

CITATION: [2010] NTMC 066

PARTIES: VIVIEN LYNETTE BALCHIN

v

CAMERON MURRAY

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20926954

DELIVERED ON: 22.11.10

DELIVERED AT: Darwin

HEARING DATE(s): 8.9.10, 22.10.10 & 15.11.10

JUDGMENT OF: Mr Daynor Trigg SM

CATCHWORDS:

Criminal Code – s 188(2) – aggravated assault

Criminal Code – s 8 – common purpose

Criminal Code – s 12 – aid and abet

Power to compel prosecution to re-open their case and whether appropriate to do so – R v Eastman (1995) 125 FLR 460; Nguyen & Tran (1998) 102 ACrimR 577

Failure of police to obtain statements off witnesses and whether an adverse inference should be drawn – Boyce v Nunn (1997) 138 FLR 475

REPRESENTATION:

Counsel:

Prosecution:

Mr Ledek

Defendant:

Ms Bennett

Solicitors:

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| Prosecution: | Summary Prosecutions |
| Defendant: | NTLAC |

Judgment category classification: B

Judgment ID number: [2010] NTMC 066

Number of paragraphs: 96

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

No. 20926954

[2010] NTMC 066

BETWEEN:

VIVIEN LYNETTE BALCHIN
Complainant

AND:

CAMERON MURRAY
Defendant

REASONS FOR DECISION

(Delivered on 22 November 2010)

Mr DAYNOR TRIGG SM:

1. The defendant was charged on information that:

On the 13th day of August 2009

At Darwin in the Northern Territory of Australia

1. unlawfully assaulted Brian Kelly

Contrary to section 188(1) of the Criminal Code

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

- (i) that the said Brian Kelly suffered harm
- (ii) that the said Brian Kelly was unable to effectually defend himself due to situation

contrary to *section 188(2) of the Criminal Code.*

2. The hearing commenced before me on 8 September 10 at which time the defendant pleaded not guilty to the charge and both of the circumstances of aggravation. Evidence commenced on this day but was not completed, so the matter went off part-heard. The hearing resumed on 22/10/10 when the remaining evidence was called. At the end of submissions I adjourned the matter for decision on 15 November 2010. However, prior to delivering my decision Ms Bennett approached the court co-ordinator and requested that this matter be re-listed. Accordingly, I had the matter re-mentioned before myself on 2 November 2010 at 0930. Mr Ledek continued to appear for the prosecution.
3. On 2 November 2010 Ms Bennett applied to re-open the evidence in the case. However, upon further development it appeared that she was not in fact asking to open her case (the defence did not call any evidence during the course of the hearing, but did tender certain documents during the cross-examination of certain prosecution witnesses) but rather was asking the court to re-open the prosecution case. Mr Ledek advised that the prosecution did not consent to the application and opposed it. Accordingly, Ms Bennett was asking the court to compel the prosecution to re-open their case (when they did not want to do so) and to re-call two witnesses for further cross-examination.
4. Ms Bennett stated that it was her mistake, and she should have raised certain matters with Brian Kelly (hereinafter referred to as "BK") and his wife Sheila Kelly (hereinafter referred to as "SK"). It appeared that there were two issues which she now wished to raise.
5. The first was that specific mention was made (in the evidence before me) as to the actions of the defendant near a light pole, but allegedly no such specific mention was made when evidence was given in

relation to the trial of the two co-accused. I was advised that the trial of the two co-accused (Patzwald and Gallagher) took place on 19, 20 and 21 May 2010. This defendant was to have been tried with them, but an application for a separate trial for this defendant was apparently made by Ms Bennett on 19 May 2010, was not opposed by Mr Ledek, and was granted by Ms Morris SM. If there had not been separate trials this application should not have been necessary.

6. Ms Bennett advised that the prosecutor (Mr Ledek) had been very fair and had allowed her access to a transcript of the evidence in the trial of the co-accused, and it was upon reading portions of this that her “oversight” had come to light. Ms Bennett had ample opportunity to obtain a transcript of any of the evidence in that earlier case if she required the same. It was suggested that a transcript may not have been sought due to financial constraints of the NTLAC. If a financial decision was made then I do not understand how the defendant can now say that an “unfairness” has arisen as a result of that very decision. Ms Bennett must have known that BK and SK gave evidence in the trial against the two co-accused, and must have known that they were to be called again in the case against her client. This is not a situation where something unexpected has arisen, or fresh information has now come to hand. The information as to what BK and SK had said in the earlier hearing was always available to the NTLAC if they had wanted to ascertain it. If the NTLAC was unable to afford transcript, then Ms Bennett or anyone else could have sat in during the trial of the two co-accused to take notes of what was said during that hearing. It was not suggested that this occurred.
7. The second issue appears to be that Ms Bennett would now want to suggest to BK and SK that they may have discussed their evidence together. This appears to have arisen from a closing submission by Ms Bennett that BK and SK were married and therefore could have

colluded in their evidence. When this was initially raised I pointed out to Ms Bennett that no such suggestion was made to either witness. It appears that as a result of this brief exchange Ms Bennett now wished to put this to both witnesses.

8. From all the evidence in the case it is clear that on 13 August 2009 BK was set upon and assaulted in a prolonged assault after he approached three males in the street. It is clear (and I find) that the defendant was one of the three males approached and the other two males were Patzwald and Gallagher. The issue in the trial before me appears to have been limited to whether the defendant was actively involved in any (and if so, which) part of the assault, and whether there was any (and if so, what) common purpose between the three males.
9. BK and SK have already had to attend court twice in order to give their evidence as to what occurred this night. I am now being asked to compel them to attend for a third time. I asked both counsel to take me to the relevant law as to what the cases said about a court obliging the prosecution to re-open when they did not wish to do so. I was given some assistance in this regard, however I felt unable to decide the application without hearing further submissions. Accordingly, I advised both counsel that I would not be able to deliver a decision on 15 November 2010 at 0900 as originally hoped, but would now adjourn this application to that date and time for further submissions.
10. When the matter resumed on 15 November 2010 Ms Bennett seems to have misunderstood the reasons for the adjournment, and seems to have believed that her submissions had finished. I make no issue of this, and accept that a misunderstanding occurred. I asked Ms Bennett if she could point to any portion of the transcript in the earlier

trial of Patzwald and Gallagher where BK and/or SK had given evidence different to what they said in evidence before me about the physical actions of the defendant. Ms Bennett was unable to point to anything, but asked me to stand the matter down for 15 minutes so that she could re-visit the transcript which the prosecutor apparently had. I granted that request.

11. When we resumed Ms Bennett was unable to point to any specific inconsistency in either the evidence of BK or SK. The highest that she could put her application was on the basis of what they didn't say, namely that they did not specifically refer to what the defendant did. However, in my view, I do not consider this to be of much (if any) significance. In the earlier hearing it was only Patzwald and Gallagher who were on trial and therefore it is to be expected that the focus of the questioning and any responses would be towards what either or both of them did. Ms Bennett stated that in the earlier hearing BK and SK answered in the general as to what "they" (referring to the three males) did. However, in my view, this is not dissimilar to how they gave portions of their evidence before me. Generally BK and SK were not able to break down individual punches and kicks and attribute them to any one of the three males present. Even the most significant blow (the kick to BK's head which caused a bleeding open wound) was unable to be attributed to any particular individual. If there were only a few blows in total, then this might be significant. However where, as was the case here, there are multiple blows alleged in a mobile situation it would be very difficult (if not impossible) to break it down into such detail. There may be particular moments that stick in a person's mind, but otherwise it is likely to be non-specific.
12. I asked Ms Bennett if she was able to point to any specific question or answer (in the trial of the co-accused) where either BK or SK were focussing on the actions of the defendant during the physical portion

of the incident. She was unable to do so. Accordingly, it was not suggested that there was any (with one possible exception) prior inconsistent statement made by either BK or SK from their earlier evidence as opposed to their evidence before me. The one possible exception was that BK allegedly said in the earlier trial “I had three men chasing me, I didn’t have anyone cutting me off”, but clearly BK was caught and assaulted several times before he made it back to his property. In his evidence before me BK said (as noted in more detail later in these reasons):

He was right in front of me and it was – he was running with me in and the same formation was there for the same three chaps. As we were running next – I knew the light pole was coming up or that power pole was coming up, I needed some evasive action and I knew that I would put the power pole between myself and he and this chap, because he was trying to push me into – back into the melee of the other two.

13. These two versions (assuming that what I was told BK had said in the earlier trial was correct, and not taken out of context) may at first glance not appear to fit well together. However, it appears to me that the “I had three men chasing me, I didn’t have anyone cutting me off” may well be referring to the fact that there wasn’t a fourth person involved. In any event, I do not consider this one statement as being sufficient justification for re-calling BK. It would afford no justification for re-calling SK.
14. Ms Bennett submitted that in the statement of BK (which was tendered by her and became ExD3) BK did not make any specific mention of any blow from the defendant, whereas in his oral evidence before me he did. I agree with this submission. However, it is clear from ExD3 that for the period from his description of the initial blow to his back until he was in his yard he has generally referred to “they” or “all three”. That one statement was prepared for the case against all three males. That does not mean that if, when later asked, he is able to be

a bit more specific about what each one did that this is inconsistent. It depends upon the circumstances. In any event, Ms Bennett had ExD3 in her possession and cross-examined BK on it quite extensively, hence why it became an exhibit in the defendant's case.

15. Ms Bennett sought to submit that SK's statement was similar, but this statement did not make it's way into evidence so I am unable to give this submission any weight.
16. After hearing all of Ms Bennett's submissions I ruled against her application. I ruled that the defendant had failed to satisfy me that an arguable case had been made out that a "manifest injustice" (see: *Nguyen & Tran* (following)) might occur if BK and/or SK were not recalled for further cross-examination.
17. Do I have the power to direct the prosecutor (over his objection) to reopen his case and recall certain witnesses? In the case of *R v Eastman (1995) 125 FLR 460*, Carruthers A-J stated at Page 465:

I have no difficulty in assuming that I had the power to invite the Crown Prosecutor to recall all or any of these witnesses. However, I have no doubt that if I had extended that invitation, the learned Crown Prosecutor would have declined to do so. There the matter would have ended so far as the Crown Prosecutor was concerned because I lacked the power to direct the Prosecutor to recall any of the witnesses. (emphasis added)

18. Carruthers A-J did not decide whether he had the power (over objection from the Crown) to himself require the recall of certain witnesses. However, he proceeded on the assumption that he could, but then decided that in the instant case he would not exercise such a power (assuming that he had it). At pages 463-464 of his decision Carruthers A-J noted as follows:

20. In recent years the senior criminal courts of this country led by the High Court have stressed the need for fairness in criminal trials and an avoidance of the pollution of the purity of

the stream of justice. There can be little doubt that this attitude has had the consequence that we have not had in this country any of the major miscarriages of justice such as have occurred in other criminal jurisdictions.

21. However, be that as it may, the High Court has consistently re-affirmed two basic propositions. The first is that a criminal trial is of an adversary nature and not an inquiry. Thus in *Ratten v. The Queen* [1974] HCA 35; (1974) 131 CLR 510, Barwick CJ said at 516-517:

"However, the rules appropriate in this respect to civil trials cannot be transplanted without qualification into the area of the criminal law. But the underlying concepts of the adversary nature of a trial, be it civil or criminal, and of the desirable finality of its outcome are valid in relation to the trial of a criminal offence.

As Smith J rightly said in expressing the reasons of the Full Court in this case, 'Under our law a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing on the question of guilt or innocence' (1974) V.R. 201 at 214. It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, the jury is to decide whether the accused is guilty or not. Consequently if the proceedings are not blemished by error on the part of the judge, whether it be on a matter of law or in the proper conduct of the proceedings, or by misconduct on the part of the jury, there has been a fair trial. It will not become an unfair trial because the accused of his own volition has not called evidence which was available to him at the time of his trial, or of which, bearing in mind his circumstances as an accused, he could reasonably have been expected to have become aware and which he could have been able to produce at the trial. Great latitude must of course

be extended to an accused in determining what evidence by reasonable diligence in his own interest he could have had available at his trial, and it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence. But he must bear the consequences of his own decision as to the calling and treatment of evidence at the trial." (emphasis added)

22. And in *Whitehorn v. The Queen* [1983] HCA 42; (1983) 152 CLR 657 at 682, Dawson J said:

"A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side."

23. The adversary nature of a criminal trial was confirmed by the High Court in *Dietrich v. The Queen* [1992] HCA 57; (1992) 177 CLR 292: see, for example, per Deane J at 334.

24. The second proposition is: "In determining the practical content of the requirement that a criminal trial be fair, regard must be had 'to the interests of the Crown acting on behalf of the community as well as to the interests of the accused'"; per Deane J in *Dietrich* at 335, quoting Gibbs ACJ and Mason J in *Barton v. The Queen* [1980] HCA 48; (1980) 147 CLR 75 at 101.

25. Relevantly, in *Moss v. Brown and Another* (1979) 1 NSWLR 114 at 126, the New South Wales Court of Appeal (Moffitt P, Reynolds and Hutley JJA) said:

"In any discussion of fairness, it is imperative to consider the position of all parties. It is sometimes forgotten that the Crown has rights and, as it has a heavy responsibility in respect of the invoking and enforcement of the criminal law, which includes seeing that the public revenue is not imposed upon, it is entitled to maintain those rights, even if they may bear heavily upon some accused. As Lord Goddard CJ said in *R v. Grondkowski* (1946) KB 369 at 372: 'The judge must consider the interests of justice as well as the interests of the prisoners'". (emphasis added)

19. In the NSW CCA case of *Nguyen & Tran (1998) 102 ACrimR 577 @587* Smart J (with whom Ireland and Dunford JJ agreed) stated:

Counsel for Tran did not approach the matter on the basis that the District Court lacked power to admit evidence after the summing up had concluded but counsel for Nguyen did. It is unnecessary for this Court to decide that point and to revisit *Dryburgh (1961) 105 CLR 532 at 534-535*, *Picknell (1969) 90 WN (Pt 1) (NSW) 731 at 734* and *Shaw (1952) 85 CLR 365*. This was not a case where any power to admit evidence after the summing up should have been exercised. My own view is that the court does have a discretion but that it should be exercised sparingly and only in those cases where there would be a manifest injustice if the power were not exercised. One case would be where a witness has given evidence against an accused and seeks to return to the witness box to say that the evidence was false or that he made a major mistake. It would not be possible to give a comprehensive list. A court should be particularly hesitant about allowing the Crown to re-open to strengthen its case. (emphasis added)

20. Based upon these authorities I find that I do not have the power to compel the prosecutor to re-open the prosecution case without his consent or over his objection. However, it appears that the court itself has a power (which should be sparingly used) to call witnesses itself, but the logistics of how this might be done may be problematic. For the reasons set out above I was unable to be satisfied that this was an appropriate case for the court to exercise this discretion. I therefore declined to have BK and/or SK recalled for the purpose of further cross-examination.
21. I now turn to consider the evidence in the case. In terms of the actual incident in question, I heard evidence from the alleged victim BK as to what occurred, from his wife SK who witnessed most of the latter events and from Jacob McElhinney (hereinafter referred to as “JM”) who came upon the scene and witnessed most of it also. In addition, an electronic record of interview (hereinafter referred to as “the EROI”) conducted with the defendant on 13 August 2009 was played

in court and tendered as ExP6. That was the extent of the evidence from “eye-witnesses”.

22. When the disc of the EROI (ExP6) was played in court I was provided with a transcript as an aide memoire. I thank prosecution for that assistance. Unfortunately, whoever prepared the transcript did not do a very thorough job, and there were some glaring errors throughout the document, and some of these were crucial pieces of evidence. For example, at page 20 (hereinafter referred to as “P20”, and with reference to other pages of it, similarly referred to) of the transcribed EROI it was typed that the defendant said:

Yeah, after he stumbled towards Leroy, Leroy didn’t know what to do and started swinging at him, **then I** punched him in the temple.

23. Ms Bennett did not agree that this part was correctly transcribed. Accordingly, I have listened again to this portion of the disc, and it seems to me that what the defendant actually said was:

Yeah, **like** he stumbled towards Leroy, Leroy didn’t know what to do, **he** started swinging at him, **the guy** punched him in the temple.

24. So rather than the defendant admitting in the EROI that he had punched BK, in fact he was stating that BK had punched Patzwald. It goes without saying, that this is a significant and important difference. Accordingly, I have listened again to the whole of the EROI and made changes to the transcribed aide memoire. Hereafter, where I refer to portions of the EROI I refer to those portions as amended by me in accordance with what I can hear being said.
25. It was evident from the evidence of JM that when he came upon the scene he was in the company of his friend Emanuel Stram (hereinafter referred to as “ES”). They were in the same motor vehicle. JM and ES

were both visitors to Australia and were working at McDonalds on Bagot Road in Darwin at the relevant time. In cross-examination JM said that he and ES went to the police station to give a statement, but they were sent away because “they couldn’t take my statement the first time or something” – T85.4 (which is a reference to where this evidence appears in the transcript of evidence). When he went the second time he did manage to do a statement, and he thought ES went with him, but he didn’t remember.

26. The statement of JM was tendered into evidence and became Exp5. It purported to have been declared on 18 August 2009, so only 5 days after the events in question. When JM gave his evidence he made it clear that his memory was weaker now with the passing of time (which is not surprising). He now only remembered the first and last part of the events with some clarity, but the bit in the middle was unclear. He was clear that there were two main aggressors towards BK at the start and end, and it appears clear from all the evidence that this was Patzwald and Gallagher. At the time he gave his evidence he could not recall whether these two were the only ones involved in the “middle” incident, but he noted that in his statement he said all three were involved then, and he in effect adopted that as being correct. As the statement of JM was tendered in the case without objection it forms part of the evidence in the case.

27. At T87 of his cross-examination his evidence was as follows:

Thinking back to the incident now do you have any direct recall of seeing the three men at any point kicking that man?---Today only I have a direct recall of the two of them doing it, not at the second location, just the first and third location.

So, your recollection really is that there was – out of the three there were two people who were aggressive towards the man and one who was hanging back, is that right?---Yeah, at two

points anyhow. But that's the only thing I remember now but I remembered it differently on the day it seems.

Well, just today, do you remember at any stage all three kicking this person?---No, I don't.

But you certainly remember two people kicking this man on a number of occasions?---Yeah.

Is that the same in relation to punches that were delivered to him?---There was the same two at the first attack and the third – can I express myself like that?

Yes?---There were three – yeah, the first and the third, it was the same two guys.

And at the gate, the shaking of the gate, that's the same two again?---The third encounter and, yeah, it was the same two guys.

28. Later in cross-examination at T90 the following further evidence was given in relation to the second incident:

What do you remember about the second incident?---I didn't mention it in the statement but there was a dog and I think somebody hit or kicked the dog. That's what I remember most about that.

So, that's what you remember of the second incident?---Yeah.

Nothing further?---No, not really. Well, I – there was – the man was attacked by someone at the second incident but I couldn't say if it was all three of them or just one or two. At this point I don't remember. But I said in the statement I think three, so it would be three then I think. (emphasis added)

29. I accept Exp5 as JM's best memory of events as he recalled them some 5 days after the event, and at a time when the events would still have been reasonably fresh in his mind.
30. It is clear from the evidence of Dion Bowdern (who was at the time a police officer and the OIC of this investigation, but is now a farmer in

Queensland) that ES did accompany JM on the second occasion to the police station as his evidence on this topic was as follows (@T76):

In terms of the statement from an ES, do you recall who that person was?---Yes, ES came along with JM, they were both backpacking. At the time they had to go back to work, I only had time to take JM's statement. We'd arranged for ES to come back for another statement but all further contact between him and the one phone number that they were sharing, fell through, he never answered any of the calls. And then later left the Territory.

Did ES ever present at the police station to make a statement at any stage?---In the initial stage with JM and I asked him to leave the station whilst I conducted a statement with JM. And then it ran a little longer than expected and they had to get to work and so I made another time with him but it never eventuated.

31. It is not surprising that having attended the police station twice to make a statement, and having been sent away both times, that ES might lose interest in returning a third time. Hence no statement was ever obtained from ES.
32. When JM gave evidence it became apparent that he was still in contact with ES (who was still in Australia) and he provided an email address for him. Mr Ledek (the prosecutor) contacted ES by email dated 13/9/10 in the following terms (ExP11):

Dear Sir,

You may be aware (through Jacob) that we have been attempting to locate you in relation to an assault you may have witnessed in August last year. We would be very interested in flying you to Darwin for the 22nd of October this year as a witness if you had evidence that shed any light on what happened that night.

Would you mind contacting us via email or by ringing either of the numbers listed below at the first available opportunity and we can discuss the steps that would need to occur before anything is organised.

33. On 14/9/10 ES replied by email as follows (also part of ExP11):

Dear Mr Ledek,

Jacob sent me an email about this week telling me that you would contact me, but I never gave my statement and I do not remember the incident.

I honestly believe that flying me to Darwin would not be worth the money it would cost. I know that you will pay for my trip there, but I do not have anything to say, I don't remember how many people were involved or how anyone looked like. I don't think I saw what really happened. But I'm not sure, I don't remember.

34. In those circumstances it is not surprising that Mr Ledek decided not to call ES to give evidence. However, if a statement had been taken at the time things may have been different. Ms Bennett (counsel for the defendant) asked me to give myself a "*Longman* direction" due to what she said was the inadequacy of the police investigation. I assume that Ms Bennett was referring to the High Court decision of *Longman v The Queen (1989) 168 CLR 79*. However, on my reading, that case dealt with the issue of the danger of convicting a person on uncorroborated evidence, and whether a warning in that regard was required. It does not appear to be relevant to the point Ms Bennett was wishing to make.
35. On this issue I have had regard to the decision of (the first) Martin CJ in the case of *Boyce v Nunn (1997) 138 FLR 475 @ 476-480*, where His Honour said:

As to ground 1, the appellant told police in an interview conducted soon after that there may have been an independent witness to the events. He referred to "a guy in the caravan park who had heard us arguing, ...". When asked where the person was who saw the events, the appellant said: "I'm not exactly sure, but he was wearing a woolly shirt and he lives in a sort of a caravan with a nice sort of an annex". The appellant did not know that person's name, but he identified, on a plan produced

by the police, a location and said "the witness lives about here". The appellant obviously thought he was going to go back to the caravan park that evening with police, and told them that he could show them where the potential witness was staying, saying: "You can talk to the bloke". One of the policeman, Constable Wessels replied: "OK. We'll do that then". Later Constable Brown said: "What I want to do is while we're there is go and find out who this guy is, and speak to him and see if he can bring us any other evidence to light. All right?" The appellant said: "OK". The police explained that they had no choice but to charge him. There was the complainant and another witness (Mrs Knight) and the interview was designed to obtain the appellant's version. Senior Constable Brown went on: "But in all fairness to you, and you know to find out what's going on, I need to speak to the guy who ...". The appellant was charged and bailed after the interview, a condition of his bail being that he was not to approach Mr Knight which effectively meant that he was not able to go back to the caravan park or perhaps even make a telephone call. Whatever transpired after the interview is not clear, but the police and the appellant did not on that evening return to the caravan park.

Only Constable Wessels was called at the trial. Senior Constable Brown was at Papunya. In cross-examination Constable Wessels said that Senior Constable Brown was the policeman in charge of the case. Constable Wessels could not remember when he went back to the caravan park looking for the potential witness, but said it was that night, or a couple of nights later, but it was only once. It was in the evening when he and Senior Constable Brown attended the site which the appellant had indicated the person may have been, but no one was there. He was not aware of enquiries being made with a view to identifying the person and as to whether or not he was a permanent resident of the caravan park. Senior Constable Brown may have conducted other enquiries, but Constable Wessels was not aware of them. He acknowledged that he knew that the appellant's case was that he was defending himself, that it would have been important to the investigations to speak to an independent witness, and that it was the duty of an investigating police officer not only to look for evidence that incriminates someone, but to look also for evidence that exculpates that person from a crime. No calling card was left requesting anyone from that particular site in the park to contact the police.

There was no evidence that the accused endeavoured to have enquiries made on his behalf nor that he communicated further with the police to see what, if anything, they had done. It was not known whether that person, if found, could give any evidence as to the events, or if so, whether the evidence would support the prosecution or defence.

In the course of submissions from the prosecutor, the learned Magistrate enquired as to whether a conviction would be "unsafe" in circumstances when, in his Worship's view, the police had not satisfactorily endeavoured to identify, locate or interview the potential witness. However, it was not suggested that either police officer should be regarded as having decided for some improper purpose there would be no further enquiry made for the person. The case was not related to the authorities regarding the exclusion of evidence, but it seems to me that the general principles lying behind those cases may well be applicable here. This ground of appeal suggests, as Constable Wessels acknowledged, that there was a duty on the police in the circumstance of this case to seek out and interview, if successful, the potential witness. It was submitted that failure to do that renders the finding unsafe and unsatisfactory. Reliance was placed upon *Wyatt v R (1990-91) 99 ALR 490* and especially what fell from Jenkinson J at pp492-3. Wilcox and Miles JJ agreed. There it was a ground of appeal that the conviction was unsafe and unsatisfactory because of the failure of police to examine scientifically the appellant's fingers for traces of the victim's blood. It had been submitted that the appellant had been deprived of the benefit of evidence which that scientific examination might have provided for his rebuttal of the victim's allegations. As Jenkinson J noted, commencing at p492, it had not been submitted that any police officer had decided for some improper reason not to suggest that the examination be made, but rather that neither they nor the doctor involved realised that the examination ought to be made. On that basis his Honour found it was not easy to subsume the argument in support of that particular ground of appeal under the principle expounded in *R v Ireland (1970) 126 CLR 321* and *Bunning v Cross (1978) 141 CLR 54*. It was simply suggested that the police inactivity had been incompetent. His Honour went on at p493:

"But, whether or not the circumstances to which attention is drawn by counsel for the appellant are analogous to some other circumstances which have been authoritatively classified in criminal jurisprudence, the

court has responsibility to consider whether the circumstances upon which reliance is placed show that there has been a miscarriage of justice. I do not understand the categories of circumstances giving rise to such a miscarriage to be closed".

Going to the circumstances of that case, his Honour proceeded:

"It may be assumed, without deciding, that a failure by a person in authority to cause to be undertaken some scientific examination of available material by means of which cogent evidence for or against a suspected person's guilt of a serious crime could reasonably be expected to be obtained might in some circumstances result in the conclusion, before trial, that a fair trial of the suspected person could not be had and, after trial, that he had not had a fair trial. Much would depend, in determining whether either conclusion should be drawn, on the actual beliefs, and on what should have been the beliefs, of the person in authority concerning the availability and the likely cogency of such evidence, and concerning the capacity of other persons - particularly persons acting in the suspected person's interest - to get the evidence which the person in authority had failed to get".

Here, there was no reason whatsoever for the police not to have believed what the appellant had said regarding the potential witness, either as to the opportunity that he may have had to observe what happened in the fight, or as to where he might be located. The caravan park was easily accessible to police, there was nothing to stop them going into the park and making enquiries. The evidence is that they did so on one occasion, but no one was home at the place to which they had been directed. There was no evidence of enquiry of those responsible as to the identity of the person or persons who occupied that site, whether or not they lived there permanently, and whether or not they had moved from the site in the period between the time when the fight occurred and the police returned. Whether Senior Constable Brown may have done more is simply not known, and the evidence of Constable Wessels, such as it was, was imprecise and not conducive to the view that so far as he knew adequate enquiry had been made with a view to trying to speak to the potential witness. As to the appellant's opportunity to do that, he had undertaken not to go back to the caravan park as part of his bail conditions,

and he was told by the police that they would make the enquiry. In my opinion the appellant was deprived by the failure of the police to make adequate enquiry of any prospect that the enquiry may have afforded evidence tending against a conclusion of guilt. In this jurisdiction, *Hallett v R (1995) 3 NTJ 1422*, the appellant had been charged with committing an act of gross indecency with a male in public and it was necessary for the Crown to establish the presence of a person who was not a party to the act. The prosecution gave particulars of the names of the persons other than the appellant and the complainants who it was alleged were present at the time of the relevant acts, but did not call any of the eight persons named in the particulars relating to some of the counts on the indictment to give evidence, and did not explain at trial the reasons for not calling those persons. Gallop J at p1442-3 said:

"That eight persons who may have witnessed what the Crown was alleging the appellant had done and yet not called to give evidence on behalf of the Crown is surprising in itself. But the absence of an explanation is astonishing. At the hearing of the appeal before this Court, counsel for the respondent proffered the explanation that the witnesses were not called to give evidence because the Crown did not have their evidence and did not know what they would have said about the Crown allegations. I agree with the submission on behalf of the appellant that this is an even more astonishing situation. It amounts to a statement by the Crown that the investigating police did not even make inquiry or investigation from the eight named persons. If that is the way crime is to be investigated then the consequences may well be that any resulting conviction of that crime is unsafe and unsatisfactory".

Although coming to the same result, it does not expressly appear that Angel J agreed with what Gallop J had said (it was not necessary for him to do so), but Thomas J said that she agreed with these reasons. The appellant in that case had denied the acts with which he was accused.

In *R v Williams (1992) 8 WAR 265* the Supreme Court of Western Australia was concerned on appeal by the Crown with the question of the admissibility of a confession made at a time when the accused respondent had been found by the trial Judge to have been drinking heavily for two days (on and off) and finding that it was probable that he had a blood alcohol

level approaching the quantity shown by the deceased, 0.417. There was other evidence of the respondent's behaviour indicating that he was affected by alcohol. The police had not sought to procure from the respondent a sample of his blood or of his breath with a view to determining whether he had in fact the level of alcohol in his blood at the time of the interview at which the confession was made. In the view of the Court on appeal, the question of unfairness arose because the respondent had been deprived of the opportunity of bringing some form of objective evidence which would assist in resolving the only issue then relevant, namely: Did the respondent make the confession in the exercise of a free choice to either speak or remain silent? That question reflected directly on the respondent's right to a fair trial (p277). The Court of Appeal was critical of the learned trial Judge because he had speculated:

"Unfairness is not to be judged by fixed rules, nor is it necessarily to be judged by the propriety or otherwise of the actions of investigating officers. It is to be judged against the effect which some evidence, or importantly in this case lack of evidence, will produce on the trial of an accused ... The respondent has been deprived of evidence which could be relevant at his trial concerning his condition at the time that the statements were taken ... the respondent has been denied the opportunity of adducing evidence which could have been readily available ...".

That was the view of the majority, Rowland and Owen JJ. Franklyn J dissented on that point.

I can discern no relevant distinction between a case in which evidence, such as a confession, had been obtained in circumstances where it was unfair to admit it (for example, *Duke v The Queen* (1989) 63 ALJR 139 at 141) and in the case where the unfairness may arise because other investigations by police had otherwise not been properly conducted, in the sense that the investigations were inadequate and for which there was no reasonable explanation or excuse for the failure. In some circumstances it may be, as suggested in *R v Wyatt*, that no injustice arises because the accused can be shown to have had an opportunity to secure the evidence for other reasons.

In this case the accused may have been in breach of his undertaking as to bail had he attempted to make enquiries for

himself to identify the potential witness and he was entitled to rely upon what he was told by the police namely, that they intended, in fairness to him, to endeavour to do that. The appellant was denied by those circumstances of the opportunity of adducing evidence which could have been available and which may have supported his defence to the charge. The appeal is allowed on that ground.

36. However, Bowdern did (on his evidence) try to chase up ES for a statement but was unable to speak to him and all his left messages went unanswered. The extent of these inquiries or when they were carried out was not “fleshed out”. Accordingly, this was not a case where the police failed to do something that they should reasonably have done. Police were aware of ES and his relevance as a witness. It appears that Bowdern was busy with other matters when ES initially attended to give a statement. There was no evidence to suggest that this was not the case, or that ES was unreasonably sent away. On the second occasion when ES attended, Bowdern could not take two statements at the one time, so he elected to take the statement of JM first. There was nothing to suggest that this was an unreasonable decision. By the time the statement of JM had been completed, ES needed to go to work, and hence the failure to take a statement off ES at this time again appeared to be reasonable. Bowdern could not force ES to miss his work and stay to make a statement. It appears that another time for ES to attend may have been arranged but did not eventuate (for reasons that were not fully explained). Thereafter Bowdern could not compel ES to answer his calls, or give a statement. Whilst it is unfortunate that we did not hear from ES, I decline to draw an adverse inference against the prosecution in the circumstances of this case.
37. BK gave sworn evidence before me. His manner of giving evidence was at times somewhat unusual. He appeared to be somewhat pedantic at times, and at other times to almost be giving his account

from a disassociated perspective. However, it must be borne in mind that it is clear (and I find) from all the evidence that on this evening he was the victim of a prolonged physical attack upon his person. As such it is not surprising that his ability to recount the events would be affected. Ms Bennett submitted that he exaggerated his evidence. However, whilst he may have over-emphasised some aspects of his evidence my impression of him was that this was more likely to be due to his particular personality and style, rather any more sinister motive.

38. In assessing the evidence I will consider the evidence relating to various distinct headings, but also generally in relation to the offending incident.

PRECIPITATING EVENT

39. The evidence on this topic comes from two sources only, namely BK and the defendant. In his evidence BK stated, in a very drawn out fashion:

I live at 54 Playford Street in Parap – T17;

I was awakened by the sound of a dog barking in back yard which is unusual, I just don't have a – you know, it's the next door neighbours dog. I – you know, you didn't take too much of it. The next moment and I don't know the length of time between the dog because I wasn't taking a lot of attention, there was a noise at the back door which sounded like my back door being tested or the screen door being tested. And very shortly after that, within, you know, we're talking seconds my dog which is sleeping outdoors was starting to bark quite – you know, fairly, how can I put it, there was an issue – T18;

I did recall the time as showing on my clock as 25 to 1 – T19;

Look I – having heard that commotion from my dog and knowing the other two incidents as I had three incidents that led me to believe there was someone in my yard – T19;

I then looked out, I could see out the – outside of my yard and just next to my gate I could see feet through, you know, just through that front fence, I could see some feet running away to my left, which is heading down towards the racecourse – T19;

Look, I was curious at who these – these were, I was convinced that there was certainly someone had been in my property. I wanted to have a look, you know, what was this? What was the episode? So, I went to the front gate, I looked through the gate, you know, I went through the gate and looked down towards Playford – the racecourse down Playford Street towards the racecourse and I saw three males running away from the – that entrance – T19;

Well, I was naked prior to getting up. Now that's the way you sleep in Darwin most. I grabbed a towel, and I – that's all I had. I wrapped a towel around my waist – T19;

Well, I was still curious about who these guys were and they looked like children to me, they – they looked quite young, so I just followed them to see, you know, who they were, where they were going. They were starting to slow down as they were running from that corner and I just followed them – T20.

40. SK did not hear any unusual noise. According to my notes she was asleep, but remembered BK getting up quickly, a dog barking and BK leaving the bedroom quickly. It seems that she may then have drifted back to sleep briefly.

41. In his EROI the defendant stated as follows:

A---Well me, Jack and Leroy were going to go to the servo to get a feed and stuff. So we started walking up and then – um – about two houses down Jack threw a rock because he was waiting for us and he was like, I don't know (inaudible) talking shit, and he threw a rock and he hit the guy's roof. So the guy – I don't know he didn't come running out straight away, we just started walking off and we got around the corner and then we heard something and we looked back, the guy was behind us with a towel on – P7.

42. The defendant's version does not sound implausible, and I am unable to reject it. It is clear that BK believed that someone had been on his

property, but I am unable to find that he was correct in that belief. What is clear is that the defendant has made the unwise decision to leave his property at 0035 hours, with only a towel around his body, to follow three unknown males.

THE FIRST CONTACT

43. Again, the only evidence of this comes from BK and the defendant. During his evidence BK referred to the three males and their positions relative to himself at the beginning and thereafter. He described the male on his left as shorter than himself (BK said he was about 5 foot 8 inches tall), slightly chubby, part aboriginal, wearing a grey hoodie or collar or something like that. I find that this person was Gallagher. He described the person in the middle as being slimmer, shorter than himself, with pointed and angular features, more aboriginal looking, with longer hair touching the shoulders, wearing a dress shirt. I find that this person was Patzwald. He described the male on his right as taller than the other two, medium set (between the build of the other two), wearing a basketball type shirt (possibly white and blue) with a logo or number on it, and white shorts. I find that this person was the defendant. In his evidence BK stated:

Okay, I was as I say, I was driven by the curiosity of who these young guys were. I called out "Hey guys" so I can get a look at their faces to see who they were. They turned around, had a look me quizzically. I'm not sure if they said something at the time or what, but they looked at me quizzically and I felt that it was probably a silly thing, I just felt obliged, I'd attracted the attention of these guys and need to continue the – you know, whatever I'd talked – I'd engaged in, I needed to continue that engagement....

.....I was across the road from there, I was probably 15 metres away from – maybe more from them and, yeah...

....it was probably a politeness thing, not a stupid thing, but ...

....I walked – I approached the three guys and I was within probably 2 or so metres from them on the other side of the road, because this is a corner of Playford Street. And I said to them, “I think you guys have just tried to break into my house”

.....The chap on my right, there were three, three young men. The chap on my right said “No, no, no, it’s not us, we’ve just been chased down the road by some other guys”. And then he said, “What are you doing out here naked anyway? You rapist – you paedophile, you – you know what. And he started abusing me quite significantly – T20.

44. In his EROI the defendant said:

and he’s like, “so who’s breaking into my house?” and we went like “we weren’t breaking anything”, he was just throwing a rock and he’s hit his roof and we heard something smash as well so it must have hit like the roof window or something. Anyway he was like – ah – “I do martial arts” and all this shit, “fuck you”, I don’t know, he chased us - P7.

45. These two versions have some similarities and some differences. BK denied referring to “martial arts”. I don’t understand when this “chase”, that the defendant referred to, is supposed to have occurred. It is, in my view, not necessary to make any specific findings at this stage of the evidence.

THE FIRST PHYSICAL CONTACT

46. Again the only evidence of this comes from BK and the defendant. BK stated:

Okay, the chap was flaying his arms and calling me rapist, paedophile and you know, and all sorts of horrible things which, yeah. And I said, “Okay”. The three were starting to circle me. The chap on my left went quite considerably to my left and the chap on my right kept on making a – quite a din of the noise. I was then kicked in the back by the chap on the left. And I said, “well hang on guys” and I – I stood back, I was getting into trouble here – T21

47. Accordingly, BK is stating that Gallagher was the one who made the first physical contact, and it is the defendant who is making the most noise. In his EROI the defendant said:

Anyway he was like – ah – “I do martial arts” and all this shit, “fuck you”, I don’t know, he chased us. We just forgot about it and then he started going off at us like shaping up and stuff, like towards the three of us and I went behind Jack and Jack pushed him from behind so that’s the start of it - P7.

48. Again the versions do not greatly differ about the first physical contact. Whether it started with a push or kick does not seem to matter that much. It came from behind BK so presumably he did not actually see whether it was a kick or not. But both BK and the defendant agree that it was Gallagher who made the first physical contact. The suggestion by the defendant that after the initial conversation “he chased us”, seems unlikely. The defendant must have been suggesting that the three moved away, otherwise there could not have been a “chase”. It wasn’t suggested to BK in cross-examination that this had occurred (namely that he had followed the three males twice) and I am unable to find that it did.
49. The defendant further suggests that it was BK who “started going off at us like shaping up and stuff”. It is to be remembered that BK is out on the street alone at 0035 in the morning wearing only a towel, talking to three unknown males who he thinks might have been trying to break into his house. Whilst BK showed, in my view, very poor judgment to put himself into this position in the first place, it would have been stupid if he had started shaping up to three unknown males, unless he had good reason to be confident about his physical abilities (and there was no evidence to suggest that he should have). The defendant’s version just sounds inherently illogical. BK did not strike me as a person who was “stupid” and I consider it very unlikely that he would have wanted to start a physical confrontation.

50. Once the physical incident started JM and SK came upon the scene at different stages. I will next consider the evidence from the initial contact until the point that BK is almost at his gate. I will then consider the evidence as to what happened after the defendant retreated behind his gate. Then I will consider the evidence as to what the defendant said his role was throughout.

FROM START UNTIL NEAR GATE

51. In his evidence (T22-25) BK stated:

Yes?---So, I'd just been kicked in the back. I could smell alcohol on the – on the guy's breath. He was that close to me. And I said, 'Hang on guys, you know, I've had a – you've been drinking. I'm okay with this' you know, I was trying to back out of this episode. It was very clear that there was intent from these three chaps in particular, the first two to my left shaping up. I was then – the man on the right was still waving his arms quite – he – very exaggerated if I can call it that and shouting profanities at me. The chap on my left then punched me in the left hand – left – well, punched me in the ear – left of my head. I was trying to back out of the situation. And then a car pulled up – hang on, how was it? A car pulled up or cars lights, I could see a cars lights to my left which is coming up Playford Street and I could see just square headlight and I knew that there was – this is a little bit of sanction for me. I can't recall whether it was me who – who gestured to the car to hey, you know, please keep your lights on me I'm in trouble here. But I think it was me who did that first, but the chap on my right also did the same thing, which is quite odd.

What do you remember that chap saying? --- He put his hands up and started gesturing to the car, 'Yeah, come on over here, we've got a rapist, we've got a paedophile here' and profanities that went on and on and on. So, and he was making, you know, trying to pass the, you know. I'm surrounded by three guys and just trying to pass off that time of – you know, something.

So, a car has arrived and its headlights are shining? --- Yeah.

It's drawn your attention, you've signalled to them? --- Yes.

Something is going on? --- Yeah.

What's happened next that you recall? --- They were approaching me, **these guys** were really approaching me quite dramatically and drastically. It was shaping up – my towel fell from my grip, because I'm trying to hold a towel and I'm trying to move back from these guys. I thought about using the towel as a flicky thing to try and keep these away. I knew that if I had you know, attempted some sort of defensive action that I would be mincemeat, the intent – the intention was so intense. I turned and ran to get away, these guys ran with me, **the three of them** ran with me in the same order, it's strange, but they were in the same order as they – we initially met. They caught me on the opposite side of the road, which is you know, from one side of the road to the other and I was pushed over by the chap on the left, the heavier set guy. And punches were thrown in quite a – how can I put it, a flurry, a very large flurry of punches and – and kicks, whatever they could do, there were pushing me down and kicking.

And this was the point at the other side of the road - - - ?---
Correct

From where you initially had the confrontation? --- This would be 10, 12 metres from the first start.

And do a recall who – you say, 'Pushing you down' is that what you said? --- Yeah, but the chap on – the fellow in the, you know, in the – the hoodie, I call it a hoodie, it may or may not have a hoodie, but it was clearly that type. He was coming at me and – and using his weight and the chap in the middle was punching as this guy was punching and **this guy here** was doing the same and punching as well.

All three were punching you, is this your recollection? ---
Correct.

What happened then? --- It was the case of survival of trying to get up and move and get back to my house.

So, now you're saying that you're getting up – to get up and move. What happened to you that you had to get up? --- Well, I was – I was knocked over by these chaps. And it was – I was knocked over by the chaps and I just had to get up and try and

move from wherever I could. I – in the space from that first 10 metres to the next and I'll use a light post and a power pole as a point of reference if I could, which is on the corner of my property. In the space from that first 10 metres to that power pole, I would have been knocked over two – possibly three more times.

And during that time, those two or three times that you were knocked over, what was happening to you? --- I was being punched. You know, whatever they could do in – in getting – in inflicting, you know, some sort of pain I guess is what – I don't know what their aim was obviously.

Whereabout were you being punched? ---The body, the head, the neck. I had a huge neck problem. My legs, goodness me, my legs were kicked behind at the calf of – or behind the thigh. I had a bruise this long on the back of my leg and this fat. And I can ---

HIS HONOUR: Just a sec? ---I actually measured it, I was taken aback.

So, you had your legs behind your calves, they were bruised? - --Sorry, not calves, thigh, my upper thigh.

Is this the one with the (inaudible) bruise or are you talking about the calves earlier? You said, 'Calves' and then you went to drift onto something else? --- Look, I have to correct that, it was thigh, rear thigh.

Is this the one with the (inaudible) bruise or are you talking about the calves earlier? You said, 'Calves' and then you went to drift onto something else? ---Look, I have to correct that, it was thigh, rear thigh.

On your thigh? ---But to be honest, you Honour, I had that many bruises over me it's hard to ---

Yes, I'm just trying to get your evidence down you've given already? ---Yeah.

And you described a size of a bruise and you gave hand signals? ---Mm mm.

What size was the bruise? ---320 millimetres long by – goodness, well, that – that to me is 100 mil – and – but it was

egg shaped, it was shaped with a big circle and then a longer one as well. So, there's certainly in my mind, the result of several blows to that area.

So, you told me you were punched in the body, the neck – neck and legs? --- The Back.

In the back was it? --- Yes. The neck, the top of the head, my cheek. I had a – not a dramatic black eye, but I had a – certainly a bruised eye, yeah.

MR LEDEK: And these are the injuries that you felt you sustained in that period between being first knocked down and making it to the light pole that you used as a reference, is that correct? ---Correct. I had absolutely no injuries to my body prior to that episode.

Could you tell which of those three were landing which blows? - --No, I can't specifically say which person was landing which blows, because the number of blows were significant.

You've got to the light pole, what's happened then? --- Okay, the light pole, okay, can I step – there's possibly 5 metres prior to that light pole.

Yes, please do? ---in trying to run and move away from these guys, I can picture – I have a very solid picture of a man's face in my face in my face, running next to me. That man is the man on my right who was wearing the basketball shirt.

BENNETT: Sorry, your Honour, I missed that bit of evidence could I ---

MR LEDEK: He's gone back 5 metres from the light pole? --- Yeah.

So, he's just winding back his evidence to start where he has a clear solid recollection of the man who is wearing the white basketball top? ---Correct.

Being right before you, it that right? --- He was right in front of me and it was – he was running with me in and the same formation was there for the same three chaps. As we were running next – I knew the light pole was coming up or that power pole was coming up, I needed some evasive action and I knew that I would put the power pole between myself and he

and this chap, because he was trying to push me into – back into the melee of the other two. I went to the – got to the power pole and did a dart backwards. At this time, the – the heavier chap had caught me and he again knocked me and at the same time the chap in the right hand side of me put a punch to my head.

And you saw that punch clearly as? ---Absolutely, yeah.

In terms of when you say he was in your face, how close was he to you? ---If I can gesture and – and I'm holding my hand, your Honour, to how far that was and if I measure that 500 millimetres, something like that.

After that blow, what happened then? ---It was again a matter of trying to get up and get away from what was happening to me. The – I had my head down and was – my whole, you know, arms about my head to try and stop the blows to my head. The – and I didn't realise that it – who it was at the time, but a person came into me and I have – I grabbed his shirt and I felt it rip – rip – yeah, I felt it rip. I saw who I – which shirt I'd ripped and there a – it was an angular face, the person that was in the – the middle of me all way through, it was the shorter and the slighter build of those. So, he – I've ripped his shirt, he punched me again, you know, at that time, because I knew that one. And the chap to my left and again I come back, they kept the information, the chap to my left said to my wife who was – she didn't reply to that. He then kicked the dog, the same dog that was barking, the same chap. And I can't recall exactly next, but it – I ended up on the ground again and this time I was between that light post and my front gate, so that is approximately 10 metres from that light post. I was on the ground on all fours absolutely exhausted. I called out, I said, 'Okay, guys, enough is enough'. I had my head down and at that time I received a particularly nasty and heavy blow to the head, which had resulted in this scar at the top of my head.

MR LEDEK: The witness is indication the scar on the front right scalp?

HIS HONOUR: I'm going to take notes and catch up? ---Sorry.

I'll try and get the notes and then I'll try and work out where he's talking about. I don't take shorthand, I'm trying to do the best I can? ---Sorry, your Honour, I can slow down, but it's a little emotive if I can call it that.

I understand that. You're indicating where you had the scar? ---
Yeah, that scar at the top of my head there.

So, it's to top right of forehead where the hairline would have been. No offence, but about where the hairline would have been? ---Right, it's been a while. I then had blood it started to gush down my face and if I can call it. (emphasis added)

52. Accordingly, BK stated that it was Gallagher who made the first physical contact (a kick to his back) and who also delivered the first punch (to the left side of his head). Thereafter, he was not generally able to be specific as to who delivered what kicks and what punches (which is not surprising). As to any specific memory of the defendant's actions he noted:

in trying to run and move away from these guys, I can picture – I have a very solid picture of a man's face in my face in my face, running next to me. **That man is the man on my right who was wearing the basketball shirt.**

BENNETT: Sorry, your Honour, I missed that bit of evidence could I ---

MR LEDEK: He's gone back 5 metres from the light pole? ---
Yeah.

So, he's just winding back his evidence to start where he has a clear solid recollection of the man who is wearing the white basketball top? ---Correct.

Being right before you, it that right? --- He was right in front of me and it was – he was running with me in and the same formation was there for the same three chaps. As we were running next – I knew the light pole was coming up or that power pole was coming up, I needed some evasive action and I knew that I would put the power pole between myself and he and this chap, because he was trying to push me into – back into the melee of the other two. I went to the – got to the power pole and did a dart backwards. At this time, the – the heavier chap had caught me and he again knocked me and at the same time the chap in the right hand side of me put a punch to my head.

And you saw that punch clearly as? ---Absolutely, yeah.
(emphasis added)

53. From my notes, SK stated that after BK had left the bedroom she woke up a bit later and realised that he had not returned, so she decided to go and see where he was. She couldn't find him in the house so she looked outside. She looked out the gate but couldn't see anything, but she heard yelling from her left so she started walking down that way. As she got closer she heard male voices aggressively yelling but she could not make out the words. She then described what she saw as follows:

I saw BK.

He was naked.

He was surrounded by three young men who were yelling and swearing at him and punching and kicking him.....and every time he got up they'd punch and kick him down.

All three were punching and kicking.

They all corralled around him.

I think I saw BK go down about 3 times from there back to the house.

It was quite frenzied.

They were calling out "fucking paedophile", "fucking rapist", "fucking cunt", "fucking white cunt".

BK didn't have a chance to do much. He was just trying to get back to his house.

BK was trying to say something but he'd get dropped before he finished.

I didn't see BK throw any punches.

Every time BK got up they'd swear in his face and punch and kick him again.

At one time BK stood up around the lamp post and they “mish-mashed”....still attacking him around the lamp post.....the lamp post got in the way.....the dog got in the way and got kicked....it was like a frenzied fight.

BK got kicked a few times.....he got a really good kicking and boxing at the lamp post.....he got a really good kick to the face, but can't say who by.

They were all over him.

The three of them did all the physical stuff.

The defendant was involved in kicking and punching....but I can't say who did which.....it was quite frenzied.

(and in XXN)....Patzwald was the one who was the most verbal and the most vicious....but **they were all blameworthy.....they were all very involved....all three attacked him....at the lamp post I remember the defendant closing in and joining in.....I remember him using his body to join in.....the defendant was the more physically intimidating.....I think the defendant gave the punch, I can't say if he delivered the kick.....Patzwald was in BK's face and the other two would back him up and circle him and drop him. (emphasis added)**

54. I find that this evidence (particularly concerning the defendant's actions) is generally consistent with the evidence of BK. In his cross-examination JM also volunteered that he had a memory of “there was a dog and I think somebody hit or kicked the dog” – T90. BK also referred to the dog being “kicked” as well, and so all three had the same memory.
55. SK did not attribute the verbal abuse to any one in particular of the three males at this stage.
56. In his statement (Exp5) JM stated:
 2. I have been in Australia for approx 2 months. I have travelled here from Sweden. I am also an Australia citizen. On Thursday the 13th of August 2009 at about 12.30pm. I was driving in my

White Ford Econovan with my friend Emanuel STRAM. We both had just finished working at McDonalds on Bagot Rd.

3. As I was driving to a house in Wells Street in Parap where we are staying at the moment with a family. We have been there for about a month now. As we drove towards Wells street I heard some one shouting out. I looked over and saw what I thought was a man wearing orange shorts but it was a towel.

4. The man was shaking his finger like he was telling some one off or something. I didn't see who he was shaking his finger at as the other people were out of sight behind a fence.

5. I was about 25m away from the make when I saw him. It was pretty dark so I couldn't see very well because the lights of the vehicle were not on the people as I was turning around a corner at the time.

6. I heard some one shouting for help it sounded like several people. They were saying, "help" and "stop". I stopped the vehicle in the middle of my turn and reversed so the lights were now pointing on the people.

7. I could see three young men and one was wearing a grey hoodie and another man had a black hoodie and the third man had a black baseball style cap on. One of the males had shoulder length curly hair.

8. At that point the man in the towel backed back into the middle of the street. The three males charged into the street after the male with the towel.

9. Two of the males seemed pretty aggressive and began hitting and kicking the male in the towel the third male looked as though he was staying back. The fight progressed to the other side of the road and the male with the towel hit the ground. The male then lost his towel and was now naked. Emanuel and I started yelling out at the three males to break it up. We couldn't call the Police as we didn't have our mobile phone.

10. I saw the male with the towel get up from the ground and start running towards the direction where we live. I again saw the male get kicked and hit by the three guys. I drove my van towards the three males in an attempted to scare them off. We didn't know who the bad guys were or the good guys were at

that point. The male got up continued to run away into a yard and closed the gates at the front of the house. One of the males then charged the gate trying to kick or hit it. (emphasis added)

57. The defendant in his EROI had a different version. It is clear that the defendant asserted in his EROI that apart from one “glancing” blow from Patzwald to BK the rest of his “friends” actions were only “pushing”, “shoving” and “wrestling”. He stated as follows:

.....and I went behind Jack and jack pushed him from behind so that’s the start of it.

Q---Okay.

A---yeah, Leroy started like swinging at him and stuff and the guy was swinging back too, punched Leroy in the head, like on the side (inaudible but something about “shoulder”) and then – um – yeah, started wrestling from there and – um – his wife came out and I – I said – I lied to her and said, “oh, we’ve already been assaulted and stuff, can you tell your husband to go away”, and I was trying to make her to tell him to go away, like leave us alone.

Q---Yep.

A---(inaudible) and, yeah, started going all the way back to that guy’s house and they started wrestling on the road and shit. All I did once was I ran up and pushed them both out of the way like I was trying to stop it, I ran up and pushed everyone, and, yeah that’s all I really done, and then he went in his gate and the boys kept running and booting his gate while his wife was there. (P7-8)

.....

A---Yeah, two hands.

Q---And whereabouts did---

A---But he didn't fall over or anything.

Q---Yep. How – where did he push him, in the – in the shoulder area, the lower back---

A---Yeah, the shoulder. He was trying to – trying to charge us, like – ah – I don't know it was like charging us one by one.

Q---Yep.

A---Yeah, it was pretty weird.

Q---Okay. So then – um – Jack's ---

A---And then his towel fell off and shit too so Leroy started freaking out a bit, it was pretty weird.

Q---Leroy started freaking out?

A---Yeah.

Q---What do you mean freaking out?

A---“Oh you fucking rapist”, he thought that he was going to rape him or something. (P9)

.....

A---And jack pushed him into Leroy sort of so Leroy didn't know what to do and he started swinging.

Q---Okay.

A---But he was drunk like, he didn't really follow through with anything, you know.

Q---Who was drunk?

A---Leroy.

Q---Yep.

A---He was just swinging everywhere.

Q---Yep.

A---And his towel fell off and the guy was like coming towards Leroy with no towel.

Q---Yep. So how many times did Leroy swing punches at him?

A---About three times.

Q---About three punches you saw?

A---Yeah.

Q---Did he make contact with any of the punches?

A---I think one – ah – but it sort of grazed him.

Q---Yep. (P10)

.....

A---Ah – they just started wrestling and shit on the road all the way to his house.

Q---So who was wrestling?

A---Jack and Leroy with the guy.

Q---They were both---

A---Yeah---

Q---Having a go at this bloke?

A---Yeah.

Q---Yeah, okay. Were they throwing punches while this was happening?

A---It was like – they was just kind of pushing and shoving and shit.

Q---Yep.

A---Coz the guy wouldn't let go of Leroy's shirt. (P11-12)

Q---So he had – ah – his hands full so he wasn't able to throw any punches or do anything like that?

A---I don't know, but Leroy had a big fucking lump on his temple and he was going on about it all the time.

Q---Yep.

A---He must have got one in on Leroy.

Q---Yep. Did Lee- Leroy or Jack fall to the ground at any stage?

A---Yeah, Jack fell over like once or twice.

Q---Yep.

A---I'm not sure about Leroy.

Q---What about – ah – this male, how many times did he fall over?

A---I saw him once on the grass near his house.

Q---Just once?

A---Yeah, just once.

Q---And then – um – he’s made it back to his house. (emphasis added)

58. The defendant made no mention of any van or motor vehicle lights being there at any time during the incident. He was specifically asked about who else was there and he said the following:

Q---Was there any other people around that you saw?

A---Just a lady, just his wife.

Q---Just his wife?

A---Yeah.

Q---okay. You didn’t see anyone else around at all?

A---Nup. Oh, until got like to Jack’s flat and the girls were there that’s all. (P14)

59. Yet on BK’s evidence it was the defendant who was calling the car to come closer.
60. According to the defendant the only punching occurred at the very beginning, and was one punch by BK that connected to Patzwald’s head and three punches by Patzwald with only one connecting to BK, and that was a glancing blow. BK has indicated that it was Gallagher who delivered the first punch, but I don’t think that this matters much in the overall scheme of events. Thereafter, on what the defendant said in his EROI there was only “wrestling and shit” or “pushing and shoving and shit”. What he meant by “and shit” remains unexplained. It is clear, in my view, that the defendant was asserting in his EROI that there were no punches from himself or Gallagher at any stage, and that there were only three initial punches from Patzwald (of which only one connected). Further, he is clearly asserting that BK only went to ground on one occasion. The defendant makes no reference to any kicks being delivered by anyone at any stage.

61. This version is contrary to the evidence of BK, SK and JM. Whilst there are some differences in their evidence (which is to be expected when observing a fast moving incident involving multiple blows) all three describe multiple blows and multiple kicks being delivered to BK until such time as he was able to retreat behind his gate.
62. In addition to this evidence a number of photographs of BK were tendered:
- ExP1 showed a head and shoulders view of BK. He had an open wound on the top of his bald forehead, with blood down his forehead, eyebrows, nose, mouth and chin;
 - ExP2 showed the inner right thigh area of BK's leg. There was a large area (about 2/3 of the thigh length) of obvious bruising which could well have come from more than one blow;
 - ExP3 showed the top of BK's head. There was a large gash which was closed using some 7 sutures, and an area of open abrasion to the left (as in closer to the left ear) of it;
 - ExP7 comprised of 5 photos of BK. Photos 1 and 5 showed the treated gash with a bandage over it, and the open abrasion (shown in ExP3) with some gauze over it. Photo 2 showed abrasions to BK's left and right knees. Photo 3 showed abrasions to BK's left elbow. Photo 4 showed a large area of abrasion to BK's left outer buttock area.
63. In addition, a medical summary dated 13/8/09 by Dr Siau came into evidence as ExD1, and also formed a part of ExP10. In this document the doctor noted (in relation to complaints and observations):
-He complained of pain in his left knee, left upper thigh and was bleeding from a head wound.

He has a 7cm laceration to his frontal scalp, with a superficial abrasion nearby. There were multiple minor abrasions on his right flank, left upper outer thigh and left knee.

64. I find that these injuries were all received by BK as a direct consequence of the assault upon him, and that before this assault he had no marks, bruises, cuts or injuries to his body. In his evidence BK also referred to having “ringing in his ear”, but on the evidence I am unable to find that this was as a result of the assault herein.
65. I find that the injuries received by BK are not consistent with the version of events put forward by the defendant in his EROI. I find that considerably more must have happened to BK than the defendant stated. I am unable to accept what the defendant said in his EROI as being an honest and truthful account of what occurred on this occasion. It is clear, and I find, that he has deliberately sought to downplay the actual physical contact made with BK. Whether these untruths were to protect Gallagher and Patzwald, or whether they were also to protect himself remains a live issue.
66. By way of comparison, the versions of events by BK, SK and JM are generally consistent with each other and more easily able to explain the multiple injuries that BK received. I note that it is not the role of the court to prefer one version to another (where they conflict), but to be positively satisfied beyond all reasonable doubt that certain acts did occur. I reject what the defendant said, in his record of interview, occurred in the physical altercation. It is contrary to the other oral evidence in the case, and is contrary to the objective evidence (photos and medical report) as to the injuries that BK actually received. I will turn to my ultimate findings of fact later in these reasons.

BK GETTING TO HIS GATE

67. In his evidence BK said:

Right, it's been a while. I then had blood it started to gush down my face and if I can call it – I took a flight of adrenalin and bolted the next 8,10 metres into my gate – T25

68. As noted above, JM in ExP5 stated:

The male got up continued to run away into a yard and closed the gates at the front of the house. One of the males then charged the gate trying to kick or hit it.

69. My notes of what SK said in her evidence do not reveal if she said anything about how BK proceeded into his gate. She did make it clear that BK was trying to get back to his house but he was continually set upon by the three males. Accordingly, it would be inconsistent with this picture if BK at some stage “calmly just walked off”.

70. However, this is what the defendant stated in his EROI, where he said:

Q---When his towel fell off how long was he still standing there before he tried to get back home?

A---Um – I don't know he was – he wasn't in a like a real rush to get home.

Q---Mm.

A---I think he was just trying to get back at us a bit---

Q---All right---

A---before he goes home.

Q---And did he run off, walk off?

A---He calmly just walked off, but he jogged it at the end through his gate like and he then went inside and then the boys started kicking his gate and stuff. (P33) (emphasis added)

71. It is clear from the EROI that the defendant is suggesting that the defendant “calmly just walked off” before “jogging in at the end through his gate”. Given the violent nature of the incident, and the injuries BK received I consider this version of events to be so implausible that I cannot accept it. It is clear from all the evidence (even what the defendant said in his EROI) that from the early stages the defendant was trying to make his way back to his property but there was ongoing physical confrontation with (some or all) of the three males, of which the defendant was one. Even after he got to his gate there was physical and verbal aggression shown (by either 1 or 2 of the 3 males) towards BK. It is also clear on the evidence that BK was bleeding heavily from a head wound that was caused before he made his final effort to get inside his gate. In all those circumstances it would be bizarre, in my view, if with all that occurring BK “calmly just walked off”. I am unable to accept this as true, and reject it.

AFTER BK BACK IN HIS YARD

72. BK stated at T25-26:

What happened next? ---Then it ended up as **two of the chaps were rattling and pushing on this gate.**

Which of the two of the three? ---Okay.

That you first described were they? ---Okay, the two were the angular faced chap and the chap with the hooded top. Well, I call it a hooded top, as I say with qualification. They overpowered my efforts to hold back the gate. The angular faced chap made his way into the property. The hooded fellow stayed outside the property. The third chap was on the road.

What happened next? ---Okay, I had blood as you can imagine streaming down my face. This – this was seriously the last stand in my mind. I bellowed out and – and made a stand about 5 metres inside my property and behind my parked car. I – I

pointed to the ground and said, 'This my place, this is my place'. And I bellowed that out from the deepest part of my lungs I could get. To which the angular faced chap saw that he was by himself, he saw he had no – you know, he looked around, he saw there was no one there with him. I must have looked like a – a – you know, quite a warrior if I can put it that way, had he turned and – and bolted out the gate.

Was anything said as he left? ---He didn't say anything, I don't think any more was said by him. Nothing was said by the other one.

Who is that? ---The – the heavier build chap with the grey hooded top on. And there were other people out on the road at this point, I don't know how many, but I know that there were other people out there.

What happened next? ---I ran to my cordless phone and grabbed that and dialled 000 and ran back out to my back yard though the back door. (emphasis added)

73. It is clear that BK was indicating that the defendant was not one of the two who were involved at the gate.

74. My notes of what SK said on this topic were:

I remember BK getting back and trying to get behind the gate...I didn't want to go into the gate as I didn't want them to know where I lived....BK was through the gate and **one of them** was attacking him through the fence....I went into the neighbours and called for help....at the gate the one with shoulder length hair was more fierce and attacked him through the gate.....**two stood back** and continued up the road....

The one at the gate was saying: "fucking cunt", "fucking white cunt", "fucking Paedophile".

BK said "I'm on my property now....get out".

The latch on the gate somehow got ripped out....there was quite a fight at the gate....BK was trying to push them out....quite a lot of blood on the gate....the incident at the gate took maybe 5 minutes.

I was still watching and calling up to the neighbours....I was about 4 to 5 metres away.

The fellow backed off.....and **they** walked off up the road.

One of them said “you’ll piss in my blood” or something like that. (emphasis added)

75. It appears from this that where BK is describing 2 persons at the gate, SK is only describing 1, and that appears to be Patzwald. However, SK also was calling out to the neighbours for help, so her attention may have been elsewhere. She did refer to BK trying to push “them” out.

76. JM in his statement said:

The male got up continued to run away into a yard and closed the gates at the front of the house. One of the males then charged the gate trying to kick or hit it. (emphasis added)

77. Again only 1 person is allegedly involved at the gate, so this is consistent with SK’s version. Yet in his oral evidence (as noted earlier) he referred to two being involved at the gate with BK.

78. In his EROI the defendant was adamant that neither Patzwald nor Gallagher entered BK’s property. He described the interaction as follows:

Q---And then – um – he’s made it back to his house.

A---Yes.

Q---And gone inside the gate. You said that – ah - Leroy and Jack were running up and kicking at the gate?

A---Yep.

Q---How were they doing that? What – what actions were they using?

A---Um – “you rapist”, “cunt” ran up and kicking it.

Q---Yep.

A---They thought he was like a proper rapist.

Q---Yep. And they just kicked at the gate?

A---Yep.

Q---What about – um – did they go inside---

A---No---

Q---the fence after---

A---no---

Q---kick---

A---No.

Q---No?

A---No. They just kicked at it like two times and then that's it.

Q---Yep.

A---They didn't go in there to his house and stuff and start bashing him or anything. (P12-14) (emphasis added)

79. Accordingly, what the defendant said is consistent with BK (that 2 were involved) and JM in his oral evidence, but inconsistent with SK and JM (in his statement where it is said only 1 person was involved at the gate). Despite that inconsistency it is not a matter that I need to resolve, as on all the evidence it is clear that whoever it was kicking and yelling at the gate (it was certainly Patzwald, the issue was whether it was Gallagher as well) it was not the defendant. By the

time BK had got back into his yard it is clear, and I find, that the defendant had no further involvement in the events. If I did have to decide it I would find that both Gallagher and Patzwald were involved at the gate, but that Patzwald was the one who was most involved. In addition, I would find that Patzwald did enter BK's yard at one stage but then left without any further physical confrontation.

80. As part of the evidence a statutory declaration of Louise McMahon was tendered into evidence, and this became ExP8. Ms McMahon is a forensic scientist who examined various items of clothing and some swabs from the scene, and then compared these with some "NISK" samples from BK, Patzwald, Gallagher and the defendant. As a result, blood of BK was found on the inside of the gate, portion of the wire of the premises, the shorts of Patzwald, the shirt of Gallagher, the shorts of Gallager, and the shoes of Gallagher. No blood of BK was found on the clothing or shoes of the defendant.
81. In my view this is not necessarily surprising given that the blow that caused to bleeding was delivered at the end, and just before BK retreated behind his gate. SK described the scene at the gate as "there was quite a fight at the gate....BK was trying to push them out....quite a lot of blood on the gate" and accordingly the people involved at the gate were the ones who were most likely to get BK's blood on them. All persons agree that the defendant was not involved at the gate.

THE DEFENDANT'S ROLE

82. In his EROI the defendant clearly stated that he had no physical contact with BK at any stage. He described his role as follows:

A---yeah, Leroy started like swinging at him and stuff and the guy was swinging back too, punched Leroy in the head, like on the side (inaudible but something about "shoulder") and then – um –

yeah, started wrestling from there and – um – his wife came out and I – I said – I lied to her and said, “oh, we’ve already been assaulted and stuff, can you tell your husband to go away”, and I was trying to make her to tell him to go away, like leave us alone – P7;

A---I was just watching, I was like the referee or whatever you want to call it. (P10)

Q---Did you do anything to try and stop your friends from – ah – continuing on with what they were doing?

A---Um – yeah, I ran up and pushed them all at once that kind of got them all off, but then they ---

Q---So who did you push?

A---Jack and Leroy.

Q---So you pushed them?

A---I only pushed them. (P11)

Q---Yep, okay. Um – you said you tried to stop the boys, you pushed them once, did you say anything else to them to stop it and leave it alone?

A--- Yeah, a few times like, “fuck, what are you doing, leave it, what are you doing?” (P16)

Q---all right. Now after you had this initial fight and Leroy has had his pocket ripped---

A---Mm---

Q---and – um – when – when Leroy’s throwing his punches, what was Jack doing?

A---Just watching until the guy started on Jack again....

Q---All right. And what were you doing?

A---I was freaking out watching like I was saying, “what the fuck, leave him alone, leave him, let’s go, hurry up, let’s go”, but they were like proper drunk, yeah. (P29-30) (emphasis added)

83. It might be argued that one portion of the evidence of SK supports the version of the defendant where he said “I ran up and pushed them all at once that kind of got them all off”. This is when the following exchange (according to my notes) occurred in cross-examination:

A---At the lamp post.....BK was one side of the lamp post and the boys were on the other side, and I remember the defendant closing in and joining in....

Q---At the lamp post you remember the defendant using his body to join in?

A---Yes...

84. However, when the evidence of SK is taken as a whole it is clear that her evidence is that the defendant “joined in” by punching and kicking BK. Accordingly, what the defendant said in his EROI on this topic is contrary to all the other evidence in the case and I am unable to accept it as truthful. To suggest that he was “like a referee” is rejected by me. SK was clear in her evidence that all three were involved in the assault, and according to my notes she stated:

There was no attempt by any of the three to stop it.

(and in XXN) if anyone had yelled “help” or “stop” I’d remember that very clearly. I’d have been very relieved.

85. I accept this evidence from SK. It makes good sense. If the defendant or anyone else had tried to stop the assault upon BK, then that is something that I would expect that SK would remember. She would have been grateful, and she would have had good reason to be. I find

that none of the three males made any such attempt. I am unable to accept this part of the defendant's EROI as truthful or honest.

86. It is clear that Patzwald, Gallagher and the defendant were completely unknown to BK, SK or JM. None of them had ever seen the others at all, and they therefore had no past history. There was no good reason for BK, SK and JM to say that the defendant was involved in punching and kicking if he was not. If the defendant truly was not involved at all in any part of the physical interaction then this would be something that would have been clear (especially to SK and JM who were able to observe from a distance). It would, in my view, be something that an observer would note. Whether it was two onto one, or three onto one is something that would be important, and something I would expect to be noticed. Once the numbers get higher the importance begins to disappear.
87. The defendant has, in my view, deliberately attempt to downplay his role. I reject his version as untrue. It is against the weight of all of the other evidence in the case.

THE DEFENDANT'S ARREST

88. In his EROI the defendant said:

Q---Um - and then what happened after you went back there?

A---Um – I went to sleep and then I got woken up by detectives.
(P15)

.....

Q---Okay. And when you got back to the flat.

A---Mm.

Q---What happened, did you speak to the girls about what happened?

A---yeah, I told them what Jack and Leroy just---

Q---You told them?

A---Yeah, I told them the story and then they started freaking out and then all these torches and they started turning off the lights and shit and I just went to sleep in the room.....like coppers were looking around everywhere for the boys, or for us... (P36).....

.....just got to sleep and a copper woke me up (P38)

89. In relation to the arrest Matthew Crichton gave evidence. At the time of the events in question he was a first class constable, but he has now left the NT Police and is currently a residential care co-ordinator for youth at risk. His evidence on this was:

....And I recall Aaron Haseman and I going to one of the bedrooms and I recall Aaron lifting up the bed and there was a person underneath the bed, a person who I know as Cameron Murray. And I was probably at the entrance to that room and the Haseman had a conversation with Murray – T69

(and in XXN)

Q---Could it simply have been the covers, inside – under the covers?

A---No, not unless there's covers underneath the bed. Because it was – what is clear in my mind is that I can picture Haseman lifting up the bed and I've got a person being under that bed, under the bed, not under the sheets, under the bed itself – T71

90. Aaron Haseman also gave evidence. At the time of the events in question he was a police officer, but he also has now left the NT Police. He is currently the self employed managing director of a business in Brisbane. His evidence was:

Q---Now, you say – where exactly did you find Mr Murray in that bedroom?

A---He was hiding under the bed.

Q---What type of bed was it?

A---It was a double bed from what I recall, just a – I can't recall actually in regards to what the description of the bed was like, but I do recall it being a double bed. I can't really give you any further details.

Q---How did you come to notice him actually being in the room?

A---Well, we just – we were looking, we were obviously searching the premises after getting consent from the owner or the occupier. And I looked under the bed and Cameron was under there, so.

Q---Did he come out from under the bed voluntarily?

A---Yes – T72-73

91. In cross-examination of Haseman it was not suggested to him (as it had been to Crichton) that he might be mistaken and the defendant was not “under the bed” but rather just “under the covers”.
92. I am unable to accept as true what the defendant said in his EROI about being asleep at the time police found him. On the contrary I find that he knew the police were looking for him and he was hiding from them under a bed when he was located. Why would the defendant tell an untruth in this regard? One possible explanation was that he was trying to create the impression that he had done nothing wrong and therefore went to sleep. In reality, he was hiding and seeking to avoid being located by police. However, I do not believe that the evidence is such that I can infer a “guilty mind” in relation to the events the subject of this charge. The defendant may have had other reasons (unrelated to this charge) for not wanting to be located by police.
93. Ms Bennett sought to highlight that BK had told the doctor at the RDH that he “had a home invasion”. He volunteered that in his evidence in chief as well. It is clear that no “home invasion” actually occurred this

night, and BK's own evidence clearly shows this. Why he might have used the term at all may be a reflection of his personality. It is clear that in BK's mind the incident started when he believed that he heard someone "trying" his back door. BK thought that someone was trying to get into his home, and this appears to be what he has then interpreted as a "home invasion". I attribute any unusual aspects of BK's evidence to his particular personality and style. I generally found him to be an honest witness who was doing his best to recount what was a very difficult event for him.

94. Likewise I accept SK and JM as honest witnesses doing their best to recall the events. It was a very action packed event that took place over quite some distance as it moved back towards BK's property. But I am unable to accept the defendant's version of events as being generally honest for the reasons noted above. Whilst there is the thread of truth running through it, he has (in my view) deliberately lied about what he, Patzwald and Gallagher actually did to BK.
95. Based upon my above observations and findings I make the following findings of fact beyond all reasonable doubt:
 - At about half past midnight on 13 August 2009 BK and SK were asleep in their home at 54 Playford Street in Parap;
 - At that time the defendant was walking along Playford Street in the company of Leroy Patzwald and Jack Gallagher;
 - BK was woken by the sounds of a barking dog, and he then heard a noise which he interpreted as his back door being "tested";
 - BK (who was naked) got up quickly and looked outside and saw through his fence feet moving quickly;

- SK was aware of BK getting up but took little notice;
- BK put a towel around himself and went out to investigate;
- BK decided to follow “the feet” to try to find out who the persons were, so he walked up the road;
- BK observed three young males (being the defendant, Patzwald and Gallagher) and he called out to them and then approached them;
- SK awoke again and noticed that BK had not returned to bed, so she got up to look for him;
- BK accused the three males of trying to break into his house, which was denied by the males;
- The defendant noticed that BK was wearing a towel and started accusing (in a loud voice) BK of being a paedophile and rapist etc;
- SK went to her gate but couldn't see anything, but she heard loud male voices coming from her left so she walked in that direction to investigate;
- At no time did BK provoke, invite or challenge any of the three males to a physical altercation;
- As BK was talking to the three males they spread out around him and Gallagher (without provocation or warning) struck him forcefully in the back, causing him to move forward, and BK was then struck him to the left side of his face either by Patzwald or Gallagher;
- BK began to back away from the three males onto the roadway;

- At about this time JM and ES arrived on the scene in a motor vehicle, and BK and one of the males (the defendant) called out to JM and ES;
- All three males (including the defendant) then charged onto the street after BK, and Patzwald and Gallagher began to punch and kick BK in a flurry;
- The defendant was not initially involved but pursued BK and did nothing to stop or discourage Patzwald or Gallagher in their actions;
- It was around this time that SK came on the scene and was able to observe the events;
- The assault continued and the defendant joined in the assault;
- BK went to ground several times, and each time he did he was further punched and kicked (by all three males, including the defendant) while he was on the ground;
- The defendant freely joined in on the assault of BK after it had commenced and also landed punches and kicks on BK when he could but Patzwald and Gallagher remained the principal aggressors throughout;
- During the assault BK lost his towel;
- BK was knocked and punched and pushed to the ground about 3 times during the ongoing assault;
- BK was at all times trying to get away from the assault and get back to his property, but Patzwald, Gallagher and the defendant continued the assault upon him;

- Near a lamp post and when BK was on all fours on the ground he received a forceful kick to his forehead from one of the three assailants which caused an open wound and significant blood flow;
- BK was eventually able to escape back to his yard;
- The defendant ceased his involvement from this point;
- That apart from ceasing his involvement, at no time, by words or actions, did the defendant try to stop or dissuade Patzwald or Gallagher from assaulting BK or from continuing with such assault;
- BK was trying to shut his gate but Patzwald, and Gallagher were kicking out at the gate, abusing BK and still trying to continue the assault;
- Patzwald was able to force his way into BK's yard, but upon realising he was without back-up he departed;
- The three offenders then returned to a unit on Hudson Fysh Avenue;
- Patzwald and Gallagher departed for elsewhere, but the defendant remained at the unit;
- The defendant became aware that police were searching the area near the unit with torches;
- Police requested permission to search the unit, which permission was granted;
- The defendant was found hiding under a bed in the unit;

- The defendant was hiding in an attempt to avoid being found by police;
- Whilst Patzwald and Gallagher were the ones who started the assault and continued it all the way through the defendant freely joined in during the assault and intentionally delivered some (more than 1) punches and some (more than 1) kicks to BK, but the evidence does not enable me to be more precise as to the number;
- The assault was unlawful, as it was without authorisation, justification or excuse – *section 1 of Criminal Code*;
- When the defendant joined in on the unlawful assault he did so with the intention of joining the common intention (which was shared with Patzwald and Gallagher) of assaulting BK – *section 8 of Criminal Code*;
- Even if I am wrong in relation to a common intention to unlawfully assault BK, I find that the defendant also intentionally aided Patzwald and Gallagher in that regard – *section 12(1) of Criminal Code*;
- That because of the nature of the unlawful assault and the fact there were at all times at least two and for some (not minor) part of it three males assaulting BK he was unable to effectually defend himself;
- At no stage did BK punch or strike any of the three assailants;
- At one stage during the unlawful assault BK was able to grab the shirt of Patzwald and the pocket of the shirt was ripped off;

- As a result of the unlawful assault BK suffered harm (as per ExP1, ExP2, Exp3, ExP7 and ExD1 as more fully described above) – *sections 1 & 1A of Criminal Code*;
- The harm (in particular the open wound to the forehead) was a physical injury that interfered with BK's health.

96. I therefore find the defendant guilty of charge 1 and each of the two circumstances of aggravation. I will hear prosecuting counsel on any matters relevant to sentencing, and then defence counsel.

97. As a consequence of being found guilty after a fully contested hearing (in which I have found significant portions of what the defendant told the police in his EROI to be untrue) the defendant is not entitled to any discount in that regard.

Dated this 22nd day of November 2010.

Daynor Trigg
STIPENDIARY MAGISTRATE