believed that Sheridan may have also intended to attack the same Pioneer player or supporter.
39. While this episode occurs with Miller, Cornford is still being set upon by Cole. The ABC footage therefore largely confirms the events as both Smith and Sheridan described them in their evidence.
40. Scott Taylor was called after Smith. He was also a Wests player in the grand final. He said that at the end of the game, he saw an altercation developing between his brother Adam and a Pioneer player who he said was Wayne McCormack. He said that his brother was wearing the number 3 jumper and the Pioneer player was wearing the number 12 jumper. He said that he ran around to the left side of his brother and tried to pull him back to break up the altercation.
41. He said that he saw Cole and Trevor Dew come onto the ground and he also observed a person known as Willy Foster running at his brother with a clenched fist. He said that he then felt a blow. He said that he did not see Cole do anything up to that point. He said that he blacked out for a few seconds when he was struck and realised that he had a couple of Wests players standing over him in a protective position.
42. He said that he then looked towards Cornford and said that he saw Cole with a hand placed on Cornford's collar region and striking him up to three to four times with a clenched fist. He said that he observed Cole-Manolis standing nearby.

43. Scott Taylor said that he knew Cole-Manolis as he had played football with him before. He agreed that Cole-Manolis was not doing anything. He claimed not to have seen Cole-Manolis being held with his jumper pulled over his head. He said that he also knows Kerrin, having also played against him as well. He confirmed that he did not see Kerrin do anything either.
44. In relation to the assault on Cornford, the ABC footage shows that Cornford was in the picture early. The ABC footage does not show how the pack developed or anything in the lead up to the brawl, specifically nothing of Adam Taylor or any other Wests player gesturing offensively to spectators as Mr Jefferis put to a number of witnesses. More of that was revealed in the amateur footage which I describe in more detail later in these reasons. The first view of the brawl on the ABC footage was of the large pack and lots of jostling. Cornford can be identified on the footage. He was wearing a light blue t-shirt, a baseball cap on his head and sunglasses on the cap. He is initially attempting to keep players apart. It is not clear what started the actual punching part of the brawl, but two Wests players wearing jumpers with the numbers 3 (Adam Taylor) and 4 (Scott Taylor) are in the group. Scott Taylor is actually pulling Adam Taylor back and away and just as they become clear of the group, the Pioneer player wearing number 58 charges in from behind and crashes into the back of Adam Taylor causing him to collide with the back of Cornford and in turn to then to fall to the ground. The number 58 Pioneer player then goes off screen to the right and he is seen to grapple with a number of Wests players. The Pioneer player wearing the number 15 jumper then, almost at the same time, delivers a round house kick hit from behind to Scott Taylor, who falls to the ground and lies motionless as the melee develops. As I have said earlier, Cornford could not have seen the blow to Scott Taylor. Up until this point, Cornford was clearly in the middle of things but apparently only trying to break it up.
45. Cornford is then seen getting into a stoush with a person, apparently a Pioneer supporter given his actions. That person, who the prosecution



alleges is Cole-Manolis but who I shall hereafter refer to as A, is not wearing a Pioneer jumper. He is wearing a dark coloured (possibly dark green) t-shirt and short blue (possibly denim) jeans and is barefooted. Careful viewing of the ABC footage shows A punching Adam Taylor after he has fallen to the ground following the charge by Pioneer player number 58. Cole-Manolis is not charged before me over that incident. Cornford clearly sees this and his reaction is to immediately punch A. A then grabs Cornford's T shirt resulting in it tearing. There is no sign of Cornford being hit to the back of the head up to this point. Cornford however is seen in a quick motion to grab A by his top and punch him and as A squirms, it results in his top being pulled off, virtually in the one motion. This sounds similar to what was put by Mr Jefferis in cross examination of a number of witnesses, namely that Cornford held Cole-Manolis with his jumper pulled over his head while punching him. What the footage depicts however is not precisely that which Mr Jefferis put as A is wearing a t-shirt, not a jumper and it is over the head only for an instant in the process of the t-shirt coming off. It is certainly not held over his head while punches are delivered as was put.

46. In the lead up to this, a person who I am able to identify as Cole is seen to be approaching the group. He is behind Cornford and apparently has a clear view of Cornford's retaliatory attack on A. He must also have seen that A had first punched Adam Taylor on the ground as he had an unobstructed view of this. He is so close that after A punches Adam Taylor, that impact causes Adam Taylor's head to fall back close to Cole's feet. Cole's focus then changes and he goes straight at Cornford while he is in struggle with A. Cole starts from approximately two to three metres behind Cornford and goes directly at him.
47. Cornford gets one further punch into A and he is then set upon by two Pioneer players. A joins in very quickly after that as does Cole. One of those Pioneer players is wearing the number 34 jumper and I will separately

describe his actions below. The other Pioneer player is wearing a jumper with the number 15. In the course of this, Cole falls to the ground. Cole then quickly gets up and forces his way into the struggle with Cornford, who at this stage is still being punched by Pioneer player 34 and A. Pioneer player 15 is not seen to act aggressively. Cole forces himself on top of Cornford, as a number of other players, mostly Pioneer players but also two Wests players wearing the number 12 jumper (Smith) and the number 8 jumper (Sheridan) move in to assist. It is at this point that Miller is seen punching Smith. I have already described the footage as it relates to the punch on Smith and I mention it here only to put it into the overall sequence of events.

48. When Cornford is set upon by Cole, A and Pioneer player 34, Cornford acts defensively and is backing away and attempting to fend off this attack. In the course of this attack, Cole is seen on top of Cornford with his knees bent into him and punching him. Although no contact is seen, clear punching actions are seen with the right arm aimed at, and apparently connecting with, Cornford's head.
49. Where Cole is initially seen on top of Cornford and punching him, Cornford is seen to be actively attempting to fend off the punches and he is using both his arms and legs to do this. His actions clearly cannot be described as "not responsive" as Ferguson had previously suggested. The Pioneer players are then pulled off Cornford and as he gets up, he is grabbed momentarily from behind by a Pioneer player wearing the number 1 jumper. At this point, Cole is seen to be focusing directly on Cornford and runs straight for him as Cornford is being led away and facing away from Cole. Cole approaches Cornford from the back right side of Cornford. Cole is seen to wind up with his right arm and then make contact with his right forearm to Cornford's jaw or neck area in a wide swinging tackling motion and at the same time pulling Cornford down on the ground from behind. That motion forces Cornford to the ground and Cole is then seen to drop on top of Cornford

with his knees and is seen reaching in on top as a number of Wests players reach in to pull him off. A round arm punch by Cole apparently aimed at Cornford's head is seen almost instantaneously after he drops himself on top of Cornford and then the presence of the pack obstructs any clear vision of any further strikes, other than that Cole's right arm can be seen cocked at the elbow and in a punching motion aimed at the presumed location of Cornford's head. However, with this blow neither the fist nor the contact can actually be seen.

50. When the two Pioneer players and Cole initially set upon Cornford, it cannot be said that they are acting in defence of A as is evident from A's subsequent actions. During the course of that attack, A, who is not wearing a shirt at all at this point, steps in while Cornford is busy attempting to fend off the blows from the others and the imminent attack of Cole. He punches Cornford at least once with his right hand while Cornford is on the ground. The punch is aimed at the head area and some contact is seen but it is not clear as to precisely where the contact occurs. A then appears to attempt to edge in towards Cornford and manages to do so a little, but without striking any further blows. He is then escorted away from there by a Pioneer player wearing the number 19 jumper.
51. Looking now at the actions of Pioneer player number 34 previously referred to. He is seen in the very first scene where the melee develops. He is slightly closer to Cornford than Cole when Cornford first punches A. He has a very good view of what occurs between Cornford and A and he goes straight at Cornford after Cornford punches A. Pioneer player number 34 is also only two to three metres away and gets to Cornford almost at the same time as Cole but Cole stumbles to the ground resulting in Pioneer player number 34 being the first one to actually get a grip on Cornford. Pioneer player number 34 throws the first punch at Cornford, just as one other Pioneer (the player wearing the number 1 jumper) jostles Cornford as aforesaid. Cole then becomes involved as previously described. Cornford

goes to the ground after that initial punch. Pioneer player number 34 is then reaching down to hit Cornford with Cornford lying on his back on the ground and Cole has to actually muscle his way in on Pioneer player number 34 to take over. Pioneer player number 34 however punches Cornford a number of times while he is on the ground before Cole muscled his way in. Then as Cornford is trying to get up, Pioneer player 34 throws more punches with his right arm aimed at Cornford. In the interim, Pioneer player 6 is seen to bend over and reach towards Cornford while he is on the ground but what he does is not seen. Pioneer player 34 is then held back by a person in a blue check shirt, who as I said earlier in relation to the assault by Miller on Smith, must be Marc Loader, given that this precisely depicts what he described when he gave his evidence. Pioneer player number 34 later is seen to have a push and shove with Mr Loader, again consistent with Mr Loader's evidence. Mr Loader however was holding Pioneer player number 34 back at the time that Cole delivers the right arm swing/tackle type blow to Cornford as described above.

52. Marc Loader gave evidence. He is a board member of AFL Central Australia. He was at the game and went into the melee. He said that he saw Cornford with several people over him, including Cole and another three or four players. He said that he grabbed one of them who he said was wearing the number 34 Pioneer jumper. He purported to identify that person as Kerrin but for the reasons which appear below, that identification evidence is deficient. He said that he pulled Pioneer player number 34 off and away and he said a period of pushing and shoving between them then occurred. He said that Cole was on top of Cornford and struck Cornford with his right hand two to three times. He said Cornford was on his back at the time. He said he knows Cole as Cole is a well known Alice Springs identity.
53. His evidence is consistent with the ABC footage. A person is seen pulling the Pioneer player number 34 away. He conceded in cross-examination that he did not actually see the contact of the blows by Cole and that all he saw

was the elbow of the striker moving up and down. Again, that is largely the view from the ABC footage also.

54. Adam Taylor was the next Wests player called. He said that at the final siren he dropped to his knees and pumped the air with raised fists. He denied any offensive gestures. He said that Wayne McCormack, a Pioneer player, came straight at him and pushed and shoved him. He said that McCormack then went away but came back at him and a melee started and punches were thrown. He said that he was thereafter shortly surrounded by a big group of players. He recalls being hit and going to the ground but has no recollection thereafter.
55. Before that occurred, he said that he saw Cole running towards him, aggressively pushing his way through with his arms going everywhere. He identified Cole in Court. He said that he was certain that he came straight for him as he looked straight at him. Both items of footage show Cole right up to where Adam Taylor is but there are many others around in the immediate vicinity. The ABC footage does not show the lead up to Cole arriving there. The amateur footage does show more of the lead up. Although Cole is seen to be very angry, it does not show Cole as pushing his way through or with Cole “with his arms going everywhere” as Adam Taylor described.
56. He said that the hit on him was from behind and it was while he and McCormack had a hold of each other. That latter assertion is not supported by the footage as no-one has hold of him when he is struck from behind. He says that he has no recollection of events after that.
57. In cross-examination by Mr Jefferis, he confirmed that he had no involvement with Cole-Manolis or Kerrin in the melee. He maintained however that Cole ran straight towards him and was certain of that and claimed they made eye contact. Both items of video evidence shows that Cole was close enough to him for this to occur.

58. It is in relation to this aspect however that the amateur footage is more revealing than the ABC footage as the amateur footage focuses more on these events. What the amateur footage shows is that on the sounding of the siren, a Wests player gestures towards the crowd. This Wests player may be Adam Taylor but it is not possible to say with sufficient certainty as I cannot identify him and the number is not very clear. It is also not clear whether the gesture is intended to be offensive or celebratory or to whom it is directed. Then, after a short period of celebratory hugs with team mates he is seen to gesture towards a Pioneer player. As best I can tell, that player is wearing the number 12 jumper but again the vision is not sufficiently clear to say that with sufficient certainty. The Pioneer player seems to take offence as he is then seen to walk up to the Wests player and they bump each other and then start jostling each other. At this point the focus of the footage changes for a short time but it is clear that this is where the main part of the melee starts. The footage then resumes its focus onto the developing trouble. Cole can then be seen in that footage. Adam Taylor can be seen in that footage as his number is clearly seen. However, there is nothing evident then from that which connects him to the Wests player who made the initial gestures. Cole's facial expression suggests that he is very angry and that anger is clearly directed towards Adam Taylor. He can be seen to be having words with him. Thereafter, the footage does not reveal anything significant that is not evident from the ABC footage save that it does show more of the happenings between Marc Loader and Pioneer player 34. Importantly however, and notwithstanding Adam Taylor's denials, there is much to suggest that there was some offensiveness in his gestures.
59. Steven Resier was the water carrier for Wests on the day. At the time of the final siren he was away from where the melee eventually occurred but he moved towards it when he saw it. He said that as he approached, he saw Scott Taylor on the ground and that he appeared unconscious. He had medical personnel standing over him to shield him. As described earlier, the

ABC footage does show a Wests player wearing the number 4 jumper on the ground motionless just after a Pioneer player number 58 jumper charged through the pack.

60. He said that he also saw Smith on the ground. He said that Smith had been knocked to the ground by a person holding a beer in one hand. He said that the person hit Smith once to the head resulting in Smith immediately falling to the ground. The video footage shows that Miller does not have anything in his hands. In cross-examination from Ms Collins, Mr Resier however did concede that although he held what looked like a beer, it might not have been. Mr Resier is clearly wrong on this aspect but nothing turns on that given Miller's later evidence.
61. Constable Tristan Waddell was called when the hearing resumed in May. His evidence was directed to proving an electronic record of interview conducted with Kerrin on 18 September 2007. Objection was raised as to the admissibility of the record of interview and therefore evidence was taken on the voir dire on the question of admissibility. The challenge was initially made on the basis that questions were asked and admissions were made after Kerrin made it clear that he did not wish to answer questions. As evidence of the section 140 interview was presented in the course of the voir dire, an argument also developed as to whether there was compliance with section 140 of the *Police Administration Act* and the record of interview was challenged on that basis as well.
62. The video of the record of interview was then played. Constable Waddell was the interviewing officer and Constable Ferguson, who was a witness in the proceedings, was the corroborating officer. The defendant was naturally present, as was a Mr Harold Howard who acted as Kerrin's support person. The record of interview confirmed that the defendant was then under arrest for investigation purposes in relation to an aggravated assault although he had not been formally charged at that point. The record of interview

confirmed that a section 140 interview had been conducted following the arrest.

63. In the initial part of the interview, Constable Waddell identified the matter in relation to which the interview was to be conducted. A caution had not been administered at this point. An initial objection had been taken by Mr Jefferis as a result, i.e., that a question was asked before the caution was given. The tape was played through to the conclusion and it was apparent then that the question complained of was a preliminary or introductory question only and the caution was given immediately after that preliminary question. In my view the caution was properly given before substantive questioning. I am also satisfied that Kerrin understood the caution.
64. The matter under investigation was identified after the caution was administered and Kerrin was asked whether there was anything that he wanted to tell Police in relation to the matter. His reply was “no”. Constable Waddell then responds with words to the effect “...*to be fair to you, I have to detail the allegations and give you a chance to comment if you wish*” (emphasis added). Kerrin responded with “okay”.
65. The substantive allegation was then put in general terms, namely that Kerrin assaulted Cornford by punching him to the face several times and then continuing to hit him when he was on the ground. That is consistent with merely putting an allegation and inviting voluntary comment as Constable Waddell had indicated he would do. Thereafter the ABC footage was played in the course of the interview and the defendant was asked to identify himself as the player wearing the number 34 Pioneer jumper, which he did. That is interrogation. It goes beyond putting an allegation and results in Constable Waddell extracting an important admission. There is then commentary from Constable Waddell saying that the footage indicates him striking, but there was no audible response from Kerrin to that question. He was then asked if he had any reason for assaulting Cornford, to which Kerrin



commented that he only did so because a cousin and uncle of his were involved. Again, that goes beyond putting allegations and is interrogation and extracts an important admission. Likewise when he was then asked if it was the right thing or the wrong thing to do and he indicated the latter. Kerrin is then asked if he was provoked and he responds that he was hit in the back of the head before then but did not know how that came about. That is again interrogation.

66. In cross-examination on the voir dire, Constable Waddell confirmed that he and Constable Ferguson went specifically to Kerrin's place of work with the intention of arresting him. He confirmed that Kerrin was only under arrest and not under charge at the time of the record of interview, but he conceded that in his view he had all the information he required to charge him by that time, even if Kerrin did not answer any questions.
67. It is also apparent that Kerrin was arrested and taken back to Alice Springs Police Station where he was processed and placed in the cells. The section 140 interview previously referred to was conducted in the cells. Constable Waddell said the only reason that it was not conducted at the time of the arrest was because he omitted to take a tape recorder with him.
68. The response by Kerrin to the initial question as to whether he wished to say anything about the identified subject was an unequivocal "no". Notwithstanding that, Constable Waddell then obtained Kerrin's agreement for allegations to be put to enable him to make a comment if he wished, supposedly out of fairness to Kerrin. However, although the general allegation was put, the rest of the questioning was very much an interrogation and important admissions were extracted from Kerrin. I think is a very telling that Constable Waddell said that he intended to charge Kerrin whether he answered any questions or not. Kerrin has unequivocally indicated that he does not wish to answer any questions. Constable Waddell then proceeds to extract admissions under the guise of wishing to be fair to

Kerrin, yet it was his intention to charge Kerrin with the offence notwithstanding.

69. Kerrin was therefore misled and he was questioned and made admissions after he has indicated that he did not wish to answer questions. On a discretionary basis therefore I ruled that the record of interview was inadmissible.
70. As to the separate objection based on the section 140 interview, Mr Jefferis' objection, if I understood it correctly, was that the section 140 interview was not conducted at the time of the arrest. Section 140, and section 143 which is also applicable, provide as follows:-

140 Before any questioning or investigation under section 137(2) commences, the investigating member must inform the person in custody that the person –

(a) does not have to say anything but that anything the person does say or do may be given in evidence; and

(b) may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person's whereabouts,

and, unless the investigating member believes on reasonable grounds that –

(c) the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or

(d) the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed,

the investigating member must defer any questioning or investigation that involves the direct participation of the person for a time that is reasonable in the circumstances and afford the person reasonable facilities to enable the person to make or attempt to make the communication.

143 A court may admit evidence to which this Division applies even if the requirements of this Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for

the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice.

71. It is clear that section 140 does not stipulate that the caution and advice specified in that section must be given at the time of arrest. The section requires that it occurs “*before any questioning or investigation ...*”. The section 140 interview was conducted before any such questioning. It is possible that in any event Mr Kerrin was advised of his rights to have someone present at the time that he was arrested as in his evidence on the voir dire he said that he made a call to the nominated support person on route between his place of work where he was arrested and the Police Station. Importantly however, no questioning had occurred up to that point. Even if section 140 is to be interpreted as requiring the advice specified therein to be given at the time of arrest, which I do not accept, then in any event the fact that Kerrin did contact and arrange for a support person to attend would be ample reason to allow it under the general discretion given to the Court under section 143 of that Act. The challenge on the basis of section 140 therefore fails.
72. After the close of the prosecution case only Miller chose to give evidence. His evidence formed two discrete parts. First, he put his character in issue and secondly, he raised defensive conduct. As to the former, he gave some evidence of his background and by consent, some character references (Exhibit P6) were tendered. As to defensive conduct, Miller said that he was the official scorer for the Pioneers team on the day. He said that after the final siren he began tallying the score sheet. He then saw people chasing others, punching and the like, referring obviously to the melee. He said that as he walked around and amongst one of the groups, he saw a person “diving in”, he said that the person “ran in” and that one of “our blokes”, no doubt referring to a Pioneers player or supporter, was on the ground. He then claimed that he hit that person by punching him to the face with his right

hand because it looked to him that the Pioneer player or supporter on the ground was being assaulted and that the person was intending to further assault him. Miller conceded that the person he hit was Smith and that the blow was a king hit.

73. He said that after he hit Smith there was another Wests player nearby and he also thought that he was going to get involved. He claims that he asked him what he was going to do and that other person backed off. He said that he then turned away and left and then he took the score sheets to the League Office. I am satisfied on the evidence that the other Wests player Miller refers to is Sheridan.
74. In cross-examination by Mr McMinn, Miller conceded that he did not consider any alternative action other than to hit Smith. Specifically, he did not consider the alternative of calling out a warning. He said that he did not strike Smith with full force and that his intention was only to stop him hurting the Pioneer player or supporter on the ground. He claimed that he just decided that a pre-emptive strike was necessary.
75. He also said in cross-examination that he shaped up to Sheridan because he thought that he might “have a go at me” for hitting Smith. This contrasts with his evidence in chief only moments earlier when he said that he shaped up to Sheridan because he thought that Sheridan also was going to assault the Pioneer player or supporter on the ground. I have concerns regarding this disparity in evidence within a short period of time.
76. Miller said that Smith was reaching in at the time that he punched him and he said that he did not consider that Smith may only have been separating others involved in the brawl. Although it was clearly necessary for Miller to say this for the purposes of raising defensive conduct, this is very much at odds with what is depicted on the ABC footage and that claim simply cannot be maintained in light of that footage.

77. Defensive conduct, when properly raised, is a matter which must be rebutted by the prosecution beyond reasonable doubt. Defensive conduct negatives responsibility for an assault, as it is a form of justification. The parts of that section 29 of the Criminal Code relevant to the issues before me provide as follows:-:

29

- (1) Defensive conduct is justified and a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event.
- (2) A person engages in defensive conduct only if –
  - (a) the person believes that the conduct is necessary –
    - (i) to defend himself or herself or another person;
    - (ii) to prevent or terminate the unlawful deprivation of his or her or another person's personal liberty;
    - (iii) to protect property in the person's possession or control from unlawful appropriation, destruction, damage or interference;
    - (iv) to prevent trespass to land or premises occupied by or in the control of the person;
    - (v) to remove a trespasser from land or premises occupied by or in the control of the person; or
    - (vi) to assist a person in possession or control of property to protect that property or to assist a person occupying or in control of land or premises to prevent trespass to or remove a trespasser from that land or premises; and
  - (b) the conduct is a reasonable response in the circumstances as the person reasonably perceives them.

78. Section 29 relies largely on subjective factors. The parts of section 29 relevant to the current case are succinctly, that a person engages in

defensive conduct only if firstly, that person believes that the conduct is necessary to defend another person and secondly, the conduct is a reasonable response in the circumstances as the person reasonably perceives them. The reference to the person's belief clearly refers to a subjective test. Objectivity however becomes an issue in relation to the assessment of the conduct as a reasonable response, albeit that it must be measured against the circumstances as the person reasonably perceives them.

79. Miller has claimed in his evidence that he believed that his conduct was necessary to aid the Pioneer player or supporter who was on the ground. It is also submitted that his response, i.e., the king hit to Smith, was a reasonable response in the circumstances as he perceived it.
80. The ABC footage however very much cuts across this claim. There is no Pioneer player or supporter on the ground being assaulted. The only Pioneer players involved were the persons doing the assaulting. Leaving that aside for the moment, it is clear that Miller has a good a view of Smith for a time before he assaults him. There is no evidence of Smith running in or diving in as Miller has claimed. Although Smith is seen to be reaching in, that concludes by the time that Miller gets to him and delivers the blow. By then Smith is fully upright and not doing anything. On the other hand, Marc Loader is still seen to be reaching in as I described earlier in these reasons.
81. In that circumstance alone, it is inconceivable that Miller's response is a reasonable response in the circumstances, even if I were to accept his assessment of the situation, which I do not. I have carefully viewed the recorded footage a number of times. The only person that Smith is reaching to in the melee, consistent with his evidence, is Cornford, who is then being assaulted by Pioneer players and supporters. Miller must also have seen that. On that objective and clear evidence, Miller's claim lacks credibility.
82. Other matters relevant to the credibility of Miller's claim as depicted on the ABC footage is that Marc Loader was closer to Miller than Smith was and

doing initially exactly the same as Smith. Although Smith ceases reaching in, Loader continues yet Miller has apparently targeted Smith. Miller has had a good opportunity to this yet he has gone directly to Smith and king hit him. It is then more of a coincidence in my view that the only observable difference between Smith and Loader and their actions is that Smith is clearly a Wests player.

83. Secondly, his version as to his assessment of Sheridan's intentions varied between his evidence in chief and cross-examination and within a short period of time. That is not indicative of a truthful person, in my view. In any event, he claimed that Sheridan looked like he was also going to be involved and that the Pioneer player or supporter on the ground also needed his protection from Sheridan. That likewise is not sustainable on either footage.
84. Lastly, he claimed that after warding off Sheridan, that he then went and put his score sheets into the League office. It is interesting that he saw fit to mention that and described that as if that was the next thing that occurred. However the footage shows Miller loitering around and observing the ongoing disturbance.
85. Dealing with the evidence of good character, evidence of an accused's good character is relevant in two ways. Firstly it is relevant to bolster the defendant's credibility. Secondly it can also go to the question of guilt in that it can raise doubt about the likelihood of the defendant having committed the crime as charged as he is unlikely to have acted unlawfully in such a violent manner. I accept that Miller has no criminal history for violence. In terms of credit however the character evidence is not considered in isolation and must be weighed up with all the relevant evidence and given such weight as is appropriate. It is not conclusive on its own and does not prevail. Courts recognise that persons do commit offences for the first time. Indeed, every person who commits an offence does so for

the first time at some point and until that point they would be considered to be of good character. Still I have regard to the evidence and although I accept that the defendant is, at least until now, a person of good character, I am of the view that there is convincing evidence of guilt, particularly but not exclusively, the recorded footage, which is so probative that the evidence of good character, as far as it goes, cannot prevail over that.

86. Applying the foregoing findings to each of the defendants, firstly Cole-Manolis. There is no eyewitness evidence of him doing anything other than being present in the vicinity of Cornford. That leaves only the recorded footage. I am unable to identify him from either footage. The only possible connection of Cole-Manolis with any person depicted on either footage is that Mr Jefferis put to a number of witnesses that Cornford fought with Cole-Manolis, that he grabbed Cole-Manolis and that he pulled and held his jumper over his head while punching him. As I have said, that scenario is not precisely depicted on either footage. At the best, Cornford is seen to be fighting with a person and that person's t-shirt (not a jumper) is quickly removed in the course of that fight. Certainly blows are then exchanged, but that does not precisely fit with what Mr Jefferis put and it is therefore not certain that that is the incident that Mr Jefferis referred to as opposed to some other incident. Save for that, the fact that Mr Jefferis put that allegation which must obviously be on instructions, could inferentially have connected Cole-Manolis with one of the persons depicted on the recorded footage.
87. All things considered, the involvement of Cole-Manolis in any activity depicted on the footage or described by the witnesses is not established beyond reasonable doubt and I find him not guilty.
88. Kerrin likewise cannot be identified by me on the recorded footage. Having ruled as inadmissible Kerrin's admission in the record of interview that he was the Pioneer player wearing the number 34 jumper depicted on the ABC



footage, the only evidence which can possibly connect Kerrin to any of the activities seen on the recorded footage is that of Mr Loader. He described his involvement in attempting to break-up the melee and he described how he pulled the Pioneer player number 34 away which then led to a scuffle with that person. He purported to identify that person as being Kerrin. What he said in evidence however was that that person was “now” known to him to be Kerrin. He did not elaborate at all on this. It is not clear whether he has since come to know Kerrin and remembered him as the person that he saw on that occasion or whether someone has simply pointed Kerrin out to him and identified him as the person involved without any independent recognition by Mr Loader. That therefore means that there is a reasonable doubt about Mr Loader’s evidence of identification. There is no other evidence to connect Kerrin to the person wearing the number 34 Pioneer jumper. It is regrettable that evidence as to the numbers worn by the various players was not provided to the Court. Absent that however, the identity of Kerrin as the person wearing the number 34 jumper is not established beyond reasonable doubt and I also find him not guilty.

89. Miller is identifiable from the recorded footage. That identification is no longer strictly relevant as Miller admits striking Smith. He raised the claim of defence of another. As I have described earlier in these reasons, his claim however is highly inconsistent with the objective evidence of the recorded footage. Firstly, he claims that a Pioneer player or supporter was on the ground and he needed to defend that person. That runs counter to the recorded footage. The person on the ground was Cornford, as is evident from the footage, and as Smith and Sheridan attested. The only Pioneer players and supporters there were the persons attacking Cornford. Either way there is nothing depicted which supports Miller’s claim. Moreover, Miller can be seen making a calculated approach towards Smith. He had ample opportunity to observe Smith’s actions. At best, those actions, as depicted on the footage are as Smith and Sheridan described, i.e., simply

reaching in. There is nothing to indicate that Smith was doing anything aggressive and nothing to indicate his intention was anything other than to try and assist Cornford. Smith had actually ceased reaching in and was standing up fully upright at the time that Miller struck the blow. Miller had ample opportunity to see this. I therefore reject his evidence and specifically his claim that he perceived a need to protect another person.

90. That finding essentially therefore renders it unnecessary to consider the second limb of section 29 relevant to this case, however I will do so in case it becomes relevant. I have also come to the conclusion on the evidence that Miller's actions were not a reasonable response within the meaning of section 29(2) of the Criminal Code. On my findings, and putting matters at the highest in favour of Miller for the purposes of argument, Miller observed Smith reaching in momentarily and apparently with the intention only of pulling others off Cornford and then withdrawing. Even if it could be said that he genuinely believed that he needed to take any action, in light of that it cannot be said that striking Smith with a king hit punch is a reasonable response. A reasonable response at best in my view would have been to reach in, as Smith was doing, and pulling Smith away or perhaps pushing him away. A warning as suggested by Mr McMinn in cross examination also may well have been all that was necessary.
91. On that basis, the prosecution has rebutted defensive conduct beyond reasonable doubt. Miller having admitted the blow and all other elements of the offence of assault having been satisfied to the requisite standard, I find Miller guilty of assaulting Smith. The charge against Miller is one of aggravated assault based on the circumstance of aggravation of harm. The definition of harm in the Criminal Code is set out in section 1A which provides:

1A Harm

- (1) Harm is physical harm or harm to a person's mental health, whether temporary or permanent.
- (2) Physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.
- (3) Harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.
- (4) Harm does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

92. The evidence in this regard is that Smith was felled, he was momentarily dazed and suffered a cut behind his ear which required attention. None of that evidence was challenged. I am satisfied that harm is proved to the requisite standard and I therefore find Miller guilty as charged.

93. That leaves Cole. Cole is apparently a well known Alice Springs identity and he has been sufficiently identified by way of recognition evidence by numerous witnesses. It was only the identification evidence of Cornford which was challenged. As I have said earlier in these reasons, Cornford's identification evidence is not probative but identification is established in any event from the remaining evidence. Cole is in any event clearly identifiable by me on both of the recorded footage. It has not been submitted that defensive conduct has been raised by the defence in the case of Cole nor could that have been maintained had it been raised in my view. The defence submits that consent has not been negated in the case of Cole. This is said to arise because Cornford is seen to be involved in a fight at the outset. As I have said, the recorded footage shows Cornford initially attempting to separate players but then gets involved in a fight with A where he strikes the first blow. The footage shows that that is retaliation against A

anyway as he has seen that same player strike a Wests player who was on the ground at the time. Nonetheless the issue of consent can be said to arise, albeit barely, from Cornford becoming involved in a fight and the prosecution must prove the absence of consent to the requisite standard.

94. Cornford was not asked the usual question as to whether he consented to anyone assaulting him. That is not conclusive either way. Even had he said that he had not given consent that would have to stand up to objective scrutiny against the rest of the evidence including the recorded footage. It does not simply turn on a statement from Cornford as to whether he consented or not. It is safe to say that no one consents to being assaulted unless they have started the fight. On my consideration of the evidence, at best, Cornford can be said to have consented to a one on one fight with A. The situation I am presented with on the evidence is that Cornford has punched A after he has seen A punch one of his team mates. Arguably Cornford's punch might be seen to be under a perceived need to defend that team mate given that that team mate is then on the ground and vulnerable to further punches and Cornford acts very quickly. This has occurred in the context of a fast developing volatile situation i.e., in the situation of a rapidly developing melee, with numerous hostile people in the vicinity and ready to become involved. It is not realistic to suggest that once Cornford has struck A in these circumstances that he is consenting to assault by every other person in the vicinity or even a limited number of persons. If the submission is taken to its logical conclusion, then Cornford would be taken to have consented to being assaulted by every Pioneer player or supporter in the vicinity, which is an absurd proposition. No rational person would consent to a gang assault in these circumstances. Even if I were to accept the proposition in principle, then it could not possibly apply to the second part of the assault by Cole on Cornford. As described in paragraph 49 hereof, after the initial attack on Cornford by a number of people, as Cornford is being led away, Cole rushes at Cornford from behind, drags him down to the

ground and again set upon punching Cornford. Any consent which could be inferred up to that point would have clearly terminated. It could not possibly be said that that any inferred consent from Cornford initially punching A continues at this point. I am satisfied that it has been established beyond reasonable doubt that Cornford has not consented to an assault by anyone other than possibly A on a one on one basis and then only in relation to his initial fight with A. As A again becomes involved in assaulting Cornford after the others have intervened, that initial consent cannot be said to continue. I am satisfied on the evidence that Cornford has not consented to any assault at the hands of Cole at any point in time.

95. Two circumstances of aggravation are alleged in the case of the assault by Cole on Cornford. The first is harm. Evidence sufficient to establish harm overall has been lead. That however is not the issue. There is a causation issue and here and the clear evidence of the involvement of other assailants works in Cole's favour. Although clearly Cole has struck Cornford a number of times, there is nothing to connect the harm alleged with Cole only. The harm said to be occasioned by Cornford could have been caused by any one of the assailants overall or any combination of them. Absent evidence of common enterprise, that circumstance of aggravation is not made out.
96. The second circumstance of aggravation is that Cornford was defenceless at the time. This is said to arise because of the gang nature of the assault upon Cornford and that for part of the time, Cornford was on the ground. The circumstance of aggravation is set out in section 188(2) of the Criminal Code which applies where it is established that the person assaulted "*is unable because of infirmity, age, physique, situation or other disability effectually to defend himself or to retaliate*". It has been argued that Cornford was able to defend himself because he gave evidence, supported by the recorded footage to a certain extent, that he was blocking blows and attempting to push Cole away with his feet.

97. However, the circumstance of aggravation is made out when a victim is unable to “effectually” defend himself. Parrying blows is a natural defence mechanism. It does not mean that a person who performs any defensive actions is thereby able to effectually defend himself. In the circumstances of a gang assault, it is absurd to suggest that taking any defensive action means that a person is able to effectually defend themselves. Cornford has done no more than taking basic instinctive type actions. If the submission were to be taken to its logical conclusion that would mean that the circumstance of aggravation could never be made out unless a victim simply remained passive under attack and did absolutely nothing at all to defend himself. In the circumstances of the gang assault, in my view, the circumstance has been made out beyond reasonable doubt and I find that Cornford was unable to effectually defend himself from the attack from Cole due to the circumstances as aforesaid.
98. Accordingly, in relation to Cole, I find that he has been identified as the assailant, that consent has been negated and that the defenceless circumstance has been made out, all beyond reasonable doubt. I accordingly find Cole guilty of aggravated assault but not of the circumstance of aggravation of harm.
99. All charges on complaint are dismissed based on section 18 of the Criminal Code.

Dated this 13th day of August 2008.

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V M Luppino SM