

CITATION: [2014] NTMC 02

PARTIES: POLICE

v

DEREK JAMES TASKER

TITLE OF COURT: Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 21228782

DELIVERED ON: 5 February 2014

DELIVERED AT: Alice Springs

HEARING DATE(s): 5.12.13 & 6.12.13

JUDGMENT OF: Daynor Trigg SM

CATCHWORDS:

Aggravated Assault – section 188(2) Criminal Code

“authorisation” – section 26(1)(a) Criminal Code

Use of force against detainee – section 153 Youth Justice Act

Procedure when youth “at risk” – section 162 Youth Justice Act

REPRESENTATION:

Counsel:

Prosecution: Mr Robson

Defendant: Mr McBride

Solicitors:

Prosecution: DPP

Defendant: John McBride

Judgment category classification: B

Judgment ID number:	[2014] NTMC 02
Number of paragraphs:	83

IN THE COURT OF SUMMARY JURISDICTION
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21228782

[2014] NTMC 02

BETWEEN:

POLICE
Complainant

AND:

DEREK JAMES TASKER
Defendant

REASONS FOR DECISION

(Delivered 5 February 2014)

Daynor Trigg SM:

1. This matter has an unusual history. At all material times the defendant (hereinafter referred to as “Tasker”) was working in the area of youth detention. He had been employed with the Department of Justice (through various bureaucratic name changes) for some 16 or 17 years by the time he gave evidence before me on 6 December 2013. He commenced as a casual youth worker, and worked his way up to Acting Officer in Charge of the Alice Springs Youth Detention Centre. He apparently chose not to apply for the substantive position when it became available, and is currently the escort and training officer with youth justice in Alice Springs.
2. In the course of his employment he had undergone “professional assault response training” (PART) which he undertook every 3 or 4 years. This was a 3 day in-house training course, and this year Tasker qualified as an instructor in PART.

3. Dylan Voller (hereinafter referred to “Voller”) was a youth who was born on 24 September 1997. He is currently 16 years of age. Voller was first detained in youth detention in October 2009 when he was 12 years of age. Tasker was the admission officer for this first admission, and had regular daily dealings with Voller thereafter each time he was at Aranda House (which appears to have been fairly regularly thereafter). In addition, Voller has spent time detained in Darwin in Don Dale.
4. On 9 December 2010 (when Voller was 13) he was again being detained at Aranda House in Alice Springs. Whether this was on remand or under sentence was not clarified in the evidence before me. On this day Voller made a complaint that he was unlawfully assaulted by Tasker, and this complaint was passed onto police.
5. Senior Constable Darren Cox was the initial officer in charge of this complaint and he commenced his investigation either that day or the following day. Cox interviewed Voller to ascertain what the allegations were, but he ceased the interview when Voller disclosed that just prior to allegedly being assaulted by Tasker, he had spat on another member of staff named Knispel. Cox determined (correctly in my view) that as Voller had made admissions to the commission of an unlawful assault it was prudent not to continue with the interview as Voller would himself need legal advice, in relation to his rights.
6. Cox stated in evidence that he had several dealings with Voller over the years, and prior to 9.12.10 he knew that Voller had a history of spitting particularly on staff when in detention. There were quite a large number of incidents he was aware of, but he couldn’t put a number on it.
7. Cox said that he tried to get CCTV footage of the incident from Barry Clee (hereinafter referred to as “Clee”), but he couldn’t get it, but why

this was so was left unexplained (even though Clee gave evidence before me). Cox said that he was subsequently informed by Constable Jeremiah that Voller did not wish to pursue the complaint. When Voller gave evidence he could not remember whether he ever told police this or not. Cox said that despite this he continued to try and get the CCTV footage for several months after this without success. He eventually closed the investigation when he was told that the CCTV footage had supposedly been lost.

8. Subsequently the investigation was re-opened in February 2012 when the Children's Commissioner sent a copy of some CCTV footage to police, having apparently received it as part of an email at some time prior to this. Who this email was from, or how this CCTV footage came to be created or preserved was not canvassed in the evidence before me.
9. On 13 November 2012 Tasker was charged on information, that:

On the 9th December 2010

At Alice Springs in the Northern Territory of Australia

1. Unlawfully assaulted Dylan Voller:

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 Dylan Voller suffered harm
- (ii) That the said Dylan Voller was under the age of 16 years, namely 13 years old and the said Derek James Tasker was an adult

- (iii) That the said Dylan Voller was unable to effectually defend himself due to age and physique

Contrary to section 188(2) of the Criminal Code.

10. This charge first came before the court on 17.1.13, when the matter was adjourned and a fresh summons was ordered to be issued. On the next appearance on 14.2.13 the summons must have been served as Mr McBride appeared for Tasker and indicated a plea of not guilty, so the matter was listed for a contest mention. At the contest mention date of 11.4.13 the matter was set for hearing for 1 day on 31.5.13. The hearing was subsequently allocated to be heard by myself.
11. After the matter was set for hearing Tasker voluntarily attended upon police and took part in an electronically recorded record of interview (EROI) on 28 April 2013, when he was under no obligation to do so, and no adverse inference could have been drawn against him if he did not do so.
12. On 23.5.13 the matter was re-listed at the request of the DPP as apparently an issue as to the admissibility of the CCTV footage had arisen, such that a search warrant may be required. Accordingly I vacated the hearing date of 31.5.13 and re-listed the matter for hearing on 22.7.13 before myself. On 19.7.13 the matter was again re-listed at prosecution request and I was advised that the DPP were not proceeding with the charge. Accordingly, I granted leave to withdraw the charge, discharged Tasker and vacated the hearing date. I was informed by Mr Robson (counsel for DPP) that the charge may be re-laid if a copy of the CCTV footage in admissible form was located.
13. On 27 September 2013 a charge was re-laid on information in the same wording as the charge that had been withdrawn on 19.7.13. This

new charge was later listed for hearing before me on 5 and 6.12.13. Tasker pleaded not guilty to the charge and the hearing proceeded to finality on those days. I then reserved my decision, which I now deliver.

14. It is clear that Tasker has been aware of the allegation against him since the 9th day of December 2010, and accordingly has had this matter potentially hanging over his head (on and off) for over 3 years.
15. It is clear from all the evidence that Tasker admits that he assaulted Voller on 9.12.10 (an assault being the direct application of force to Voller without his consent, as defined in section 187 of the Criminal Code) but denies that the said assault was unlawful.
16. Pursuant to section 26 of the Criminal Code:
 - (1) An act, omission or event is authorized if it is done, made or caused:
 - (a) in the exercise of a right granted or recognized by law;
 - (b) in execution of the law or in obedience to, or in conformity with, the law;
 - (c) in obedience to the order of a competent authority whom the person doing, making or causing it is bound by law to obey, unless the order is manifestly unlawful; or
 - (d) subject to subsection (3), pursuant to authority, permission or licence lawfully granted.
 - (2) Whether an order is or is not manifestly unlawful is a question of law.
 - (3) A person cannot authorize or permit another to kill him or, except in the case of medical treatment, to cause him serious harm.

17. Section 153 of the Youth Justice Act states:

(1) The superintendent of a detention centre must maintain discipline at the detention centre.

(2) For subsection (1), the superintendent may use the force that is reasonably necessary in the circumstances.

(3) Reasonably necessary force does not include:

(a) striking, shaking or other form of physical violence; or

(b) enforced dosing with a medicine, drug or other substance;
or

(c) compulsion to remain in a constrained or fatiguing position; or

(d) handcuffing or use of similar devices to restrain normal movement.

(4) However, if the superintendent is of the opinion that:

(a) an emergency situation exists; and

(b) a detainee should be temporarily restrained to protect the detainee from self-harm or to protect the safety of another person, the superintendent may use handcuffs or a similar device to restrain the detainee until the superintendent is satisfied the emergency situation no longer exists.

(5) If the superintendent is of the opinion that a detainee should be isolated from other detainees:

(a) to protect the safety of another person; or

(b) for the good order or security of the detention centre,

the superintendent may isolate the detainee for a period not exceeding 24 hours or, with the approval of the Director, not exceeding 72 hours.

18. In addition, Regulations 70 and 71 of the Youth Justice Regulations state:

70 (1) A member of staff must manage incidents of misbehaviour in the manner the member considers most appropriate, having regard to all the circumstances, including the interests of the detainee or detainees involved and the rules of the detention centre.

(2) In the discipline or control of behaviour of detainees, a practice that is prohibited by the rules of the detention centre must not be used.

71 Reasonable physical force permitted

(1) Subject to regulation 70(2), if it is necessary to physically restrain a detainee for the protection of a detainee, other detainees or other persons, physical force may be used.

(2) The force used must not exceed force that is reasonable in the circumstances.

19. In addition, Section 162 of the Youth Justice Act states the following in relation a detainee who is “at risk”:

The superintendent of a detention centre must ensure that a detainee who is considered to be at risk of self-harm is dealt with in the manner prescribed in the Regulations.

20. Regulations 41 and 42 of the Youth Justice Regulations state:

41 Detainee at-risk

(1) If a member of staff considers a detainee may be at risk of self-harm, the member must:

(a) ensure the detainee is in view of a member of staff or a health professional at all times until:

(i) the Emergency Management Protocol prepared under regulation 42 is implemented; or

(ii) an individual management plan for the particular detainee is implemented; and

(b) notify the Superintendent or other person in charge of the detention centre at the time.

(2) The Superintendent or person in charge must immediately:

(a) refer the detainee to a medical practitioner; and

(b) implement the Emergency Management Protocol or, if an individual management plan has been formulated for the particular detainee, that plan.

42 Emergency Management Protocol

(1) The Director must ensure an Emergency Management Protocol is prepared in relation to the accommodation of at-risk detainees in an observation room.

(2) The Emergency Management Protocol must address the following issues:

(a) the observation room must be thoroughly checked for potentially hazardous or unauthorised objects before the detainee is introduced into the room;

(b) the room must be furnished with a mattress and bedding made of rip-proof and non-flammable material;

(c) continuous monitoring of the detainee by closed-circuit television, or physical observation by a member of staff, and written recording of observations (including the date, time and name of the member of staff) at intervals not exceeding 15 minutes;

(d) the detainee to be clothed in rip-proof material and all potentially harmful items must be removed from the detainee's possession;

(e) the detainee must be provided with adequate fluids and food suitable to be eaten without cutlery.

(3) The Emergency Management Protocol may address other issues the Director or Superintendent considers appropriate.

(4) The Superintendent must ensure the Emergency Management Protocol is implemented in relation to an at-risk detainee and is maintained until an individual management plan is formulated for the particular detainee.

(5) If an individual management plan has been formulated for an at-risk detainee, the Emergency Management Protocol yields to the plan.

21. A Northern Territory Correctional Services "AT RISK PROCEDURES MANUAL" purporting to be issued on 19 March 2003 was tendered in court and became Exp5. I note the following paragraphs of this exhibit as emphasised by Mr Robson:

1.4 The agency has a duty of care with regard to the safe custody of detainees and it is essential that all aspects of the "AT RISK" Procedures Manual are

complied with. Staff must note that failure to comply with the requirements of this “AT RISK” Procedures Manual will lead to disciplinary action being taken by the Agency and may, in some cases, result in criminal proceedings against staff.

6.2 This Protocol is to be implemented routinely in all cases where:

(a).....

(b) a detainee has been placed AT RISK of Self-Harm by a Youth Worker at any time after admission; and

(c) no Individual Management Plan has yet been filed.

6.3 Throughout the implementation of this protocol, Youth Workers are, as far as possible, to maintain a humane and supportive attitude in their dealings with the detainee and should make active efforts to dispel the impression that any part of this protocol is being applied for punitive reasons.

6.4 Preliminary Procedures:

(a) the detainee is to be observed continuously until placed in an AT RISK room;

(b) all potentially harmful articles (e.g., pens etc.) are to be removed from the detainee;

(c) the AT RISK room is to be thoroughly checked for hazardous and/or unauthorised items prior to the detainee being placed in the room;

(d) all the detainee's clothing is to be removed and he or she is to be dressed in a non-rip gown.....male Youth Workers are to supervise the dressing of male detainees;

(e) the AT RISK room is to be furnished with a mattress and bedclothes made of rip-proof, non-flammable material; and

(f) the detainee is to be placed in the AT RISK room as soon as the above procedures have been completed and it is otherwise safe to do so. He or she is to be escorted to the bedroom by at least two Youth Workers.

22. As the evidence unfolded it became apparent that staff had a difficulty in the instant case, as Voller may have already been in the room/cell that would be used for "at risk" detainees before he had been allegedly placed at risk. Accordingly, it would appear that staff had two options:

(1) Either to remove Voller from room 4 so that they could thoroughly clear the room in accordance with 6.4 (b) and (c), then furnish his room as required by (e), remove his clothes and re-dress him in accordance with (d), and then return him to the room as required by (f); or

(2) Attempt to undertake all these required tasks whilst Voller remained in room 4 at all times.

23. In my view, option (1) would appear to be the one which conformed best with the requirements of 6.4. From the evidence it is not clear whether there was or was not another room available to take Voller to at the time. However, it is clear from the evidence (which I will turn to later in these reasons) that Clee (who was the OIC at the relevant time) chose to proceed with option (2). Whether Clee ever considered option (1) was not addressed in evidence. Accordingly, I do not know

if Clee ever considered option (1), and if he did why he chose not to proceed with it. It may well be that Clee had good reason for taking option (2) but I don't know. Clearly, Clee is not the person on trial herein, and accordingly his state of mind would not help to decide whether Tasker was or was not guilty of the charge herein. This is not an "inquiry" into what happened, rather a criminal hearing where the prosecution must prove every element of the charge against Tasker beyond all reasonable doubt. I simply raise this to note that there are a number of surrounding facts that are left open on the evidence.

24. On the charge herein, the issues that could be alive and that the prosecution might need to prove beyond all reasonable doubt appear to be that:

(1) Either the assault was unlawful as it was not "authorised" as it was not done "in the exercise of a right granted or recognised by law" – section 26(1)(a) of the Criminal Code:

(2) Or if the use of force was "authorised" the force used on this occasion was in excess of the force that was reasonable in the circumstances and was therefore "unlawful".

25. From the way that Mr Robson (the prosecutor) opened his case, and from closing submissions it is apparent that the DPP accept that Tasker was "authorised" in the circumstances to use some force but that he used excessive force. Accordingly, the DPP have sought to rely on the second rather than the first of these two options.

26. I now turn to consider the evidence herein. Where I set out wording from exhibits I will repeat them as is, keeping any spelling or grammatical errors.

27. From the evidence it is clear that during the period from 7.12.10 until at least 10.12.10 Voller was being held at Aranda House, in Alice

Springs. However, I was not told when he was first placed into detention on this occasion, nor was I told whether he was on remand or sentence (although I note the “at risk – observation sheet” forming part of ExP4 suggests that he was on remand), nor was I told when he was either next to appear in court or due for release.

28. ExP4 was tendered in the prosecution case. These documents formed part of a bundle of documents that were allegedly produced to the court by Ken Middlebrook (hereinafter referred to as “Middlebrook”) in his capacity as Director of Correctional Services in answer to a summons to produce documents. This summons requested a number of items, and in particular:

“3. The original and complete of any “At Risk” files relating to any threat of self harm made by Dylan Voller between 7 December 2010 and 9 December 2010 and his subsequent management as an “at risk” detainee.

4. To the extent they are not included in any “At Risk” file(s) as referred to at [3] above:

(i) the original of any “Declaration of at Risk Status” form created in relation to any threat of self harm made by Dylan Voller on 9 December 2010.....”

29. I say “allegedly” because in the course of the hearing Mr Robson asked for access to the summonsed documents. I granted him access and had them passed down to him. He retained them, and they then became subsumed within the multitude of documents on the bar table. Thereafter he showed various documents to the various witness, but whether any (and if so which) of these documents came from the summonsed documents I have no way of knowing.

30. A copy of the CCTV footage from room/cell 4 on 9.12.10 was also tendered in evidence before me and became ExP1. I will return to an analysis of this footage later in these reasons, but for current purposes it is sufficient to note that (assuming the times shown on the footage are correct) the incident occurred between 20:51:36 and 20:52:36 on that date.
31. An analysis of ExP4 for the period from 7 to 8.12.10 discloses the following:
 - 1530 on 7/12 Toni Woods notes (appendix D) – “denies any thoughts of self harm currently or in past. Manipulating staff to have needs met by threatening self-harm. Wanting to share room. Advised to ask nicely and if granted, demonstrate improvement in behaviour. No grounds to continue at risk currently. Ceased 1545”

However, this note appears immediately after a note by T Jackson relating to an alleged consult at 2200 on 7/12, so presumably the date or time must be wrong.....as it makes no chronological sense.

- 1545 on 7/12 (appendix A) Toni Woods as a person from FMHS notes the “cessation of at risk status”

Again, the date doesn’t make sense as it is before the “at risk” status was declared on that form. Hence it appears that Woods may have replicated her earlier error. Also, someone (not clear who) has attempted to alter the date (not clear if trying to change 7/12 to 10/12.....which would also appear to be wrong) as well as changing the time from “1545” to “1745”.

- 2100 on 7/12 the “at risk observation sheet” (appendix C) starts with the first entry being purportedly by Knispel, stating “trying to strangle him self”

Presumably, as a matter of logic appendix C wouldn’t be commenced until a person was placed “at risk” by an appendix A document, but the times do not marry up as:

- At 2130 on 7/12 Theresa Jackson purports to declare an “at risk” status because of “verbal threats of self harm physical threats of self harm” and purports to have notified a person (name illegible) but she hasn’t signed where her signature is required....then directly under this (in the same handwriting) the “nominated officer” (whose name is not identified) states he or she informed Jackson (at 2115 on 7/12) and “J Fattum” (at 1000 on 7/12) “of this at risk episode and commenced the at risk file”.

Someone has purported to sign this part of the form, but I do not know whose signature it may be (although it may be Clee, looking at other signatures/initials later in the materials). Informing Fattum (if this is the correct name) at “1000 on 7/12” is again impossible (if the at risk started at 2130 that day, so perhaps it is supposed to be 10pm) and presumably is yet another error.

- Also at 2130 on 7/12 Knispel notes (appendix C) “talked to by B Clee still aggressive and treatning to self harm”;

This may be the reference to threats to self harm that Jackson refers to in her note referred to next;

- At 2200 on 7/12 Jackson purportedly completes (but does not sign) “CMS/FMHS at risk notes” (appendix D) noting “tearful, aggressive, verbally abusive to staff. Verbally threatened to hang

himself. Behavioural re: unwilling to follow instructions by staff.
Informed he will be seen by FMHS re: at risk status 8/12/10”;

But this is significantly different to the apparent observation of Knispel at 2100 that he was not just verbally threatening to hang himself, but was in fact “trying to hang himself”! I would have thought an actual attempt was more serious than a threat, and would increase the seriousness of any subsequent threat.

- At 2140 and 2200 Knispel notes (appendix C) that Voller was “seen by nurse”.

It may therefore be the case that Jackson was a nurse.

- At 2215 Jackson signs an “individual management plan” (appendix B) noting that Voller’s clothing was to be an “at risk gown” and for accommodation “shared room with Kieren Murray overnight only”
- At 2215 Knispel notes (appendix C) that Voller was “placed in obs room”

On the evidence before me, it appears that an observation room may have been room/cell 4 (it is unclear if there may have been more than one, as later in ExP4 there is reference to a detainee named Murray also being placed into an observation room/cell, which was other than room/cell 4), being the room that he was later in at the time of the alleged unlawful assault

- At 2230 Knispel notes “Kieren Murray put in room with D Voller on B Clee instructions”;

Clee did not give evidence that he had done this or why. The “at risk – observation sheet” (appendix C) continues until 1300 on 8/12, which entry takes up the last line of that page. Given that it

appears Voller may not have been taken off his “at risk” status until about 1545 that day these notes should have continued onto another page, but no such page has been produced into evidence, with no explanation for the missing page offered.

32. Whilst there was evidence from Middlebrook, Clee and Tasker that “at risk” is treated seriously this is unfortunately not reflected in ExP4, as noted there appear to be numerous errors and inaccuracies in these records.
33. Also forming part of ExP4 was an unsigned A4 sheet with the names Jason Lord and Frans Knispel at the bottom. It purports to relate to events on 7.12.10 between 1800 and 2230, but in fact refers to various events between 1900 and 2130. Neither Lord nor Knispel gave evidence before me, so I have no way of knowing whose notes these are, when they were prepared, or form any view as to their truth. However, despite the fact that they would have little if any evidentiary value, these “notes” purport to assert as follows:

“2100 – As detainees were instructed for lockdown detainee’s Turner and Voller started to argue and carry on about sharing rooms with detainee’s Palmer and Murray.....Voller wanted to sleep in Kieren Murray’s room. All detainees were instructed to putt their bedding in their own rooms and to make way but Turner and Voller proceeded to argue and swear at Youth Workers stating that this place is fucked and you can all go fuck yourselves. Dylan said that he was going to kill himself and that he wanted to be shifted to “G Block”???? and said “I will kill myself” if I do not go.

Michael Turner continued to swear at YW’s about his bedding as he wanted more pillows. Michael started to kick door of room 4.

YW Knispel retracts to the office for a phone call to YW B Clee and states that the situation is getting out of hand and asks for YW B Clee and D Tasker to come in.

Detainee Voller continues to swear abuse at YW's and refused to go into his room. During this time he spat YW Knispel in the face, YW Knispel and YW Lord carried Dylan to his room. Dylan continued to spit at YW's. Voller was locked down at approximately 2120hrs and remained in his room where he continues to swear abuse at YW's.

Moments later at approximately 2125 YW Lord saw Dylan attempting to strangle himself with bedding linen and YW Lord entered his room and took the material away from Dylan's neck.

At approximately 2130 YW B Clee and D Tasker arrive and have a check on Dylan and call medical to assess Dylan."

34. I now turn to look at the events of 9.12.10, but before doing so it is desirable to consider what was the state of knowledge of Tasker and Clee in relation to Voller leading up to this event. Clearly, both Tasker and Clee had personal knowledge of what had happened on 7/12 when they were both called in to assist. So what was the state of their other knowledge.
35. Tasker stated in his evidence in relation to events that pre-dated 9.12.10:
 - He distinctly remembered Voller's first admission as he had allowed his mother to visit, but it went "pear shape" and Voller threw food at his mother and actually assaulted her;

- There were multiple times of Voller spitting to himself, including at Aranda house, at the police watch house and the court cells in Alice Springs;
- There were a couple of at risk statuses for Voller that came to mind;
- He had witnessed Voller remove his clothes and self affixiate;
- Voller was an extremely difficult child to deal with, and he had never come across such a difficult child in his 17 years.

36. Clee stated in his evidence as to his knowledge of Voller before 9.12.10:

- There was no previous occasion when Voller had to be forcibly restrained to be put in an at risk gown;
- He was known as a spitter (over the years Voller had spat on him 200 times).

37. It is clear from ExP1 (the CCTV footage) that, before the incident the subject of this charge, Voller was doing a lot of posturing and his behaviour was generally confrontational. It is also clear that Voller was not a big 13 year old. He was small in stature and of slight build. Tasker estimated that Voller would have weighed about 45-50kg at the time and he was about 110-115kg. There was obviously a very large size and weight difference. Tasker was more than twice the size of Voller.

38. I firstly look at what ExP4 discloses about the events of 9.12.10:

- There is no “declaration of at risk status” form (appendix A) relating to 9.12.10!

Accordingly, there is no formal written record (assuming that appendix A serves the purpose that it purports to) to verify that Voller was actually declared at risk on 9.12.10, who by, at what time, or for what reason. No explanation was given for the absence of this important piece of paper.

- There is no “individual management plan” form (appendix B) relating to 9.12.10!

Accordingly, there is no formal written record (assuming that appendix B serves the purpose that it purports to) to verify what was actually proposed to occur in relation to Voller. But it may have been the case that such a document was created subsequent to the incident in question, and therefore not relevant to this hearing.

- An “at risk – observation sheet” (appendix C) did form part of ExP4. The first entry for 9/12 purports to have been made by Bryers at 2042 when he notes Voller was “lying on right side screaming”.

Someone (I don’t know who) has ticked the box “self harm” on this form in relation to “type of AT RISK”. As noted earlier, the alleged assault occurred between 20:51:36 and 20:52:36, yet there is no mention of anyone entering Voller’s room/cell at this time, or indeed any such incident in appendix C! I find this most surprising.

- On the “CMS/FMHS at risk notes” (appendix D) there is a note made by Jan Coyne about a consult with Voller at 0935 hrs on 9.12.10, where she records:

“Viewed through observation cell window. Accusing staff of hurting his jaw. Verbally aggressive, agitated, pacing. Appears to be influenced by another detainee who is housed opposite

Dylan. No verbal threats of self harm at time of consult but accusatory of staff behaviour.”

Again, the time recorded does not make good sense, as on the evidence it was after the entry of Voller’s room at about 2051 hours on 9.12.10 that Voller allegedly suffered an injury to his jaw. It was not suggested that he had two such injuries within a short space of time.

- The final entry in the “CMS/FMHS at risk notes” (appendix D) is by T Woods purportedly at 1745 on 10.12.10, and records:

“Seen in at risk cell. Denies suicidal ideation. “got angry and said silly thing”. Discussed behavioural control & review by psychologist. Reminded if placed “at risk” tonight or over weekend he will not be reviewed until Monday evening. At risk ceased 1800.”

39. Also forming part of ExP4 was a 2 page typed document headed “incident report re Kieren Murray and Dylan Voller”. This document is not signed by anyone. Nor does it have any indication as to who it was allegedly prepared by or when. Someone (I don’t know who or when) has written on the top of each page “this document posted on IONS 10/12/10”. Accordingly, without knowing who prepared this document (hereinafter referred to as “the incident report”) or when or why, I am unable to give it’s contents any real weight. As will appear later in these reasons the accuracy of it’s contents are questionable in any event. However, for the sake of completeness it states as follows:

1840hr Kieren Murray comes out of the shower and drops towel of in the washing machine in the medical room. Then he demands other toothpaste as the one supplied is not good enough. The day before he threw a full tube of toothpaste in

the waste basket.

YW Knispel tells him that we do not have any other toothpaste on witch Kieren demands the medical cabinet to be opened to see for him self. After opening the medical cabinet and showing Kieren that there is no other toothpaste in there YW Knispel direct Kieren to leave the medical room Kieren refuses and start arguing.

Then Kieren starts brushing his teeth at the sink in the medical room.

Again YW Knispel directs Kieren to leave.

He is becoming aggressive and YW Knispel request PO Donaldson to get YW Bryers to come and give assistance.

Kieren becomes more aggressive and makes threats that he can hit me at least three times before YW Bryers can come and help while YW Bryers stands at the door of the medical room.

Also he makes threats that his brother will come to Alice Springs and work me over.

1910hr Dylan Voller does not want to leave the medical room after dropping of his laundry and using the nivea cream and spraying himself with deodorant over and over. YW Knispel asked to leave the room and Dylan does not want to comply he tries to steal rubber gloves and is told to drop them. After they fall to the ground he is worked out of the medical room by YW Knispel and PO Donaldson. Then he spits towards YW Knispel and hit PO Donaldson on his chest.

YW Knispel grabs Dylan Voller and marches him to his room.

PO Donaldson opens the door and YW Knispel places Dylan in the room.

2000hr Kieren Murray is place in the obs room for observation and separation from Dylan Voller.

2010hr Dylan Voller is placed in room 4 for observation.

2020hr Dylan Voller request the telephone and wants to call police and press charges against Oic B. Clee.

2035hr Dylan Voller had his call to the police and starts peeling paint off the walls.

2040hr Dylan Voller makes threat to kill himself as heard by YW Tasker and YW Bryers. He is spoken to by YW Clee.

2050hr Dylan Voller is asked by YW Clee to strip and put the at risk gear on. He refuses and is restrained by YW Clee, Tasker and Bryers striped and left in the room with the at risk shirt. On exit he tries to spit again at staff.

2055hr Dylan Voller ripped the foam mattress in half.

2050hr Kieren is banging at the door and reacting upset at what happened.

2055hr Kieren is banging at the door and tries to break the lock or window.

2100hr Kieren has gone to sleep

For Dylan Voller observation report part 2100hr see “at risk observation sheet”

For Kieren Murray observation report past 2100hr see “security room placement journal”

40. In addition to Exp4, a single page purporting to be a “use of force register” was tendered in the prosecution case and became Exp6. This exhibit appears to relate to the matter the subject of this charge, and purports to have been completed by Knipsel and signed by Clee, as the OIC. This document disclosed the following:

- The time of incident was 2050 on 9.12.10;
- The youth workers involved (presumably in the “use of force”) were Clee, Tasker, Knispil and Bryers;

However, the evidence in the case, including the CCTV footage (Exp1) clearly shows that Knispil was not involved in the “use of force” at all, and did not enter the room/cell at all during the incident the subject of this charge.

- Under “account of event and reason for use of force” is written “was requested to put the “at risk” gear on and refused was pinned down and stripped of his clothing at risk clothing was left in room”

This account is basically consistent with the evidence of Clee and Tasker.

- That part of the form then goes on to state: “was advised by J Coine to be put at risk”;

Registered nurse Jan Coyne gave evidence in the prosecution case. She did not recall much apart from (having refreshed her memory from a note she wrote in Exp4) seeing Voller through a window as he did not want her to enter. She had been called out to see Voller a few times, but she was not sure if she was called out this time because he was at risk or because he had been injured. But in my view, it is clear that if Voller was placed at risk shortly before the incident at issue herein, there is no satisfactory evidence to suggest it was done by Coyne. On the contrary the evidence would suggest that Coyne did not attend until after the incident.

- Under “nature of force used” is written “pinned down on matres by two YW’s”;

However, it is clear from all the evidence including ExP1 that the only person who made any physical contact with Voller during the incident was Tasker. Accordingly, this note is plainly wrong.

41. Again, the documents and records of the youth detention centre as contained within ExP4 and ExP6 are not particularly complete or accurate.
42. It was the prosecution case (as opened by Mr Robson) that at 2040 on 9.12.10 the at risk procedures were invoked. However, on the evidence before me I would be unable to find this to have been the case (in the absence of any appendix A). However, in my view, it would be unfair on Tasker if I did not proceed on the assumption that Voller had properly been placed at risk prior to the incident the subject of this charge. This is for a number of reasons, including:
 - If Voller was not placed at risk then there was no basis for implementing the at risk procedures, and therefore no lawful basis for requiring Voller to wear an “at risk” robe;
 - If there was no proper basis for requiring Voller to wear an “at risk” robe then there was no lawful basis for Tasker applying any force to Voller so that he could be stripped.
43. But the prosecution case was clearly predicated on the use of force by Tasker being lawful, but that the force used was excessive, thereby making his actions unlawful. It is clear that the defence case has proceeded on that basis also.
44. Despite the paucity of evidence, I therefore feel obliged to assess the evidence on the assumption that Voller was properly declared to be at

risk before Tasker entered room/cell 4 on 9.12.10. Whilst this is less than satisfactory, in my it would be unfair on Tasker to proceed otherwise.

45. Clee gave evidence as to what had occurred leading up to the incident the subject of this charge. His evidence was that:

- Voller had been “at risk” on and off since 0930 on 7.12.10;
- Staff take “at risk” seriously each time it occurs;
- On 7.12.10 Voller was placed in an at risk gown and he couldn’t recall anything untoward re that;
- At 1300 on 8.12.10 Voller was taken off “at risk”;
- Voller had been sharing a room with a 15 year old youth named Murray;
- Voller and Murray had close family ties;
- Voller and Murray were acting up so they had to be separated;
- Voller was placed into the observation room (room/cell 4) at 2010 in order to separate him from Murray;

Neither Clee nor Voller nor any police witness gave any evidence of any incident around 2020 when Voller allegedly wanted to complain about Clee for some unknown reason, and he actually spoke to police (as alleged in “the incident report” set out earlier in these reasons).

- At 2040 on 9.12.10 Voller was placed back on “at risk”;
- He went to Voller’s room with the robe and requested Voller to put the “at risk” gown on;

- He said he explained what will happen if he didn't (but whether he was giving evidence of his usual practice or what he actually did on this occasion I am unsure of);
- They usually leave the room in the hope the detainee puts the gown on himself.....but he agreed that he did not leave the gown with Voller (and was not asked to explain why he didn't);
- He knows that Voller did spit as he was closing the door, but couldn't recall if the spit hit him or the door which was half shut;

He didn't suggest that Tasker or anyone else was with him or near him when this was occurring

- Before they enter a room/cell staff discuss what they are going to do, detainee safety, how they are going to execute the action, and delegate tasks;
- He couldn't remember what the discussions were on this occasion other than Tasker was to restrain Voller, he was to clear out Voller's room and Bryers (who did not give evidence) was to take Voller's clothing and leave the gown;
- There was no discussion about discussing the matter further with Voller before entering;
- There was no discussion about giving Voller any further chance to comply;
- There had been no previous occasion when Voller had to be forcibly restrained to be put into an "at risk" gown;
- The mattress was the logical place to ground stabilise Voller.

46. Clee was the OIC of the detention centre at the time and had been since October 2009, so presumably he was in charge on this day.
47. Whilst it is clear that Clee decided (for whatever reason) not to leave a robe in the room with Voller to give him a chance to put it on himself voluntarily, it is not part of the prosecution case (as I understand it) that Tasker should (or could) have tried doing this himself. As Clee was the OIC, presumably Tasker was obliged to act under his directions. Perhaps Clee should have tried a different approach, but Tasker cannot be blamed for anything that Clee perhaps may have done differently.
48. I heard evidence of both Clee and Tasker having to be called into work because of Voller not long before 9.12.10 also.
49. Clee said that prior to 2010 he had had to ground stabilise someone who was “at risk” 4 or 5 times. It was not common. Voller has had 37 “at risk” episodes during his time in detention (but it appears this includes dates after 9.12.10).
50. When Tasker gave evidence he said that he was standing next to Clee in the doorway to room/cell 4 when Clee asked Voller to put on the “at risk” gown, and he heard Voller refuse. The earlier portion of ExP1 shows Clee in the doorway of the room (but Tasker is not in camera view). He went on to say that as they were exiting the door Voller charged towards them and spat at them. ExP1 does show Voller moving quickly towards the door, but the position of the camera makes it impossible to see if the door was closed or not at the time.
51. In his evidence Clee wasn’t asked to detail what happened in room/cell 4 when they entered on 9.12.10. He did say:
 - Tasker was an experienced youth worker;

- He had not witnessed excessive force by Tasker;
- Apart from this incident he had received no other report of excessive force by Tasker;
- He kept observing Voller after the incident and he did not exhibit any obvious injury;
- He thought the protocols and procedures were followed.

52. Voller gave evidence before me. He stated:

- He remembered bits and pieces of 9.12.10;
- He was in detention;
- Back then he would spit if he felt scared as he was too young to hit people;
- He has repeatedly spat at staff when he has been in detention over a number of years;
- He had been “difficult”, “playing up”;
- He was placed in the observation room;
- He was walking around sticking his finger up at the camera, which is something he does if he is angry;
- He was peeling paint off the wall;
- He threatened self harm, which is something he did often, every time he got angry;
- Clee came to the door and told him he had to put the gown on if he threatens self harm, and although he couldn’t remember what

was said, he didn't want to put the gown on, and agreed in XXN that he refused to put it on;

- He spat at the door and kicked it after Clee left;
- Tasker ran in and grabbed him by the throat with both hands, hard;
- He was panicking and having trouble breathing;
- Tasker pulled him down to the ground on his stomach;
- Tasker put all his weight to his right face and back;
- He was held like that for 2, 3 maybe 4 minutes;
- He tried to twist his head so he could breathe, get air;
- Tasker was also holding him on the lower part of his back;
- He was feeling uncomfortable and sore and in shock and having trouble breathing;
- He was saying he wasn't going to spit and to let him go;
- His clothes were removed;
- Tasker left the cell and as he did so it was like he pushed off him real hard;
- He felt real sore;
- His jaw and his whole back was sore for about 3 to 4 days after;
- He felt scared of Tasker;
- He wanted to make a complaint;

- He couldn't remember telling the police he didn't want to go on with the complaint.

53. There was no obvious exaggeration in the way Voller gave his evidence. He admitted his actions leading up the incident. He freely admitted that he was a difficult detainee. Whether this was just part of his personality, or because of his age and immaturity, or because he was scared by his situation I do not know. Clearly the incident did not take 2 to 4 minutes. It took one minute. But witnesses/victims are (in my experience) often wrong when it comes to estimating how long something takes to occur. Sometimes things become a blur and appear to have happened very quickly and at other times it seems to go on forever.
54. I accept that Voller felt that he had been wrongly treated by Tasker in this incident, sufficient to cause him pain and to want to make a complaint.
55. There was no evidence from Voller of any alleged incident about 30 minutes earlier when he allegedly wanted to, and allegedly did speak to police about a complaint about Clee (as alleged in "the incident report").
56. As noted earlier, on 28 April 2013 Tasker took part in an EROI. This EROI was tendered and became Exp2. In addition Mr Robson provided a transcript of the EROI as an aide memoire. I thank Mr Robson for this assistance. In my view, any EROI that prosecution seeks to play in a hearing should be transcribed to assist the court. A failure to do so creates an unfairness to the judicial officer who has to try and decide the matters at issue. Unfortunately, it is more often than not that we are not assisted with a transcript by prosecution (but this is more from police prosecutions rather than the DPP).

57. A number of things come from the EROI:

- Part of Tasker's duties involved being on call;
- He could recall, they had a lot of calls about Voller's behaviour;
- Voller has had in excess of 37 "at risk" episodes;
- Voller is an extremely difficult child to deal with.....he is notorious for banging his head on the wall, the floor, the doors;
- Voller is a notorious spitter;
- He had been spat on by Voller on many, many occasions;
- Voller had stated he was going to self harm and hurt himself, by way of self affixiation;
- The policy is they have to go into the "at risk" attire.....9 times out of 10 hopefully they can talk them around.....if they have to go hands on they've got no spit masks;
- In this incident Voller's "behaviour puts it up to us and all we're trying to do and I, I stress, is to keep him safe, we've always tried to do that";
- The window of safety is the back area/lungs not pressing really hard there;
- We try not to use headlocks;
- But by the same token Voller is an extremely bad spitter;
- Normally you'd grab a youth by the arms;
- Your best restraint is no restraint;

Then the interviewing members play the CCTV footage to Tasker and ask questions about what it shows, and the following is said by Tasker:

- He's enticing us;
- There's a buzzer there, he'd be attempting to get the plate off;
- I've got him like that and that's to, to stop him from spitting, because previous to that he was um, spitting;
- We don't have any safety wear for ourselves.....we were left no alternative to obviously protect myself and the other staff members and including (Voller);
- All we're trying to do is just keep him away from spitting at us;
- The tape obviously shows that I am holding him, but that's for his safety and our safety and I'm certainly not and I'd like to just describe again, it's just holding, I'm not you know, holding hard, all I'm just trying to do is just control the situation;
- All we're trying to do is remove all items as you know quickly as we can, um, and yeah, (Voller) is, is struggling there for sure;
- I totally dispute that (Voller is struggling because he can't breathe);
- I would never, ever do something like that;
- We were dealt with a volatile situation;
- We're not out to, um, try and hurt him or anything like that;
- There's our safety as well to consider.....we're not there as punching bags;

- I dispute that for sure (that he put his fist on Voller's jaw and put pressure on his jaw);
- If he did put his fist on his jaw it's only for his safety and my safety;
- Voller is also a biter as well.....none of us want to be bitten.

58. In the course of the EROI police officer Butcher stated that "the information we've got is that ...he had a swollen jaw and was bleeding from the mouth". In his evidence Voller said that his jaw was sore but made no suggestion that it was "swollen". In addition, there was no evidence to suggest that Voller was bleeding from the mouth. I do not know where the information came from, but it was not consistent with the evidence before me. The suggestion of Voller being a biter did not come out in any other evidence before me, nor was it suggested to Voller.

59. I also heard oral evidence from Tasker (who elected to give evidence when he was under no obligation to do so) as to what happened leading up to and when they entered room/cell 4 on 9.12.10. Tasker said:

- He got called due to Voller expressing self harm;

But according to "the incident report" set out above, it purports to say that at 2040 it was Tasker and Bryers who heard Voller make threats to kill himself.....and the "at risk observation sheet" (Appendix C forming part of ExP4) starts at 2042! Therefore, that document would suggest that Tasker wasn't called in after the at risk had been declared.....but in fact was already there and witnessed the threat to kill, which apparently led to the alleged "at risk" status being implemented. This is contrary to the evidence of Tasker and the other evidence in the case.

- Voller had to be placed at risk;
- He had to act upon the “at risk” status;
- He always had Voller’s best interest at heart;
- He acted within the guidelines;
- He was assigned to be the first one to enter and to “take down” Voller;
- He was to ground stabilise Voller on the mattress;
- Voller was held down for his welfare and safety so we could remove his items of clothing out of the room;
- The task was achieved quickly;
- He firmly believes that the best restraint is no restraint but they were dealt a difficult situation;
- The main concern was for Voller who had a history of self affixiation;
- Everything he did was to keep Voller safe and staff as well;
- He had no discussion with Voller that he could remember before entering room/cell 4;
- The way they do it is that one officer is the designated communicator, and on this occasion it was Clee;
- Communication had broken down so we went to the next step;
- Restraint is a last resort;

- The only reason he grabbed Voller by the throat was to restrain him so he couldn't spit at us;
- He did not grab his neck hard;
- He definitely did not squeeze his neck;
- He did it in a brisk manner to stop him spitting, to control his face;
- He did it because Voller was always spitting at him;
- He did not give Voller the chance to spit on him when he entered room/cell 4;
- He disputed that Voller said he wasn't going to spit, he didn't hear that, and had no recollection of Voller saying anything;
- At no time on 9.12.10 did he talk to Voller or try to de-escalate the situation – but that was because they work as a team and he was not assigned that task (Clee was the communicator that night, and it hadn't worked);
- He “put” Voller onto mattress rather than “forced” him;
- He was mindful of his weight when he was holding Voller down;
- He was using his own strength to make sure he didn't crush Voller;
- He was mindful of the “window of safety”;
- Voller never said he “couldn't breathe, you're choking me”;
- He was not there to “punish”;
- He was there to look after the welfare of the child.

60. In XXN it appeared that Mr Robson was suggesting to Tasker that he should have tried something else before resorting to the use of force. However, given that Clee (the officer in charge of the centre) was the person in charge of communicating with Voller at the time, Tasker could not be criticised for failing to unilaterally try to take over this role. On the contrary, Tasker may have done the wrong thing if he had tried to do this. On the evidence as a whole it appears that the communicating role was at all times with Clee, not Tasker. It was Clee who instructed Tasker to “take down” Voller and then ground stabilise him on the mattress. In doing so, Tasker was following the express instructions of his superior. The only real issue appears to be whether in following those instructions he applied more force than was reasonable in the circumstances.

61. In my view, the CCTV (ExP1) speaks for itself, and is objective evidence that the following occurred:

- 20:51:36 Voller leaning against wall opposite the door holding playing cards, when a foot appears in doorway;
- 20:51:39 Tasker walks in briskly towards Voller, Voller throws the cards to his left and lowers his hands, Tasker places his right hand to the back of Voller’s neck and turns Voller’s head to the right, Clee enters holding a gown;

The actions of Tasker at this point are consistent with removing a spitting risk;

- 20:51:42 Tasker swings Voller anti-clockwise and puts him face down onto the mattress holding his right hand on the back of Voller’s neck and left hand to back of Voller’s head; Clee is grabbing up sheets and other items and heading back towards

the door; Bryers comes in and moves to the bottom half of Voller;

- 20:51:46 Bryers pulls shorts and underpants off Voller; Tasker has his left hand on back of neck of Voller and moves his right hand to small of Voller's back; Clee takes items out of room;
- 20:51:49 Bryers leaves room with Voller's clothing; Clee returns with white sheet and throws gown next to Voller; Tasker resting on his left knee with left hand still on back of Voller's neck and right hand holding Voller down at top of buttocks;
- 20:51:51 Tasker goes up to his feet still pushing Voller down with his hands; Clee moves to the left of Voller:

It appears here that Tasker may have been putting himself into a position to be able to leave, but can't as Clee is still there;

- 20:51:59 Tasker goes back down onto his left knee still holding Voller in the same way, while Clee moves quickly to the top of the mattress and starts collecting cards etc;
- 20:52:04 Tasker still holding Voller down, Clee still picking up cards, Bryers quickly comes in and starts helping Clee pick up items;
- 20:52:07 Clee and Bryers still picking up cards; Voller kicking with his legs and manages to get his right knee up to level with his right hip but flat on the mattress, Tasker moves his right hand to right hip of Voller and places his right knee onto Voller's right upper leg, Voller straightens his right leg back below him, and Tasker moves his right hand to Voller's head area;

- 20:52:08 Tasker moves his weight onto his right knee that is still on Voller's upper right leg and both hands still at Voller's neck/head area; Clee and Bryers are still picking up cards;
- 20:52:11 Tasker moves his right hand to somewhere above Voller's shoulders;
- 20:52:20 Clee and Bryers still quickly gathering cards etc from around where Voller is lying; Tasker uses his right hand and picks up something near Voller's head and passes it behind him to Clee, Tasker's left hand on back of Voller's neck with his thumb and forefinger closest to Voller's shoulders;
- 20:52:29 Clee and Bryers kicking pieces of paint that Voller had earlier peeled off the wall out the door; Tasker picks up gown with his right hand and places it on the upper shoulders of Voller;
- 20:52:32 Clee and Bryers exit the room and Tasker rises to his feet with left hand still on back of Voller's neck and right hand now on upper buttocks;
- 20:52:34 Tasker moves his right foot as if to get a good start towards the door;
- 20:52:35 Tasker releases both hands off Voller and rushes quickly to the door before Voller can move;
- 20:52:36 Tasker has gone from the room.

62. In "the incident report" it clearly states that "on exit he tries to spit again at staff" referring to the time Tasker, Clee and Bryers leave room/cell 4. I find this statement to be untrue. There are a number of

untruths and inaccuracies in “the incident report”. I give it no evidentiary weight.

63. It is clear that Clee allocated the task to Tasker to physically restrain Voller. It is not suggested in the prosecution case that Tasker could or should have refused this task.
64. It is clear from ExP1 that all actions of Tasker, Clee and Bryers were done at pace giving the clear impression that they wanted to be in and out of Voller’s room/cell as quickly as possible. Accordingly, it is clear (and I find) that the physical contact of Tasker on Voller was for the shortest time necessary to enable Clee and Bryers to clear the room of cards and debris as best they could (there were some items left that were under where Voller was placed face down), remove Voller’s clothing and leave him with the “at risk” robe. There was no delay in the process. All actions appear to have been done at the quickest reasonable speed. Accordingly, in my view, Tasker cannot be criticised for any overly prolonged physical contact with Voller.
65. On the evidence Tasker had been tasked by the OIC of the detention centre (and therefore his superior) to physically restrain Voller. It was not suggested (as I understand the prosecution case) that this task/direction by Clee was in some way unlawful, and therefore should have been ignored. Nor did the prosecution case suggest that the application of force per se by Tasker was unlawful. Rather, the prosecution submit that the force was excessive and therefore this rendered it unlawful.
66. As the use of force was lawful (on the prosecution case) and the duration of the application of force was not excessive (as I have found) then it would seem to follow that to be unlawful the level of force used must be excessive.

67. Further, in my view, as this is a criminal prosecution it must follow that the force must be so excessive that there can be no reasonable doubt that it was excessive.
68. In the instant case Voller was a slightly built 13 year old youth who weighed something probably less than 50kgs. There was no evidence to suggest that Voller had any skills or tendency to actual physical violence. He was a known (even very well known) spitter. On the evidence, and on Tasker's knowledge of Voller. The risk from Voller would most likely come from his mouth, rather than from other areas. Tasker was a large male (considerably taller than Voller and at least twice as heavy). Even if Voller did try to punch or kick Tasker (and there was no evidence to suggest that Tasker had any reason to believe this was a possibility) he was unlikely to cause any real harm to Tasker.
69. In my view, the level of force to be used in any situation must be based on the individual circumstances of each case. The level of force to be applied to a 13 year old boy should be considerably less than what may be required to subdue a 100kg adult male. Voller was in detention so there was no suggestion that he might have any weapon on his person.
70. It is also clear from the evidence (and as a matter of common sense) that subduing Voller on this occasion needed to address a number of objectives. Accordingly, the level of force to be applied had to:
- Stop Voller having the opportunity to spit on Tasker;
 - Stop Voller having the opportunity to spit on Clee or Bryers;
 - Stop Voller having the opportunity to strike Voller, Clee or Bryers (even if this risk was slight);

- Limit Voller's movement so that his clothing could be removed with the least risk to himself and to Bryers;
- Limit Voller's movement so that there was the least chance of Voller injuring himself in any struggle;
- Put Voller into a position whereby Tasker, Clee and Bryers could exit the room/cell with the least chance of pursuit/retaliation by Voller.

71. It is clear from ExP1, and I find that at no time did Tasker punch, slap, kick or palm strike Voller. There was no gratuitous strike or punishment inflicted. Tasker said he applied force to neutralise Voller's head, to take him to ground, and then to ground stabilise him. In my view this is consistent with what ExP1 shows.
72. On the evidence I find that it was both reasonable and necessary for Tasker to take action to neutralise the threat of spitting by Voller. He did so by forcing Voller's head towards Voller's right shoulder. This action would appear consistent with the achieving of this objective. When Voller gave evidence he suggested that he was telling Tasker that he wouldn't spit. However, on the evidence I am unable to find that this was definitely said, or if it was, whether it should have been accepted as a reliable statement.
73. On the evidence (and based upon Voller's past actions, and Tasker's knowledge of him) I find that it was reasonable and prudent for Tasker to take hold of Voller in the head area and turn his head away from him, and use sufficient force to keep his head pointing away. Whilst the size differential raises issues as to what level of force would be reasonable, it is not clear in my view, that the level of force used to achieve this necessary aim was excessive.

74. Next, in my view, it was necessary to ground stabilise Voller (despite his size) for a number of reasons:

- To reduce the risk of Bryers being punched or kicked when it came to removing Voller's clothing;
- To reduce the risk of Voller hurting himself if he had the opportunity to flail his arms and/or legs freely;
- To give Tasker the best opportunity of exiting the room/cell without repercussions from Voller.

75. Accordingly, I find that it was reasonable for Tasker to ground stabilise Voller (as he was directed to by Clee). Choosing to do so on the mattress was a reasonable decision and one which was likely to reduce the risk of harm to Voller. I do not find that the degree of force used to take Voller to ground was unreasonable. Voller was not lifted off his feet and thrown onto the ground. He was not "pole-driven" into the mattress.

76. When Voller was initially held down on the mattress the force applied did not appear to be excessive. It appears that Tasker has a fair bit of his weight being borne by his own left knee, and he is then leaning over Voller. Further, the level of force used was such that Voller was able to squirm and get his right knee up level with his hip. In my view, this is a clear indication that the level of force at this point was not excessive. Given the way that Voller had moved his right leg, I do not consider it unreasonable that additional force needed to be applied in order to put Voller's legs back into a more neutral position. He chose to do this by applying his right knee to the right hip/buttock area of Voller. I do not understand the prosecution case to say that he had other options that he should have chosen to achieve this.

77. From Voller's evidence I do not understand him to have said that the application of this right knee caused him any particular pain or discomfort. His complaints of pain were centred on his jaw and whole of back.....and it is apparent that Tasker's right knee did not come into contact with either of those areas.
78. Whilst Tasker is holding Voller down it is clear that he is also keeping an eye on Clee and Bryers apparently checking on their movements. He passes some items to Clee at one stage to assist in clearing the room/cell. His behaviour is consistent with him wanting to get out as quickly as possible.
79. Whilst it is arguable that Tasker might have been able to achieve his lawful purpose using less force than he did, it is also equally arguable that if he had used less force he could have increased the risk of injury to himself, to Voller, and to Clee and Bryers.
80. In all the circumstances of the case I am not satisfied that the prosecution have proved beyond all reasonable doubt that Tasker applied unreasonable and/or unnecessary force to Voller. I therefore am unable to find that Tasker "unlawfully" assaulted Voller.
81. If I had found Tasker guilty of charge 2 then I would have found that circumstances of aggravation (i), (ii) and (iii) had been proven beyond all reasonable doubt. In relation to (i) Voller said his jaw and his whole back was sore for 3 to 4 days. This was not undermined during XXN. I find that this would constitute harm (but towards the lower end of the scale). In relation to (ii) all the evidence clearly indicated that Voller was 13 at the time (and Tasker knew this) and Tasker was an adult (well over the age of 18). In relation to (iii) given the significant age and large physical differences (Tasker was at least twice the size of Voller) if the assault had been unlawful then Voller would have been unable to effectively defend himself from it.

82. I find Tasker not guilty of charge 2. Charge 2 is dismissed and Tasker is discharged.
83. I will hear counsel on any additional orders herein.

Dated this 5th day of February 2014.

Daynor Trigg
STIPENDIARY MAGISTRATE