CITATION:	ANDREAS ANDREOU V RAYMOND NEILSON-SCOTT [2020] NTLC 04
PARTIES:	ANDREAS ANDREOU V RAYMOND NEILSON-SCOTT
TITLE OF COURT:	LOCAL COURT
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Criminal Code Act 1983 (NT) ss 27, 29, 188, 43BQ-43BX, 208E

Criminal Reform Amendment Act (No2) 2006

Gardiner v Marinov (1998) 7 NTLR 181; *Sinclair v Burgoyne* (2007) 208 FLR 101; *Prior v Mole* [2015] NTSC 65; *R v Gehan* [2019] NTSC 91; *Innes v Weate* [1984] Tas R 14; *R v K* (1993) ALR 596; *Perkins v The County Court of Victoria* (2000) 2

VR 2; *Hamilton v Halesworth* (1973) 58 CLR 369; *R v Whittington* (2006) 17 NTLR 235; *R v Whittington* (2007) 19 NTLR 83: considered

Director of Public Prosecutions (NSW) v Weinstein (2010) NSWLR 666; *Re A Solicitor* [1945] K.B.368; *George v Rockett* (1990) 170 CLR 454: applied

Dr Stephen Gray, "You can't charge me I'm a cop: should police, corrections staff and law enforcement officers be immune from criminal liability for actions carried out against vulnerable people in the course of their duties?" (2018) 41(3) UNSW Law Journal 670

REPRESENTATION:

Counsel:

Complainant:	Ms Mary Chalmers
Defendant:	Mr Peter L Hanlon

Solicitors:

Complainant:	Director of Public Prosecutions
Defendant:	

Judgment category classification:	A
Judgment ID number:	04
Number of paragraphs:	143

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

No. 21928151

BETWEEN

ANDREAS ANDREOU

Complainant

AND

RAYMOND NEILSON-SCOTT

Defendant

REASONS FOR JUDGMENT

(Delivered 20 March 2020)

CORAM: ARMITAGE J

1. The defendant in these proceedings, Senior Constable Raymond Neilson-Scott, is a serving police officer in the Northern Territory Police Service. He joined the police in June 2007 and has been stationed in the Katherine region on general duties, in the Territory Intelligence Division, in Strike Force Trident, in Casuarina General Duties, and in Darwin Traffic Operations.

2. At about 12:30 am on the 23 March 2019 the defendant was conducting traffic duties with his off-sider Senior Constable Tyrone Smithers. They responded to a police radio call-out to an incident at Crerar Road, Berrimah. It was reported that Mr Solomon Mamarika was threatening to stab his daughter with a knife[1]. The defendant and Senior Constable Smithers were the first police to arrive at the location. There were three people present: Mr Solomon Mamarika, his wife

[1] Ex 5 Case 8917947 CAD Log

Ms Wendy Lalara, and their daughter (who has since deceased and at the parents' request is to be referred to as) Mamarika.

3. Shortly after attending the location the defendant used force against Mamarika, Ms Lalara and Mr Solomon Mamarika. The defendant was charged with aggravated unlawful assault on Mamarika and Ms Lalara, in each case the circumstances of aggravation being that they suffered harm, and they were female and the defendant was male[2]. He was charged with unlawful assault on Mr Solomon Mamarika[3].

4. The defendant contested all of the charges and relied on a defence specific to "law enforcement officers" that is found in s 208E of the *Criminal Code Act 1983 (NT)* (the *Criminal Code*). Although ultimately not relied on by the defence, defensive conduct[4] and an excuse arising under s 27 *Criminal Code*[5] were also raised on the evidence.

5. In the trial there was no issue as to there being three applications of force. The real issues were: the precise circumstances surrounding each application of force; and whether the raised defences had been negatived.

Section 208E of the *Criminal Code Act 1983 (NT)* and the application of Part IIAA

6. Part VI of the *Criminal Code* deals with offences against the person and related matters including the offences of assault and aggravated assault, namely the offences charged against the defendant. Division 9 of Part VI creates two specific defences for offences under Part VI. One of those defences is s 208E, a defence specific to "law enforcement officers". Section 208E and s 208F provide as follows:

[2] Contrary to s 188(1) and (2) of the *Criminal Code*
[3] Contrary to s 188(1) of the *Criminal Code*
[4] Section 29 of the *Criminal Code*
[5] Section 27(e) of the *Criminal Code*

208E Law enforcement officers
A person is not criminally responsible for an offence against this Part if:
(a)the person is, at the time of the offence, a public officer acting in the course of his or her duty as a police officer, correctional services officer or other law enforcement officer; and
(b)the conduct of the person is reasonable in the circumstances for performing that duty.

208F Evidential burden of proof
A defendant who wishes to deny criminal responsibility by relying on the provision of this division bears an evidential burden in relation to that matter.

7. Part IIAA of the *Criminal Code* applies to Part VI Division 9 defences[6] (but it does not apply to the offences of assault or aggravated assault which are not in Schedule 1 of the *Criminal Code*). Part IIAA Division 6 deals with onuses and burdens of proof. Division 6 provides as follows:

43BQ Legal burden of proof
The legal burden, in relation to a matter, is the burden of proving the existence of the matter.

43BR Legal burden of proof – prosecution
(1)The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.
(2)The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof.

43BS Standard of proof – prosecution
(1)A legal burden of proof on the prosecution must be discharged beyond reasonable doubt.
(2)Subsection (1) does not apply if a law specifies a different standard of proof.

43BT Evidential burden of proof
The evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

43BU Evidential burden of proof – defence
(1)Subject to section 43BV, a burden of proof that a law imposes on a defendant is an evidential burden only.

[6] Schedule 1 of the *Criminal Code Act 1983*

(2)A defendant who wishes to deny criminal responsibility by relying on a provision of Division 3 or Part IIA bears an evidential burden in relation to that matter.
(3)A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence (whether or not it accompanies the description of the offence) bears an evidential burden in relation to the matter.
(4)The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.
(5)The question of whether an evidential burden has been discharged is a question of law.

43BV Legal burden of proof – defence
A burden of proof that a law imposes on the defendant is a legal burden only if the law expressly:
(a) specifies that the burden of proof in relation to the matter in question is a legal burden; or

(b) requires the defendant to prove the matter; or

(c) creates a presumption that the matter exists unless the contrary is proved.

43BW Standard of proof – defence
A legal burden of proof on the defendant must be discharged on the balance of probabilities.

43BX Use of averments
A law that allows the prosecution to make an averment does not allow the prosecution to avert any fault element of an offence.

8. There are two limbs to the s 208E defence. First, the public officer must be "acting in the course of his or her duty" in this case as a police officer, and secondly, that "the conduct is reasonable for the circumstances of performing that duty".

   Applying Division 6 of Part IIAA to s 208E, and noting s 208F, I find that:

   (i) The defendant bears an evidential burden of proof only in respect of each limb of the s 208E defence. The defendant does not bear a legal burden of proof[7].

   (ii) In order to discharge the evidential burden, any evidence adduced by the prosecution in addition to any evidence adduced by the defence (if any) may be relied on.

[7] Contrary to the written submissions of the defendant at [3], s141 of the *Evidence (National Uniform Legislation) Act (NT)* does not apply.

(iii) The question of whether an evidential burden has been discharged is a question of law.

(iv) If the evidential burden in respect of the defence is discharged, the prosecution bears the legal burden of disproving either one or both of the limbs of the defence.

(v) In order to negative the defence, the prosecution must negative one or both limbs of the defence beyond reasonable doubt.

9. Section 208E was introduced into the *Criminal Code* as part of the *Criminal Reform Amendment Act (No2) 2006*. I understand the section has not yet received judicial consideration. The Explanatory Statement to the *Criminal Reform Amendment Bill (No2) 2006* is as follows:

> "**Division 9 Defences** - This clause inserts a new Part VI Division 9 to include the general Model Code defences against offences in the new Part VI, of: **Section 208E Law enforcement officers**- Where the person is, at the time of the offence, a public officer acting in the course of his or her duty as a police officer, prison officer or other law enforcement officer, and the conduct is reasonable in the circumstances performing that duty.
>
> As Part II of the *Criminal Code* will not apply to schedule offences, this provision is necessary to provide a defence for police and prison officers in circumstances involving a scheduled offence. Currently, section 28 of the Criminal Code would apply.[8]"

10. However, as noted earlier Part II of the *Criminal Code* does apply to the offences of assault and aggravated assault, and in this case the Part II defences of defensive conduct and s 27 justification are raised in tandem with s 208E.

11. There is a reference to s 208E in the Second Reading Speech of Dr Toyne (Minister for Justice and Attorney-General), as follows:

> *"This Bill also inserts two further defence provisions. The first is for the protection of persons whose conduct causes serious harm or gives rise to a danger of death or serious harm during conduct engaged in by the person for the purpose of benefiting another or pursuant to a socially acceptable function or activity where conduct is reasonable in the circumstances. This covers good Samaritan situations and sporting pursuits. The second covers police, prison*

[8] *Criminal Reform Amendment Bill (No.2) 2006* Explanatory Statement

and law enforcement officers acting in the course of duty where the conduct is reasonable in the circumstances.[9]*"*

12. There is no mention of s 208E in the debate, which was preoccupied with proposed changes to the laws concerning, inter alia, murder, manslaughter and abortion. However, paradoxically, while the *Criminal Reform Amendment Act (No2) 2006* introduced a defence that was only available to law enforcement officers, in justification of proposed changes to the defences for murder, Mr Stirling (Minister for Justice and Attorney-General) said:

"It is not appropriate that defences should be available to one part of the community and population in the Northern Territory but not others...[10]*"*

13. Although s 208E has not been judicially considered, the section has been the subject of academic consideration by Dr Stephen Gray, Faculty of Law, Monash University[11]. In his learned article, Dr Gray examined the context in which s 208E was introduced. In *R v Whittington* (2007) 19 NTLR 235, Mildren J held that s 162 of the *Police Administration Act 1978 (NT)* provided a 2 month time limit for the commencement of prosecutions for acts done in pursuance of that Act. Accordingly a police officer who shot an Aboriginal man in Wadeye, in pursuance of his duties under the *Police Administration Act 1978*, could not be prosecuted because the charges were laid out of time. Section 162 of the *Police Administration Act* was repealed in 2005 and replaced with the more limited criminal immunity provision of s 208E of the *Criminal Code*. Having identified the historical context Dr Gray, reasoned as follows:

"This provision is found in Part VI, which deals with 'offences against the person and related matters'. Offences found within Part VI include murder and manslaughter, as well as attempted murder, reckless endangerment offences, and various forms of assault. Thus, the provision is a defence to most of the offences police and other law enforcement officers might commit while acting in the course of their duties.

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[9] *Criminal Reform Amendment Bill (No2) 2006* Second Reading Speech – Thursday, 31 August 2006, Hansard p 3023

[10] *Criminal Reform Amendment Bill (No2) 2006* Second Reading Speech – Wednesday, 11 October 2006, Hansard p 3184. Mr Stirling became Minister for Justice and Attorney-General after the introduction of the Bill.

[11] Dr Stephen Gray, 'You can't charge me, I'm a cop: should police, corrections staff and law enforcement officers be immune from criminal liability for actions carried out against vulnerable people in the course of their duties?', (2018) 41(3) UNSW Law Journal 670

The provision operates as an alternative to the law of justification, or self-defence. In the NT, the applicable self-defence provision will vary depending on whether the offence is classified as a schedule 1 offence. Schedule 1 offences are, broadly, the more serious offences such as murder, manslaughter and endangerment offences. For these offences, the test requires, in essence, that the conduct carried out by a person in self-defence be a 'reasonable response in the circumstances as he or she perceives them' (s43BD of the NT Criminal Code) for less serious offences such as assault, the test for self-defence is slightly stricter, requiring that the person's conduct be 'a reasonable response in the circumstances as the person ***reasonably*** *perceives them' (s29 NT Criminal Code).*

Thus, a person other than a police, corrections or law enforcement officer who wishes to argue they were justified in committing an assault or homicide has to navigate a complex set of provisions. The conduct must be carried out to defend the person or another, or in a very strictly defined further set of circumstances (such as to prevent or terminate unlawful imprisonment: see NT Criminal Code s 43BD(2)(a)); and the conduct has to be a reasonable response in the circumstances.

If the person is a police, corrections or law enforcement officer, however, section 208E will apply. Provided that the person is acting 'in the course of' their duties (a phrase which has been interpreted widely in the past, as has been noted [earlier in this paper]), all that is necessary is that the person's conduct be 'reasonable in the circumstances for performing that duty', an objective test.

…

Providing a police officer is acting in the course of duty, it appears the test under section 208E is easier to satisfy than the general test for justification or self-defence. It could provide a defence, for example, to a police officer who killed youth in the course of carrying out an arrest, or while seeking to prevent a property offence such as vandalism. The jury's attention in such a case is not directed to the reasonableness of the officer's response to the victim's conduct, as it would be in an ordinary case of justification, but to the reasonableness of the conduct for performing the defendant's duty. This is a separate question to which different and broader considerations might be relevant.

…

As noted above, section 208E was enshrined into the NT Criminal Code in 2006. This was done as part of the sweeping reforms to the criminal responsibility provisions, which introduced a new Part IIAA, substantially incorporating the criminal responsibility provisions of schedule 1 chapter 2 of the Criminal Code Act 1995 (Cth), including its provisions regarding self-defence, and applying them to particular offences, including murder and manslaughter. This had the effect of reducing the scope of the old defence for police and prison officers in section 28 of the NT Criminal Code, which would no longer apply to murder and manslaughter. The defence in section 28 did

provide that force was justified when police or prison officers were carrying out a lawful arrest, or were attempting to prevent an escape. However this was only the case when the force used was not 'unnecessary force'. ('Unnecessary force' is defined in section 1 of the NT Criminal Code as force that the user knows is unnecessary and disproportionate, or that an ordinary person similarly circumstances would know was unnecessary and disproportionate. This section thus imposes an 'ordinary person similarly circumstanced' test similar to the test used in some jurisdictions for provocation.) This test requires that the force not exceed what an ordinary person similarly circumstanced would regard as necessary and proportionate. While this is arguably a more favourable test for the defendant than the 'reasonable response' test for self-defence, it is still a more stringent test than that created by section 208E.

It is not easy to say whether section 208E was introduced as part of a deliberate policy to expand the scope of criminal immunity for police. It is hard to see what other motive there could have been for the creation of an alternative and separate provision on this issue. Parliamentary debates are silent on the matter. However, the section was introduced at the same time as the Whittington case was making its way through the appeal process in the NT Supreme Court. It is very likely that legislators were aware of the issue of police immunity from prosecution, which would have been drawn to their attention by Mildren J's decision to quash the indictment against Whittington in August 2006. In fact, they had acted swiftly and as early as March 2005 to repeal the two-month time limit on criminal prosecution contained in section 162 (1) of the Police Administration Act 1978 (NT). Again, though, there is no reference to the issue of criminal immunity in the Police Ministers Second Reading Speech.

The NT goes further than other Australian jurisdictions in the degree of immunity from criminal liability it provides to police and law enforcement staff."[12] (citations omitted)

14. Counsel for the defence submitted that I should follow Dr Gray's reasoning in my interpretation of s 208E proposing that the defence was broad in scope, and hence, easier to raise and harder to negative, than the Part II defences.

What are the duties of police?

15. In *Gardiner v Marinov*[13] Martin CJ considered the legality of entry onto private premises for the purposes of executing a "warrant of distress" which permitted the seizure of goods by a bailiff in lieu of an unpaid debt. Both the bailiff and a police

[12] Ibid 675-678 (Dr Stephen Gray)

[13] *Gardiner v Marinov* (1998) 7 NTLR 181

officer entered premises on the mistaken but honestly held belief that the warrant authorised them to do so but it was held that the police officer was not so authorised. Martin CJ said:

> *"It is necessary to go into a little detail in relation to the powers and duties of a constable. A constable has all the powers and privileges as are by any law in force in the Territory, conferred or imposed upon him.* (*Police Administration Act 1979 (NT), s 25). The powers at common law include those necessarily incident to the discharge of a constable's functions as a peace officer or conservator of the peace. The oath taken, or affirmation made by members of the Territory Police Force include an undertaking "to see and cause her Majesty's peace to be kept and preserved" as required by this schedule to the Police Administration Act.*
>
> *In the performance of the duty to prevent a breach of the peace, police officers may enter upon private premises.*
>
> *…*
>
> *I have no doubt, upon consideration of the evidence, that the constable acted in the way he thought best in the circumstances. It is certainly not shown that he knew that entry into the room would be unlawful.… Nowhere does he say that he apprehended that the appellant would try and physically interfere with the bailiff or otherwise commit a breach of the peace in the room. Any breach or threatened breach of the peace outside the room could have been dealt with there. Entry into the room was not required in the discharge of the constable's duty to keep the peace.*[14]*"*

16. In *Innes v Weate*[15] Cosgrove J had cause to consider whether a Franklin Dam protestor had obstructed a police officer "in the execution of his duty", when the protestor attempted to board a barge, but was told not to by a police officer. Cosgrove J said:

> *"… The word "duty" does not refer, as was suggested in the argument, to the constable's duty to obey superior officers. It refers to the duty of constables generally – the duty to prevent and detect crime, to apprehend wrongdoers, to keep the peace, and to protect life and property, (that is, to protect persons from injury and property from damage).*
>
> *…*
>
> *There are two difficulties in this concept of duty. One is that it cannot be stated in other than general terms – the range of circumstances in which the duty to act may arise is too wide, to various, and too difficult to anticipate for the compilation of an exhaustive list. The other is that the existence and nature of the duty often depends upon a reasonable assessment by the constable of*

[14] Ibid pp 190-191

[15] *Innes v Weate* [1984] Tas R 14

any given situation. That assessment may be examined in the courts and held to be right or wrong. These difficulties cannot be overcome. It is important that a constable should have a wide discretion to act swiftly and decisively; it is equally important that the exercise of that discretion should be subject to scrutiny and control so that he should not too easily or officiously clothe himself with the powers of the state and by so doing affect the rights and duties of other citizens..

Two other points can be made:
(a)the general duties of constables do not require them to arbitrate civil disputes. By the same token, if, in properly acting to preserve the peace in a situation arising out of a civil dispute a constable innocently chooses to constrain the offended rather than the offending party, he is in no breach of his duty;
(b)when the decision to act is taken far from the time or place of the anticipated offence or breach of the peace, there will almost always be a residual discretion in the man on the spot. Both the superintendent and the junior and senior constables. The discretion resides in each.
…

I do not accept the suggestion that a remote possibility of a breach of the peace will call up a duty in a constable to act: Howell and Piddington [1961] 1 W.L.R. 162 at 169. The power to give orders restricting the personal liberty of citizens is a special power. It does not exist until the constable has a duty to exercise it. Thus the power to restrict liberty only arises when it is or appears to be necessary to do so. It is necessary to restrict liberty only when the risk of injury to property or persons, measured by the twin tests of probability of injury and the nature of the threatened injury, is such as to warrant the proposed degree of restraint. It is always a question of balance, but basically restriction of liberty is for a constable the last resort.

Nor do I accept the proposition that a constable is clothed with a duty to act once his superiors have ordered him to do so. As I have said, a residual discretion usually resides in the man on the spot. There may be cases where conflicts are so grave, so widespread, so confused, or so disguised that a policy of widespread intervention not yielding to the particular situation is justified. But such intervention would require very special circumstances…

In this case, there was no evidence of any such special circumstances, and their non-existence was virtually conceded by the limited crown advocates opening in the magistrates Court. Nor was there any evidence that Senior Constable the any of his superiors entertained any reasonable apprehension of the commission of an offence or a breach of the peace. It follows that the Senior Constable was under no duty to prevent a civil wrong (if it was such) of boarding the barge and had no authority to proscribe the act of boarding. As

he was acting in excess of duty, disobedience of his order was not an obstruction within the terms of the Police Offences Act."

17. In *R v K*[16] the Federal Court was asked to consider whether a police officer was "acting in the execution of his duty" as the phrase was used in s 64(1)of the *Australian Federal Police Force Act 1979 (Cth)*, an assault police offence. In this case, the Court discussed the scope and breadth of police duties. Gallop, Spender and Birch JJ held:

"The common law of the Australian Capital Territory is the common law of Australia save where it has been abrogated by statute or other enactment. No Territory legislation has dealt with the common law as it applies to the powers and duties of a constable or a police officer.

The powers and duties of police officers have always been expressed in the most general terms. In Rice v Connolly [1966] 2 QB 414, in the course of allowing an appeal against a conviction of wilfully obstructing a constable in the execution of his duty, Lord Parker CJ said (at 419):
"… That it is part of the obligation and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice."

In Thomson v C (1989) 67 NTR 11 at 13, Angel J, addressing what are the duties of police officers, said that courts have sensibly been loath to clothe the ambit of a police officer's duties in specifics and said that his duties have always been expressed in the most general of terms. He cited Rice v Connolly and the next case to which we were refer, Innes v Weate [1984] Tas R 14; 12 A Crim R 45 at 51….

The Commonwealth Director of Public Prosecutions referred to other authorities which demonstrate the need to examine what a police officer was actually doing to determine whether he was in the execution of his duty and decide whether such conduct falls within the general scope of any duty imposed by statute or recognised at common law, or outside that general scope of duty. Reference was made to R v Waterfield [1964] 1 QB 164; Donnelly v Jackman [1970] 1 WLR 562; Collins v Wilcock [1984] 1 WLR 1172; Coffin v Smith (1980) Cr App R 221; and the Canadian case of R v Westlie [1971] 2 CCC (2d) 315. In the last case, McFarlane JA expressed the

[16] *R v K* (1993) 118 ALR 596

view that in order to support a conviction on a charge of obstructing a police officer in the execution of his duty, it is not necessary to show that the officer was at the time of the obstruction engaged in the performance of a specific duty. McFarlane JA cited a number of authorities approved by the Supreme Court of Canada to that effect.

The effect of all those cases is that a police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of that duty for as long as he is engaged in pursuing the task and until it is completed, provided that he does not, in the course of that task, do anything outside the ambit of his duty so as to cease to be acting therein.

It was submitted on behalf of the accused that the learned Judge was correct in holding that the police officers had ceased executing their duty at the time the alleged assaults took place. The substance of the submission was that there has to be a start and a finish to a duty executed by a police officer, that the evidence at the trial established that the duty of crowd control and looking for incendiary devices or weapons had finished at the time the alleged assault took place and that, although the police officers at that time may be said to have been "on duty", they were not acting "in the execution of their duty".

In our judgment there was clearly evidence that at the time of the assaults the two police officers were still inspecting the car park for incendiary devices and weapons and, at the very least, acting in the execution of a general duty as police officers to preserve the peace and detect crime, as well as a specific duty of returning from inspecting the carpark to report to their superior officer on what they had observed and receive further instructions. They were certainly not performing any unlawful activity that would have taken them out of the ambit of the general and specific duties.

Section 64 should not be construed in any narrow or restricted sense, but should be given a broad operation to protect the performance of all police duties, and not just some. The section is general: "in the execution of his duty". That means that the section applies whenever the police officer is doing something which can fairly and reasonably be regarded, given the existing circumstances, as a carrying out of his duty. The generality of the section is further confirmed by the consideration that it attempts to cover a very wide range of possible interferences with the work of the police: assault, resistance, obstruction, or hindrance, or aid incitement or assistance in relation to any of those things. It is not limited to violence of the sort that was in issue in the present case.[17]"(emphasis added)

[17] Ibid at pp 600-601

18. Police duties encompass powers and obligations conferred by laws in force, powers at common law and functions ancillary to those powers. In this case there was no real dispute on the evidence that the defendant attended the premises to investigate, prevent and detect whether a criminal offence had taken place and, in my view concomitantly, to preserve the peace. I am satisfied that the defendant attended the premises as part of his duties.

When is a police officer "acting in the course of his duty as a police officer"? Is "acting in the course of his duty" the same as "acting in the execution of their duty"?

19. According to the LexisNexis Australian Legal Dictionary a "public officer" is "1. A person appointed to discharge a duty of public office, in the interests of the public, in exchange for compensation or payment out of a public fund: *R v Whitaker* [1914] 3 KB 1283.[18]" There was no dispute that the defendant was a serving police officer. Although I was satisfied that the defendant attended the premises as part of his duties as a police officer, an issue to be resolved was whether the defendant was still "acting in the course of his duty" when he used force against each of the complainants.

20. As noted earlier in this decision, although the precise phrase, "a public officer acting in the course of his or her duty as a police officer", has not been judicially considered, Northern Territory courts have considered whether police are "acting in the execution of their duty". The question of whether a police officer is "acting in the execution of his duty" or is acting outside his duties sometimes arises when the legality of an arrest is challenged and there is an application to exclude evidence improperly or illegally obtained, or when someone is charged with assaulting a police officer in the execution of his duty[19].

[18] LexisNexis Australian Legal Dictionary, LexisNexis Butterworths Australia 2016, 2nd Ed. at p 1251
[19] Section 189A *Criminal Code*

21. In *Sinclair v Burgoyne*[20], an appeal from the Local Court, Southwood J considered the question of whether two police officers were acting in the execution of their duty at the time they were assaulted by the appellant. The police had searched and restrained the appellant who was distressed and potentially psychiatrically disturbed. One police officer put his hand on the appellant's shoulder and guided him to the police paddy wagon with the intention of taking him to the hospital. The appellant then punched, hit and kicked the police; and was charged with unlawfully assaulting the police officers in the execution of their duty. Southwood J considered the requirements of s 163 of the *Mental Health and Related Services Act*, and held that on the evidence, the police had not considered matters relevant to and necessary for the exercise of a power to apprehend under s 163, and so, did not have authority to apprehend the appellant under s 163. There was no suggestion that the police were deliberately ignoring or disregarding the requirements of s 163, rather it seemed that they did not fully appreciate that they might be apprehending the appellant (as opposed to just helping him) and had not properly considered what was required for a lawful apprehension. Southwood J held on the evidence that "it could not be excluded as a reasonable possibility that the officers were not acting execution of their duty as they unlawfully apprehended the appellant.[21]" It seems that when effecting an arrest or apprehension, police must strictly comply with the legislation that confers the specific power of arrest or apprehension. A failure to comply with the legislative requirements of arrest or apprehension, even a failure arising from an honest mistake, will likely result in findings that the arrest or apprehension was "unlawful" and that the police officer "was not acting in the execution of his duty".

22. In *Prior v Mole*[22] the appellant appealed his convictions for unlawfully assaulting a police officer in the execution of his duty and for behaving in an indecent manner. In this case the appellant had been apprehended by police pursuant to s

[20] *Sinclair v Burgoyne* (2007) 208 FLR 101
[21] Ibid at [4]
[22] *Prior v Mole* [2015] NTSC 65

128 of the *Police Administration Act* on the grounds that he was intoxicated. Following his arrest, the appellant swore at police and spat at them. Southwood J found that even though the police had considered the apprehension requirements of s 128 of the *Police Administration Act*, they had failed to comply with the Northern Territory Police General Order A7[23]. General Order A7 provides, inter alia, that the arrest of a person should be an action of last resort and it was submitted that, in the circumstances of this case, the apprehension was unnecessary. Southwood J found the apprehension to be not in accordance with the requirements of the General Order. Applying s 138 of the *Evidence (National Uniform Legislation) Act 2011 (NT) (ENULA)* Southwood J held that the evidence of the appellant's subsequent behaviour (the assault on police and his behaving in an indecent manner) ought to have been excluded in the exercise of a discretion because:

> *"The undesirability of admitting the evidence about counts 2 and 3 outweighed the desirability of admitting it. The assault on Sgt O'Donnell was a low-level assault and the indecent behaviour was a very low level offence. Sgt O'Donnell was not injured and his face was, to some degree, protected from the appellant's sputum by his glasses. The apprehension of the appellant was ill-advised and unnecessary and the offences were objectively the anticipated or expected outcome of his apprehension. The apprehension of the appellant significantly interfered with his liberty and his detention was significantly in excess of any penalty that may have been imposed on him by the Court of Summary Jurisdiction for drinking in a regulated place even if he was creating a nuisance.[24]"*

23. In addition, Southwood J said:

> *"In circumstances where it seems the liberty of the subject is increasingly in need of protection, it is of critical importance to the existence and protection of personal liberty under the law that minimum standards of police conduct with respect to apprehending and detaining citizens should be scrupulously observed. For many years the courts have been at pains to emphasise the importance of the observance by police of those minimum standards by excluding on the grounds of public policy evidence obtained as a result of breaches of those standards.[25]"*

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[23] Section 14 A of the *Police Administration Act 1978 (NT)* empowers the Commissioner to issue general orders and instructions as are necessary to secure the good government and efficient working of the Police Force.
[24] Ibid at [71]
[25] Ibid at [52]

24. Applying the reasoning in *Prior v Mole*, it is possible that a failure by police to comply with the Police General Orders, particularly when police are exercising a power that interferes with the liberty of a person, may result in a finding that police have breached the "minimum standards of police conduct". It seems likely that if a police officer has breached the "minimum standards of police conduct" then he or she may no longer be "acting in the execution of his or her duty", instead it could be said that he or she was acting outside his or her duty.

25. In *R v Gehan*[26] Grant CJ was asked to exclude evidence obtained following the stop and search of a vehicle and a passenger on the grounds that the police actions were illegal or improper: s 138 *ENULA.* Although he was not considering whether police were acting "in the execution of his duty" or "in the course of their duty", Grant CJ's findings concerning what might amount to police illegality or impropriety appear pertinent to the question of whether or not a police officer was acting in the execution of his duty.

26. Concerning what was meant by "impropriety" in s 138 of the *ENULA* Grant CJ said:

> *"The ENULA contains no definition of "impropriety". The method or conduct will be "improper" in the relevant sense if it is "not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong". The meaning of the term "improperly" was described by Basten J in Robinson v Woolworths Ltd in the following terms:*
> *"It follows that the identification of impropriety requires attention to the following propositions. First, it is necessary to identify what, in a particular context, may be viewed as "the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement". Secondly, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be "quite inconsistent with" or "clearly inconsistent with" those standards.*
>
> *As suggested in that extract, the test is not materially different to the common law position that in order to warrant the exclusion of evidence on this basis the conduct in question must be "inconsistent with the minimum standards*

[26] *R v Gehan* [2019] NTSC 91

which a society such as ours should expect and require of those entrusted with powers of law enforcement". Moreover, the conduct must be "clearly inconsistent" with those standards. Although the method or conduct in question need not have been intentionally improper, it must still be capable of characterisation as clearly and significantly inconsistent with minimum standards.[27]*" (*citations omitted*)*

27. In addition, concerning the exercise of the police power to randomly breath test and saliva test drivers,[28] Grant CJ said:

"The use of the power to conduct a random breath test for the ulterior purpose of general criminal investigation would be both improper and in contravention of the law which confers the power.[29]*"*

28. Concerning the exercise of the police power to search a vehicle without a warrant on reasonable grounds to suspect that a dangerous drug may be found in it[30], Grant CJ said:

"The exercise of the power required the apprehending police officers to have "reasonable grounds to suspect that a dangerous drug… may be found" in the vehicle. Those reasonable grounds must have existed in both the subjective and objective senses which are discussed further below. If there were not reasonable grounds in both senses, the search was "improper" within the meaning of s 138 of the ENULA. It is less clear whether this would constitute a contravention of the law in the relevant sense, as mere failure to satisfy the conditions necessary for the exercise of the statutory power may in some circumstances not constitute a contravention of the law. That uncertainty notwithstanding, where the power in question is one which abrogates a fundamental liberty and is exercised by law enforcement authorities, the better view is that a failure to comply with the statutory limitations on the exercise of the power will constitute a contravention of the law in the relevant sense.[31]*"* *(*citations omitted*)*

29. Similarly to Southwood J, Grant CJ's reasons appear to suggest that police may be held to higher and more exacting levels of accountability when exercising powers that infringe on the freedoms and liberties of a person.

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[27] Ibid at [8-9]
[28] Section 29AAB(1) of the *Traffic Act*
[29] *R v Gehan* [2019] NTSC 91 at [11]
[30] Section 120C (a) of the *Police Administration Act 1978*
[31] Ibid at [35]

30. In *Perkins v The County Court of Victoria*[32], a claim in the nature of certiorari, the Court of Appeal had reason to consider whether a police use of handcuffs was legal. In this instance, it was accepted that the use of cuffs in the circumstances of the case could not be said to be unwarranted. However, Charles JA said:

> *" ... there is no general rule that persons arrested and being conveyed to or from a place of detention to a court must be handcuffed. An arresting officer is entitled to take proper precautions when conveying a person in custody, and all the circumstances must be considered to determine whether there are reasonable grounds for the arresting officer to handcuff the prisoner. But the right to handcuff must be found in some additional circumstances, such as the necessity to prevent the prisoner escaping; or committing some further offence; or endangering the safety of persons or property. If the police officers arresting this appellant had no justification for handcuffing their prisoner, it would in my opinion follow that in attempting to do so, they were not acting in the course of their duty, and the appellant was not guilty of the offence of resisting the police in the course of their duty.*[33]*"*

31. In order for a police officer to be "acting in the execution of his duty" the Victorian Court of Appeal expected that the conduct engaged in be connected to the broadly defined functions of a police officer and necessary for those functions.

32. I consider that to "execute" a duty means to "carry out or complete[34]" or "carry out and perform[35]" or "carry out and accomplish[36]" a duty. The decisions discussed above suggest that a strict approach is applied to the concept of "in the execution of a duty" and this is especially so when police are exercising a power which, unless justified by law, would otherwise infringe upon a person's liberties. In those instances, if the means or method of completing the duty diverges from the power conferred or is unnecessary for the exercise of that power, then it might be found that any such divergence falls outside the concept of "executing" the duty.

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[32] *Perkins v The County Court of Victoria* (2000) 2 VR 2

[33] Ibid at 267-268 (I note that the relevant offence under consideration was one of resisting police in the "execution of their duty": s52 (1) of the Crimes Act 1958 (Vic), which provision did not use the phrase "in the course of duty" as stated by Charles JA. See judgment of Buchanan JA at [46])

[34] Collins English Dictionary and Thesaurus, Harpers Collins Publishers, Reprint 1994 at 392

[35] The Concise Oxford Dictionary of Current English, Clarendon Press, Eighth Ed. at 408

[36] Macquarie Dictionary, Macquarie Dictionary Publishers Pty Ltd, Fifth Ed. at 579

33. However, is "acting in the **course** of his duty" a broader or looser concept than "in the **execution** of a duty"? In his paper, Dr Gray likened the phrase "acting in the course of his duty" to the phrase "in pursuance of" a duty. Dr Gray considered *Hamilton v Halesworth*[37] and the *Whittington*[38] decisions and reasoned as follows:

> *"For example, in Hamilton v Halesworth, the question arose whether a police officer who had wrongfully arrested the plaintiff was acting "in pursuance of" the relevant legislation, the Police Offences Act 1901 (NSW). According to Starke J in the High Court, the defendant was acting pursuant to the Act "if he had a bona fide belief in the existence of facts which if existing would have justified him in so acting". Provided the defendant was acting in pursuance of powers he supposed he possessed, his actions fell within the scope of the phrase. The reasonableness or otherwise of the defendant's belief was irrelevant. Moreover, the burden of proving lack of good faith lay upon the plaintiff, according to the High Court.*
>
> *More recently, in R v Whittington (2006) 17 NTLR 235, the question arose of whether a police officer who shot and killed an Aboriginal man was acting "in pursuance of" the Police Administration Act 1978 (NT). This question was relevant because s 162 of the Police Administration Act 1978 (NT) provided a two-month time limit for the commencement of prosecutions for acts done in pursuance of the Act… The prosecution conceded that there was no evidence to suggest that the "accused was acting otherwise than according to what he believed to be the lawful execution of his duty at the relevant time". Following the High Court decision in Hamilton v Halesworth, Mildren J in the NT Supreme Court held that there was no evidence on which a jury could conclude that the police officer was not acting "in pursuance of" the Act. In February 2007, and for similar reasons to those advanced by Mildren J, the Court of Criminal Appeal rejected a prosecution appeal.* [39] *"*

34. If this interpretation is correct, then police who unwittingly fail to comply with a legislative requirement or a Police General Order but proceed in the mistaken belief that they are complying with the requirements of their duties, could still be "acting in the course of their duty". It follows that certain conduct not precisely attuned to a legislative power or precisely conducted in compliance with policy, could be found to be not done "in the execution of their duty"; or an

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[37] *Hamilton v Halesworth* (1973) 58 CLR 369

[38] *R v Whittington* (2006) 17 NTLR 235, *R v Whittington* (2007) 19 NTLR 83

[39] Dr Stephen Gray, 'You can't charge me, I'm a cop: should police, corrections staff and law enforcement officers be immune from criminal liability for actions carried out against vulnerable people in the course of their duties?', (2018) 41(3) UNSW Law Journal 670 at 672-673

"impropriety", but, nevertheless, the police officer might still be found to be "acting in the course of his duty".

35. The phrase "acting in the **ordinary** course of the person's duties as a police officer" has been judicially considered in the context of a criminal defence provision.

36. In *Director of Public Prosecutions (New South Wales) v Weinstein*[40], on appeal from the Local Court NSW, Schmidt J considered whether a police officer who had failed to secure his firearm was "acting in the ordinary course of the person's duties as a police officer". The *Firearms Act 1996 (NSW)* required persons who possessed firearms to take all reasonable precautions to ensure their safe keeping[41]. However the *Firearms Act* also provided an exemption for police officers as follows:

> **Section 6(2)** a person is not guilty of an offence under this Act or the regulations only because of something done by the person while acting in the ordinary course of the person's duties:
> (a) as a police officer (or as a student police officer in rolled in the New South Wales Police Academy), or
> (b)…

37. Schmidt J said:

> *"The phrase "acting in the ordinary course of the person's duties" is not defined. It must be given its ordinary meaning, having regard to the context in which it is used. The consequences of competing interpretations must also be considered, as must the purpose of the legislation.*
>
> *In this case the evidence showed that police officers are required to carry firearms when performing their duty; that they take off their heavy belts when driving long distances; that they are required to secure their firearms when they are light from the vehicle; and when going off shift, they must secure their firearms in the gun room. All of this was what the ordinary course of the police officers duties required. The respondent erred when he left his firearm behind in the vehicle and later failed to leave the firearm in the gun room.*

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[40] *Director of Public Prosecutions (NSW) v Weinstein* (2010) 78 NSWLR 666
[41] *Firearms Act 1996 (NSW) s39*

The issue between the parties was whether or not these errors took the respondent outside the ordinary course of a police officer's duties.

On appeal the parties each relied on what was observed in Canadian Pacific Tobacco Company Ltd v Stapleton (1952) 86 CLR 1 at 6, to further their arguments as to the meaning of the phrase here in issue. There the meaning of the phrase "in the performance of any duty as an officer" was being considered. Dixon CJ observed (at 6):
"But, in any case, I think that the words "except in the performance of any duty as an office"' ought to receive a very wide interpretation. The word duty there is not, I think, used in a sense that is confined to a legal obligation, but really would be better represented by the word function. The exception governs all that is incidental to the carrying out of what is commonly called the duties of an officer's employment: that is to say the functions and proper actions which his employment authorises"[42].

38. Schmidt J then discussed various approaches to statutory interpretation and went on to hold:

"There is no suggestion that anything which the respondent did, involved a departure from the ordinary course of his duties, other than leaving his firearm in the vehicle and then failing to secure it in the gun room, when he went off-shift. This was the "something done" to which s 6(2) directs attention. In my view, that these errors, whether inadvertent or negligent, involved the respondent acting outside the ordinary course of his duties, so that exemption did not operate, may not be accepted. The phrase, "acting in the ordinary course of a person's duties" must be understood as encompassing the possibility of human error in performing a duty in the ordinary course.

…

Departures from "the ordinary course" of a police officer's duties when using a firearm can easily be envisaged. A police officer using a firearm to shoot a personal rival with whom the officer is having a dispute, is an obvious and extreme example of use of a firearm while not acting in the ordinary course of duty, albeit no doubt an extremely unlikely one. This is not a mere error committed in the ordinary course of duty, but a deliberate act entirely inconsistent with that duty. Even on the respondent's approach, such a situation would take the police officer's use of the firearm outside the ordinary course of duty.

…

Likewise, an error of judgment made when returning fire at an assailant who is shooting at a number of officers, which results in an officer shooting another police officer, could not result in a situation where the officer would no longer be acting in the ordinary course of duty, notwithstanding the serious

[42] *Director of Public Prosecutions (NSW) v Weinstein* (2010) 78 NSWLR 666 at 673

consequences of the error made. An error of this kind could be inadvertent, or could even involve negligence.

Similarly, it seems to me, an error or oversight in securing a firearm after alighting from a police vehicle, may not result in a situation where the officer is no longer acting in the ordinary course of the officers duties. The evidence does not reveal how the errors here in question came to be made. It may well be that failures like the respondents involve a very serious breach of the applicable policy, which may be dealt with in various ways, but they do not take a police officer beyond the ordinary course of duty.

There may, of course, be other factual situations which could give rise to quite different conclusions. It could be, for example, that a police officer who deliberately refuses to adhere to required policy in relation to the carrying and securing a firearms, could also be found no longer to be acting in the ordinary course of duty. Such a deliberate decision, like a deliberate decision to use a firearm to shoot a rival, while of a different character, may still lead to the same result, so far as the question of whether or not the officer is still acting in the ordinary course of duty, once that decision has been made, is concerned.
There is no suggestion that this was such a case. To the contrary, the evidence suggests that there had been no history of breaches of the firearm policy and that this was a one-off error.

The policy requiring police officers to secure their firearms is no doubt directed at the same considerations as those which underpin the objects of the Firearms Act, namely, to ensure that the firearms which police officers are required to carry in the performance of their duties are safely and securely carried and stored. That policy is unquestionably an important one, especially given the statutory exemption for police officers who breach s 39 during the ordinary course of their duties. Undoubtedly a failure to adhere to the policy may be enforced by the Police Commissioner in various ways. Assuming here that the evidence established a breach of s 39, in the circumstances it is difficult to see that it is one which could result in a conviction for an offence under s 39, given the s 6(2)(a) exemption.[43]"

39. Applying the reasoning of Schmidt J, a police officer may still be considered to be "acting in the ordinary course of his duty" even if the act performed by him was imperfect and involved human error, inadvertence or negligence. A failure to adhere to a Police Service policy or guideline might occur but the police officer might still be considered as acting in the course of duty. However, a deliberate, gross, or repeated failure to comply with a policy might result in a finding that the

[43] Ibid at 675-677

police officer was acting outside the course of duty. At the other end of the scale, it seems relatively clear that deliberate acts, that are entirely inconsistent with the duty of a police officer, are not acts done "in the ordinary course of his duty".

40. I consider that whether or not a police officer is "acting in the course of his duty" is a question of fact. In each case it will require an examination of the facts and circumstances to determine:

(i) What was the duty to be performed and the nature of that duty?
(ii) What is the impugned act?
(iii) How closely did the impugned act align with the duty?
(iv) Did the impugned act comply with or diverge from any relevant legislation or police policy?
(v) If there was a divergence between the impugned act and the duty, what was the breadth or extent of that divergence?
(vi) What factors motivated, caused or contributed to the divergence between the impugned act and the duty?

41. I consider that the phrase "acting in the execution of duty" as applied in the Supreme Court of the Northern Territory is narrower and stricter than the phrase "acting in the course of his duty". In the Northern Territory, "acting in the execution of duty" appears to call for a greater degree of exactitude with the legislation which confers powers and with the policy concerning the exercise of those powers. In my view, "acting in the course of his duty" does not call for the same high degree of exactitude between the duty and the act. The phrase allows for normal human error and honest mistakes. I consider that trivial and /or unintended breaches of legislative or policy requirements would not normally operate to take an officer outside the scope of "acting in the course of his duty" even if they resulted in a finding that the acts were illegal (e.g. an illegal arrest on insufficient but genuinely held grounds). An unintended failure to comply with police guidelines might result in the conduct being considered "improper" and might result in evidence being excluded, but would not necessarily result in the

conclusion that the officer was not "acting in the course of his duty". However, deliberate and/or gross and/or repeated breaches of legislative or policy requirements might result in the conclusion that the police conduct fell demonstrably and clearly below the minimum standards required and expected of a police officer. In those circumstances it seems that the officer would no longer be acting "in the course of his duty" but rather he would be acting in dereliction of his duty. In each case it will be a matter for the tribunal of fact to determine whether or not the prosecution has negatived beyond a reasonable doubt that the police officer was "acting in the course of his duty".

When is the "conduct of the police officer reasonable in the circumstances for performing that duty"?

42. If a police officer is "acting in the course of his duty" it seems that the second limb of the defence requires an assessment of the police conduct as against the duty to be performed taking into account the circumstances in which it is being performed.

43. The word "reasonable" has, in law, the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know[44]. Where a statute requires a decision maker to act reasonably or on reasonable grounds, the relevant decision must meet an objective standard of reasonableness. Where "reasonable grounds" must exist for forming a state of mind, facts must exist which are sufficient to induce that state of mind in a reasonable person[45].

44. In *Taikato v The Queen*[46] Dawson J (who was in the minority on the substantive issues) said:

> *"… Reasonableness provides a test which is well-known in both criminal and civil law and, though it may involve a judgment of degree, has a ready application in widely differing circumstances. The fact that the test of reasonableness frequently involves a question of degree so that minds may*

[44] *Re a Solicitor* [1945] K.B. 368
[45] *George v Rockett* (1990) 170 CLR 104 at 112 per the Court
[46] *Taikato v The Queen* (1996) 186 CLR 454 at 470

differ upon the answer does not relieve a tribunal of the duty to apply the test where that is the test laid down and does not justify confining its scope for the sake of greater precision or certainty. That is particularly so where the test is contained in a provision which is intended to define the circumstances amounting to a defence in a criminal prosecution."

45. Considerations relevant to the question of whether a police officer is "acting in the course of his duty" may also be relevant to an assessment of "reasonableness". In my view, reasonable conduct carries with it the concepts of moderation, appropriateness, proportionality and efficacy. The police conduct must be in pursuance of and appropriate for the duty to be performed. It must also be proportional to the circumstances in which it is performed. However, reasonableness permits a falling short of perfection. There will likely often be a range of conduct, all of which might be considered "reasonable". Normally, I would expect that conduct which falls clearly and plainly short of the minimum standard expected of police might be found unreasonable. However, in any given case all the relevant circumstances surrounding the conduct need to be considered to determine whether or not the conduct was "reasonable in the circumstances for performing the duty".

46. As part of the assessment to determine whether the conduct was "reasonable in the circumstances for performing that duty" it is necessary to identify and consider the relevant circumstances in which the conduct was performed. Given the breadth of duties that police are required to perform and the wide variety of circumstances which they encounter, each case must be assessed on its own facts. It would be impossible to list an exhaustive set of circumstances to be considered in any given case. However, the circumstances might include a consideration of:

(i) the urgency of the situation;
(ii) whether or not weapons are involved, and the nature and location of those weapons;
(iii) whether any person(s) is armed;

(iv) whether there is a risk to life or limb of any person (including the police officer);

(v) whether or not the police officer is outnumbered;

(vi) whether or not the police officer has back-up (and how far away it might be);

(vii) whether or not the police officer has access to relevant information (e.g. police communications, or relevant databases via use of an iPad)

(viii) the substance of any information, intelligence or history on the person or location;

(ix) whether any person(s) is intoxicated or affected by illegal drugs;

(x) whether any person(s) is affected by mental health or physical health issues;

(xi) the apparent age, strength, or frailty of person(s) with whom the police are dealing;

(xii) whether children are present;

(xiii) whether or not the person(s) is co-operating and any known history of compliance or non-compliance;

(xiv) whether there is a risk of further offending;

(xv) whether or not the person(s) has a residence;

(xvi) whether or not there are court orders or bail conditions;

(xvii) any reported information about the incident;

(xviii) a general risk assessment; and

(xix) a police officer's training and experience.

Other defences available to the charges of s 188 assault and aggravated assault

47. As noted earlier, Part IIAA does not apply to the offences of assault and aggravated assault. In respect of those offences the relevant criminal responsibility provisions are found in Part II of the *Criminal Code*, which include additional available defences. Although not specifically relied on by the defence, I consider that the evidence relied on in support of the defence under s 208E, also raised

possible defences under ss 27 and 29 of the *Criminal Code*. Accordingly the prosecution also bears the legal burden of negativing those defences.

Charge 1: Aggravated assault on Mamarika

48. The Crerar Road location where the incident took place houses a number of ground floor residential units operated by Anglicare. The relevant unit block consisted of two adjoined units fronted by a linear cement veranda. The events unfolded on the cement veranda and adjoining grass. There was limited lighting and the location was reasonably dark. There was some ambient light from external lights mounted on unit blocks nearby, from the parked police car, and from a light inside the unit visible through an open front door. Later, veranda lights were turned on. Both officers carried illuminated torches in their right hands. Both officers activated their body worn videos (BWV) on approach.

49. Both police approached the ground floor unit where the knife-incident involving Mr Soloman Mamarika was alleged to have taken place. To the left of the unit's front door, the police identified Mr Solomon Mamarika sitting cross-legged on the cement veranda with his back to the wall of the unit. Two women were also present. Mr Solomon Mamarika's wife, Ms Lalara, was in the doorway of the unit approximately two metres from where Mr Solomon Mamarika was sitting. Their 36 year old daughter, Mamarika, was standing at the edge of the veranda, opposite the doorway. Another two woman were further along the veranda but moved away shortly after the police arrived.

50. The defendant's BWV was Exhibit 1. Senior Constable Smithers' BWV was Exhibit 4. The BWV contains footage of the police officers' arrival at the scene and their initial inquiries about the knife. After verbally confirming that Mr Solomon Mamarika was unarmed, the defendant patted Mr Solomon Mamarika down and then requested Mr Solomon Mamarika to sit back down on the veranda. Mr Solomon Mamarika complied with that request. Senior Constable Smithers remained standing near Mr Solomon Mamarika.

51. Mamarika was standing near the edge of the veranda, approximately three metres from Mr Solomon Mamarika. Mamarika was holding a mobile phone in her left hand. Mamarika was speaking loudly in an Aboriginal language to Ms Lalara and on the BWV she sounded distressed and upset. Ms Lalara was initially standing on the veranda but she then sat down on a couch on the veranda located to the right of the door. As the defendant approached Mamarika, she started speaking loudly in English and she pointed with her right hand towards a grassy area at the end of the veranda. The defendant tried to quieten Mamarika down telling her: "Shh, shh. Hey, hey. Missus, Missus, Missus, Missus, all right, let's calm down". Somewhat in response to, but also speaking over the top of, the defendant, Mamarika appeared to try and explain about the knife. In a loud voice Mamarika said: "Nah, I am telling them to take that knife here, Solomon treat (sic) me with that knife, he wants to kill me". The defendant said: "Just, just calm down. He doesn't have the knife now".

52. The defendant was standing directly in front of Mamarika and about an arm's length from her, the distance between them is clearly depicted in Exhibit 4. The exchange continued:

    Mamarika: (Standing in front of Neilson-Scott but stretching her right arm in the direction of and looking towards Mr Solomon Mamarika) *Yeah he was, he was* (Mamarika turns back to look at Neilson-Scott and her right arm now gesticulates between herself and Neilson-Scott. However, she does not touch Neilson-Scott)

    Neilson-Scott: (In a raised voice) *Oy, if you don't, if…*

    Mamarika: *Yeah I'm telling you…*

    Neilson-Scott: (In a raised voice) *I'm telling you to shut up.*

    Mamarika: (In a raised voice) *You shut up.*

53. Immediately after Mamarika said "You shut up", the defendant pushed Mamarika in the upper chest using both hands and she fell to the ground on the grass landing

on her left side. The push is clearly depicted in Exhibit 4. The defendant immediately leant over Mamarika, pointed at her with his left hand and loudly said: "You, calm down. Do not yell in my face."

54. According to the times shown on Exhibit 1, 23 seconds elapsed between the defendant's first "shh" until the push. During that time Mamarika remained stationary except for changing the direction of her upper body (as she pointed to the grass at the end of the veranda, as she pointed towards Mr Solomon Mamarika and as she looked at and gestured between herself and Senior Constable Neilson-Scott). Mamarika's stance and feet are clearly depicted in Exhibit 4. She took no steps either towards Mr Solomon Mamarika or towards the defendant. The BWV also shows that Mamarika is shorter than the defendant.

The asserted justification for pushing Mamarika – BWV

55. Immediately following the incident with Mamarika, the defendant was involved in the incidents with Ms Lalara and Mr Solomon Mamarika: at paragraphs [106]-[138]. Police backup was requested and an ambulance was called for Mamarika. It took approximately 40 minutes before Mamarika was taken by ambulance to the hospital. During this delay the BWV records the defendant repeatedly explaining why he had pushed Mamarika:
    (i) The defendant told Mr Solomon Mamarika that: "She was spitting on my face"; and "No-one spits in my face."
    (ii) Over the phone speaking to police, he said that: "The complainant had to be restrained… They were going off their nutters and trying to assault us… She was spitting in my face."
    (iii) To Ms Lalara he said: "I did [push her] because she was spitting in my face."
    (iv) When Mamarika protested saying: "I didn't spit", the defendant replied: "You didn't mean it, but you weren't listening to me", and asserted that the BWV would: "Show you spitting at me, not deliberately".
    (v) The defendant gave a rundown to back-up police who arrived at the location and he said: "She won't talk to me because I put her on her arse

because she was spitting at me. So she was yelling and swearing, not deliberately spitting at me. Not assault police or anything." A little later he said: "I had to use force on the witness because she was spitting in my face. She is playing stupid because I put her on her arse because she was spitting at my face, not deliberately, she didn't spit at me deliberately."

(vi) To the ambulance officers the defendant said: "I had to push, onto the ground, an open hand push and she fell onto the grass. She's spitting at me. Not deliberately, upset trying to tell me. But I had to push for distance. So she's been put on her arse."

56. On the BWV[47], I noted that the defendant asserted on approximately 16 occasions that Mamarika was spitting at him. The first 10 assertions were of spitting simpliciter, it was only after Mamarika's denial that the defendant's version changed to non-deliberate spitting. I consider the defendant's repetition unusual and the change in his version to "non-deliberate" spitting to be legally significant.

Witness accounts

57. Everyone at the scene, including Ms Lalara, Mr Solomon Mamarika and Mamarika, heard the defendant's repeated assertions that Mamarika was spitting. When Mamarika protested that she did not spit, the defendant loudly (and incorrectly) asserted that the body worn video would show her spitting, albeit "not deliberately".

58. In her evidence in the hearing, Ms Lalara said that:

(i) Mamarika was drinking a cup of water, she tried to tell the police officer, and the police officer thought she was spitting at him. However, the BWV shows that Mamarika was not drinking water when the police arrived.

(ii) In cross examination Ms Lalara agreed with the proposition that when Mamarika was speaking to the police officer water came out of her mouth which landed on the policeman's face. However, Ms Lalara also recalled

[47] Exhibits 1 and 4, noting there was only limited transcript provided with Exhibit 1 and none for Exhibit 4.

that, at the time of the pushing, the policeman said: “Your daughter spit at me”. Ms Lalara’s recollection that the police officer mentioned spitting at the time of the pushing is incorrect when compared to the BWV. On the BWV it is clear that the defendant first mentioned spitting after the incident with Mr Solomon Mamarika.

59. I find Ms Lalara’s memory to be unreliable as to the interaction between the defendant and Mamarika and likely influenced by the defendant’s loud, insistent and repeated assertions that Mamarika was “spitting in my face”. Where Ms Lalara’s evidence differs from what is depicted on the BWV, I accept the BWV, and reject the evidence of Ms Lalara concerning the incident involving Mamarika.

60. In his evidence, Mr Solomon Mamarika said that:

    (i) Mamarika was drinking water, which is incorrect when compared to the BWV.

    (ii) In cross examination Mr Solomon Mamarika agreed with the proposition that his daughter was drinking water, water came out of her mouth, and went on the policeman. However, given the poor lighting and the distance between Mr Solomon Mamarika and Mamarika I consider it most unlikely that Mr Solomon Mamarika could have observed any inadvertent spittle leaving Mamarika’s mouth. In addition, the defendant was facing Mamarika, with his back was towards Mr Solomon Mamarika. It follows that Mr Solomon Mamarika did not have a clear view of the defendant’s face and was not in a position to see spittle landing on it. In addition, I note that Senior Constable Smithers, who was standing nearby and likely had a better view than Mr Solomon Mamarika, did not corroborate any spitting.

61. I find Mr Solomon Mamarika’s account of spitting to be unreliable and likely influenced by the defendant’s loud, insistent and repeated assertions that Mamarika was “spitting in my face”. Concerning the purported spitting, I give Mr Solomon Mamarika’s evidence little weight.

62. As Mamarika was not available to give evidence, accounts recorded as given by her were admitted, without objection and apparently by consent, pursuant to s 65 of the *ENULA*. The following representations of Mamarika were admitted:

    (i) In the BWV Mamarika said "I didn't spit" but was incorrectly told by the defendant that the BWV would "show you spitting at me".

    (ii) Mamarika attended Royal Darwin Hospital and the hospital medical records became Exhibit 3. At 2:30 AM the records contain an account apparently given by Mamarika to a nurse as follows:

    "... Involved with a domestic tonight her father threatened her with a knife pulled her hair police were involved. While yelling at her father spit came out of her mouth, police officer thought she was spitting at him and pushed her. Patient landed on grass on left side, full recall of incident[48]*."*

    (iii) Exhibit 2 is a statutory declaration of Mamarika dated 26 April 2019 and it contains the following account:

    "I saw the police arrive and I spoke to the police officer and pointed to him where my father was sitting and told him and he wanted to stab me. As I was talking to the police officer, the police officer yelled at me not to spit at him, but I didn't spit at him, I was talking to him. I was talking to him trying to explain what happened, but he was yelling at me saying I was spitting at him, but I wasn't. I was standing on the grass area at the front of my unit and the police officer was standing on the front veranda. The police officer turned towards me, pushing with both of his hands in my chest area, and I fell backwards to the ground[49]*."*

63. The hospital records appear to contain an admission by Mamarika, relied on by the defendant that "while yelling at her father spit came out of her mouth". While the account recorded at the hospital was against the interests of Mamarika and made within a short time frame, when events were likely fresh in her memory, it is contrary to Mamarika's immediate denial at the scene and her subsequent denial in a signed statutory declaration. There was of course no opportunity to clarify these apparent inconsistencies nor any opportunity for her reliability to be tested. I consider it likely that Mamarika was trying to explain what the defendant had said

[48] Exhibit 3 Royal Darwin Hospital medical records p 13

[49] Exhibit 2 statutory declaration of Mamarika dated 26 April 2019 at [15-19]

she had done, likely influenced by his repeated assertions, rather than making a genuine admission. There is certainly ambiguity. In those circumstances I am not persuaded that I should place any great weight on the hospital account, or the later-in-time statutory declaration. I give them little weight.

64. However, I came to a different view concerning Mamarika's denial of spitting at the scene. The circumstances in which the statement was made are recorded on the BWV. Mamarika's denial at the scene was, in my assessment, an immediate, natural, sober and spontaneous response to the assertion by the defendant that she was spitting. It is noteworthy that the defendant did not immediately refute Mamarika's denial. Instead, firstly, he restated his allegation that "you weren't listening to me" and, secondly, he reframed his allegation from spitting simpliciter to a new and changed version, namely, non-deliberate spitting. It was this new version that the defendant subsequently maintained. As stated earlier, I consider this change in the defendant's version, in response to Mamarika's denial, to be significant. Applying s 65 of the *ENULA*, I consider that Mamarika's denial was: spontaneous; made shortly after the stated fact occurred; in circumstances that made it unlikely that it was a fabrication and in circumstances that made it highly probable that it was reliable. I consider it appropriate to give weight to Mamarika's spontaneous denial of spitting.

65. In his evidence Senior Constable Smithers said that after Mr Solomon Mamarika sat back down, he stood nearby and used his phone to do checks on the police systems. Senior Constable Smithers saw the defendant approach Mamarika to get her version of events. He said Mamarika was yelling and quite belligerent. He heard the defendant use a raised voice and say "I'm telling you to shut up". He heard Mamarika say "no you shut up". Senior Constable Smithers saw the defendant use a "clearance push", "what we refer to in defensive tactics as a Dive" which caused Mamarika to fall to the ground. Senior Constable Smithers did not see anything that appeared to prompt the push and he gave no evidence as to seeing any spitting or spittle. Senior Constable Smithers did not perceive any

particular threat from Mamarika. I note that Senior Constable Smithers did not move closer to Mamarika, consistent with his assessment that she posed no threat. Concerning the scene itself, Senior Constable Smithers did not find it unusual to be confronted with people shouting and emoting. Senior Constable Smithers was not cross-examined on this version of events. In my view, Senior Constable Smithers account was quite consistent with the BWV and reliable.

Expert evidence and Use of Force Policy

66. Detective Senior Sgt Andrew Barram gave evidence as an expert in police defensive tactics training. Detective Barram was asked to review the defendant's BWV (Exhibit 1) and was given the opportunity to review Senior Constable Smithers BWV (Exhibit 4) during his evidence. Detective Barram considered that the language used by the defendant was unprofessional and aggressive in tone. He said the contact with Mamarika was called a "Dive" but agreed that in layman's terms it was a push. Detective Barram considered that the defendant's use of force was unnecessary because Detective Barram could not see any threatening behaviour from Mamarika, and he maintained this opinion even allowing for some water or spittle from Mamarika's mouth landing on the defendant. In cross-examination Detective Barram conceded that he had not seen a number of documents completed by the defendant about the incident (discussed below). However, he maintained that the BWV spoke for itself. Detective Barram said that police were trained that "knife equals gun" and that a high level of vigilance was required by police attending incidents where there was alleged to be a knife. In both prosecution and defence submissions it was suggested that Detective Barram's evidence was of limited value because, as Detective Barram himself said, the BWV spoke largely for itself. I agree with those submissions.

67. Exhibit 10 consisted of Police Service training and policy documents concerning the use of force. I understood from the evidence that the defendant was up-to-date on his use of force training. The policy and training documents state that police are to use only force "that is necessary on reasonable grounds, to effectively bring a

situation under control". Exhibit 10 established that training on the use of force includes the following:

(i) Successful operations avoid or minimise the use of force.
(ii) It must become second nature to talk, reason and negotiate with people for an outcome that does not involve force.
(iii) Each situation must be carefully assessed so that only the minimum level of force will be applied.
(iv) Officers will only resort to force when strictly necessary and to the extent required to control the particular situation.
(v) Officers should only use the minimum amount of force necessary to defend themselves or another, control a subject and/or effect arrest and apprehension.
(vi) Unnecessary force is force which the user knows is unnecessary, is disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion.
(vii) Excessive force includes, inter alia, any force where none is needed and more force than is needed.

Medical Evidence

68. According to the hospital discharge summary[50] as at 29 March 2019, 6 days after she was pushed to the ground, Mamarika was still experiencing groin pain and finding it painful to walk. Mamarika had a lump, likely a haematoma, on her left hip and reduced active movement of the left hip due to pain. She was using crutches. Mamarika was prescribed analgesia (Endone) for the groin/hip pain. The records were admitted into evidence by consent, were not contested, and I consider they clearly establish that Mamarika suffered harm[51] as a result of the push.

[50] Exhibit 3 p 3
[51] Definitions 1A(1) *Criminal Code*

The defendant's documented accounts and evidence

69. When he returned to the police station on the night of the incident the defendant completed three documents about the incident and was cross-examined about them as follows:

(i) (a) Exhibit 6 is a printout of a Promis case note entry headed CIIR V2. In Exhibit 6 the defendant recorded:

"The female who had reported the incident was yelling and screaming about the incident and then inadvertently spat on police while yelling. A Dive OSTT manoeuvre was done to help create distance as to not get any more spittle on police."

(b) The defendant was cross-examined about: his description of the female as "yelling and screaming", his use of the word "police", and his description of the push as a "Dive OSTT manoeuvre". The import of the cross-examination was that the defendant was exaggerating the behaviours of Mamarika to create a false legitimacy for the push. He denied those propositions.

(c) I find that there is inconsistency between the BWV and some of the defendant's assertions in Exhibit 6. While Mamarika's voice is somewhat raised and distressed, I do not consider that she is screaming. Further, there is simply no act of spitting depicted on the BWV, inadvertent or otherwise. Where the defendant's account differs from the BWV, I accept the BWV.

(ii) (a) Exhibit 7 is a Promis entry entitled Use of Force. In Exhibit 7 the defendant recorded:

"Mamarika was very emotional saying that Solomon had a knife. Neilson-Scott started to obtain the details and tried to calm Mamarika down. Whilst briefly speaking with Mamarika she began to become abusive towards Solomon and then started being aggressive towards Neilson-Scott. She raised her hand and pointed into Neilson Scott's face and started yelling. As Mamarika was yelling small amounts of spittle came out of her mouth and onto Neilson-Scott's face. Neilson-Scott attempted to give commands for Mamarika to "shut up" and to "back off" so spit was not hitting police. Mamarika didn't respond favourably to any commands and yelled back into Neilson-Scott's face where more spittle left her mouth and struck him in the face. In an attempt to stop being inadvertently spat on further, Neilson-Scott used an OSTT Dive manoeuvre to create distance and to move Mamarika

back away. This manoeuvre was effective and Mamarika fell to the grass and mud."

(b) The defendant was cross examined about Exhibit 7. It was suggested that: Mamarika was not "abusive towards Solomon" but was simply giving an account, albeit emotively and in a distressed state; was not "aggressive towards Neilson-Scott" but was simply trying to communicate what had happened; that there were no commands (plural) and certainly no command to "back off"; and no "spittle". It was suggested that the cumulative effect of these exaggerations and inaccuracies was a "gilding of the lily". The defendant accepted that there was no command to "back off" but he rejected the other propositions.

(c) I note that in this account the defendant's version has changed again somewhat. The defendant does not allege spitting but instead describes the transference as follows: "As Mamarika was yelling, small amounts of spittle came out of her mouth".

(d) I find inconsistencies between the BWV and some of the defendant's assertions in Exhibit 7. In my view, the BWV does not show Mamarika becoming abusive to the defendant, nor does it support the proposition that Mamarika was aggressive towards the defendant. Until she was pushed Mamarika remained in her original position and was only trying to speak about the incident (until she was told to "shut up"). Further, while Mamarika gesticulated with her hands, her hand movements were consistent with the account that she was giving and were not aggressive. Her hands moved: in the direction of the end of the veranda indicating the location of the knife; in the direction of Mr Solomon Mamarika when attempting to explain what he had done; and between herself and the defendant when she was trying to tell him what Mr Solomon Mamarika had done. Although the defendant alleged spittle landed on his face on two separate occasions, the BWV does not depict any reflexive reaction consistent with that account. The defendant does not flinch, move his head back, or wipe his face, and neither does he tell Mamarika to stop spitting. I note that the defendant conceded that he did not

give a command to "'back off' so spit was not hitting police". Where the defendant's version is inconsistent with the BWV I accept the BWV.

(iii) (a) Exhibit 8 is a statutory declaration completed by the defendant. In paragraphs 7 to 9 of Exhibit 8 the defendant gives an account of his interactions with Mamarika. He wrote:

"I then approached the other group of persons to be able to get a story on what had occurred. I was trying to calm them down as they started to get a bit rowdy. I saw a female, the one who had been yelling, I now know her as (Mamarika), approach me. She said that Solomon had threatened her with a knife, I tried to reassure her and calm her down but as I was talking to her she became more agitated and started to move towards Solomon and had her hand out pointing at Solomon. I was worried that Mamarika would escalate the situation so I tried to gain control by giving her some verbal directions to calm down and to stop talking. She ignored me and talked over me loudly and was close to me, as this was occurring I felt that some spit was coming out of her mouth and struck me on my face. I know that Mamarika wasn't meaning to spit on me but it had struck my face. I then raise my voice and told Mamarika to shut up. She responded to me to shut up and as she did more spittle landed on my face. I did not want to get any more spit on me so I used a "Dive" manoeuvre, taught to me in my defensive training, which I used open to push out from my body and essentially push the subject away from me. I performed this manoeuvre rapidly so the risk of being spat on again was reduced, I effected this manoeuvre on Mamarika and she stumbled back and fell on the grass and mud."

(b) The defendant was cross examined about Exhibit 8. In cross examination it was suggested that Mamarika did not "start to move towards Solomon"; was not "escalating the situation"; and did not pose a threat to the defendant. The defendant accepted the first proposition but rejected the remaining propositions.

(c) I find some inconsistencies between the defendant's version and the BWV. At the time of the push there were only two women present, not a "group of persons". Although Mamarika was talking loudly, neither she nor Ms Lalara got "rowdy". Mamarika did not approach the defendant, rather the reverse, he approached her.

(d) In addition, I find a significant change in this version from the two previous versions. The first two versions essentially assert that the push was in response to the alleged spitting or spittle. This version seemingly adds a

further justification for the push, namely, Mamarika's alleged agitation, movement and potential escalation of the situation. However, I find none of this further alleged justification to be borne out on the BWV. Where there is inconsistency, I accept the BWV.

70. I find that there are numerous inconsistencies and in my view inaccuracies between the BWV and the defendant's written accounts, and inconsistencies and changes as between the accounts themselves. I consider the inconsistencies to be significant and not simply explained by the vagaries of memory, noting that each of these versions were completed on the same day as the events. I find that the inconsistencies work together to overstate the alleged non-compliant behaviour of Mamarika, and to misrepresent her behaviour to inflate the risk she posed. Where there is inconsistency between the defendant's written accounts and the BWV, I give weight to what is shown on the BWV and I reject the defendant's versions. In my view the inconsistencies and changes raise considerable doubt as to the overall accuracy and honesty of the defendant's version of events.

71. In his evidence in chief the defendant said he attended the scene having heard a radio call for police to attend a violent domestic involving Mr Solomon Mamarika, armed with a knife. On the way, Senior Constable Smithers checked the police systems and both officers learned that Mr Solomon Mamarika had previously been trespassed from the location and that he had a criminal history which included incidents of violence and domestic violence. The defendant said he had been trained that "knife equals gun" which was seemingly a reminder to him that knives have the potential to cause serious harm or death, and ideally there should be 6 metres distance between any presented knife and a police officer. The defendant said that when he arrived, he identified Mr Solomon Mamarika, patted him down to ensure he was not concealing any weapon and then asked him to sit back down. The defendant said Mr Solomon Mamarika was "apparently cooperative". The defendant said that he had been taught to separate the feuding parties so he walked towards the daughter to create a physical barrier and a distance between the

daughter and Mr Solomon Mamarika. The defendant said that Mamarika was yelling and screaming about the knife, and was saying that Solomon was trying to kill her. The defendant said he felt Mamarika:

> *"…was going to escalate the situation or potentially could escalate the situation and then I saw her point around me and almost go to go around me. I thought she was going to walk around us, and potentially approach Solomon. I yelled at her "hey" and then I think she said something like "I'm trying to tell you" and then what happened, when she was still yelling, I felt spit go on to my face. And then I said, "I'm trying to tell you to shut up". She didn't respond very favourably, and told me to shut up… At that time I felt more spit on my face, more than the first time. And at that point I felt I needed to remove the – de-escalate the situation, and to create some distance between this person that wasn't cooperating and me, for my safety. So I pushed out with my two hands…. So, I pushed out in a Dive manoeuvre, taught to me in my defensive tactics. Pushed out with my open hands and made contact with her upper body and shoulder region, and pushed out to create that distance. When I pushed out, she fell to the grass, onto mainly her left side. And then I went in and I said, "Don't yell in my face".[52]"*

72. I note that the defendant's evidence in chief is similar to his account in Exhibit 8, but toned down, perhaps to be more consistent with the BWV. For example, the defendant no longer claimed that Mamarika "started to move towards Solomon" (which is not shown on the BWV) but instead now says that she "almost" went to "go around me" and "I thought she was going to walk around and potentially approach Solomon". I consider that the behaviours and actions of Mamarika were entirely consistent with her being a distressed victim, her arm movements were gesticulations and suggested no threat, and her words were not threatening or abusive. Apart from refusing to "shut up", I saw no evidence that she was not co-operating. When compared against the BWV, I found much of the defendant's asserted fears and concerns about a potential escalation unconvincing.

73. Concerning the spit on his face, in evidence in chief the defendant said he was concerned about "biological hazards… infectious disease and stuff like that…There's ramifications on a body fluid splash". The defendant claimed to have had, and knew of others who had had, blood tests related to exposure at work

[52] T 31/01/20 p 36

in the past. Under cross-examination the defendant said that the spit went on his "face, around my nose", and "around my mouth and on my lips". However, the defendant did not have a blood test. The further detail concerning the location of the spittle was not included in the defendant's earlier accounts. In light of that further detail, the lack of testing seems incongruent with the defendant's stated fears. The lack of testing is more consistent with no or very little spittle, than with alleged spittle landing on the nose and mouth, not once but twice. I considered the additional details embroidery.

74. I consider that the defendant's assertion of spitting was inconsistent with other more reliable evidence in the proceedings. In particular, I refer to the BWV in so far as it does not show Mamarika spitting and only shows her talking; it does not show any inadvertent spittle; it shows that there was no spontaneous reaction (movement of head, stepping back, wiping of face) by the defendant to any spittle; there was no immediate complaint by the defendant of spittle (but instead a different complaint of yelling); and it shows the spontaneous denial of spitting by Mamarika. In addition, I am satisfied that the defendant's account about the alleged spitting changed over time: firstly, in response to Mamarika's denial; and later, with the addition of exaggerated details. I find his assertion of spitting unreliable and I reject it.

75. In cross-examination the defendant agreed that he was an officer of 12 years-experience, au fait with relevant guidelines and principles, and that he possessed significant operational experience in dealing with domestic violence incidents involving indigenous witnesses and defendants. He agreed that persons involved in domestic violence incidents can be emotive and speak loudly. In cross-examination the defendant conceded that telling a suspected domestic violence victim to "shut up" was "pretty far removed from best practice".

76. The defendant agreed that Mamarika was smaller than him and fairly frail.

77. The defendant was asked whether he thought the incident could have been avoided with more patience. He did not agree. He said, "I just tried to do my job, and continue to do my job, with the threat that came up against me".

78. Having considered the totality of the evidence, I accepted the BWV and Mamarika's denial of spitting as captured on the BWV. I accepted the evidence of Senior Constable Smithers. I accepted Exhibit 10 as setting out the relevant policy and training on the Use of Force; and I accepted that the defendant was up to date with his training. I accepted that the medical records (Exhibit 3) established harm to Mamarika from the push. I rejected as unreliable the evidence of Ms Lalara and Mr Solomon Mamarika as it related to the circumstances leading up to the push of Mamarika. In so far as the defendant's evidence differed from or added to what was shown on the BWV, I found that his version changed over time on materially significant matters, was exaggerated and ultimately unreliable. I rejected his assertions that Mamarika was spitting or a potential threat.

Did the prosecution negative the raised defences beyond reasonable doubt?

Section 208E of the *Criminal Code:* First Limb

79. I was satisfied that this possible defence was raised to the required evidential standard on the evidence taken at its highest.

80. I was satisfied that the defendant attended the premises in the course of his duty to investigate a possible criminal offence and to keep the peace. In so doing, his duties included investigating any offending, preventing any continuation of any offending, preventing any additional offending, maintaining his and other persons' safety, and keeping the peace. The defendant was acting in the course of his duty when he approached Mr Solomon Mamarika, checked him for weapons, and directed him to sit down. The defendant was acting in the course of his duty when he approached Mamarika to obtain her story. But was he still acting in the course of his duty when he pushed her?

81. The push itself was a technique taught in police training. If force was required, then I am satisfied this was towards the minimum end of use of force and complied with his training.

82. Based on my evidential findings, namely, that there was no spittle, aggression or escalation by Mamarika, I consider that no force was necessary or warranted. I consider that the defendant's use of force was not appropriate for any of the duties the defendant was engaged in and was a clear breach of police policy and training. The use of force, even minimal force, was a clear and gross departure from police duties. Accordingly, I was satisfied the prosecution had negatived the first limb of the defence beyond reasonable doubt.

83. For completeness, if my evidential findings are wrong, and if there was unintentional and inadvertent spittle from Mamarika to the face of the defendant (in isolation from aggression or escalation by her), then, I would have considered that no force was necessary in response. The defendant could simply have stepped away and increased the distance between himself and Mamarika. In my view, where no force at all is warranted, for a police officer to use force (even force at a minimal level) amounts to a gross divergence from both his duty and police policy. Such a gross divergence would have resulted in me finding that the defendant was acting outside the course of his duty, and the defence would have failed.

84. For completeness, if my evidential findings are wrong and Mamarika spat at least twice (either in isolation or in combination with aggressive or escalating behaviour), I would have considered that a clearance push using fairly minimal force, (even if the force was not strictly necessary because the defendant could have given a clear direction to stop spitting or moved himself away), would not take the defendant outside the permissible range of "acting in the course of duty". The defendant being the "man on the ground" possessed a discretion as to how to

respond and, if there was deliberate spitting, even if there was an available alternate response using less or no force (such as stepping back or verbal commands) I would not have found a clear, deliberate or gross breach of police policy. Instead, I would have been satisfied that the use of force was minimal and largely reactive to those circumstances. I would have considered that the defendant was within the acceptable range of acting "in the course of his duty" to prevent further offending and to protect his safety.

85. For completeness, if my evidential findings are wrong, and if Mamarika was aggressive to the defendant and/or escalating the situation (in isolation or in combination with either spitting scenario), I would have considered that a clearance push using fairly minimal force, even if there were other options available, would not be a gross divergence from a duty to maintain the peace and would not take the defendant outside the acceptable range permitted by the phrase "acting in the course of duty".

Section 208E of the *Criminal Code:* Second Limb

86. However, if I am wrong concerning my findings of fact or law on the first limb, I will also consider the second limb of the defence.

87. In order to assess whether the push was "reasonable in the circumstances for performing that duty" it is necessary to identify the relevant circumstances. I consider that the relevant circumstances are:

(i) The defendant was an experienced and trained police officer;
(ii) The defendant had experience dealing with domestic violence call outs and Aboriginal persons;
(iii) Two police were in attendance;
(iv) Back up was available;
(v) Mr Solomon Mamarika had a history of violence and was a potential risk;
(vi) The location was dark;

(vii) There were three persons present, namely Mr Solomon Mamarika and two women, likely a potential complainant and a potential witness;

(viii) Although it was alleged that Mr Solomon Mamarika had a knife he was searched and not armed;

(ix) Mr Solomon Mamarika appeared compliant with police instructions;

(x) Senior Constable Smithers was standing near and effectively guarding Mr Solomon Mamarika;

(xi) Any potential threat from Mr Solomon Mamarika or a knife was minimal;

(xii) Mamarika, a female in her 30s, was likely the complainant as she was complaining about the alleged incident;

(xiii) Mamarika was holding a mobile phone;

(xiv) Mamarika was talking loudly;

(xv) Mamarika appeared upset or distressed;

(xvi) Mamarika appeared frail;

(xvii) Mamarika was speaking in language to the older lady and then in English to the police, apparently attempting to communicate;

(xviii) Mamarika was stationary (not taking steps in any direction), but was moving her upper body and gesticulating as she told her story; and

(xix) Mamarika was not spitting; or alternatively

(xx) Some unintended spittle came from Mamarika when she spoke to the defendant and landed on his face; or alternatively

(xxi) Mamarika deliberately spat at the defendant ; or alternatively

(xxii) Mamarika was aggressive, abusive and escalating the situation.

88. In my view, taking into account circumstances (i) – (xviii) and (xix), being the circumstances I found on the evidence, no force was necessary or required by police to perform their duties. The introduction of any force, where none at all was required, was unreasonable. Accordingly, I was satisfied that the prosecution had negatived the second limb of the defence beyond a reasonable doubt.

89. For the sake of completeness, if I am wrong on the facts, and take into account circumstances (i) - (xviii) and (xx), in my view, any use of force, even a minimal use of force, would be an immoderate and disproportionate response to unintended spittle. In my view, any use of force in those circumstances would not be in pursuance of a relevant police duties, would be clearly inconsistent with police policy, and therefore, unreasonable.

90. Again, for the sake of completeness, if I am wrong on the facts, and take into account circumstances (i) - (xviii) and (xxi), I would consider that a minimal application of force such as a push would be appropriate and proportionate to prevent an assault by spitting, and to protect the defendant from harm. If they were the circumstances I would have found the push to be reasonable.

91. Again, for the sake of completeness, if I am wrong on the facts, and take into account circumstances (i) - (xviii) and (xxii), I would consider that a minimal application of force such as a push, would be appropriate and proportionate to prevent genuinely anticipated further offending and to protect the defendant from harm. If they were the circumstances I would have found the push to be reasonable.

92. Accordingly, on the evidence as I found it I was satisfied beyond a reasonable doubt that the prosecution had negatived both limbs of this defence.

Alternate defences: s 27 *Criminal Code*

93. As this defence was not ultimately relied on by the defence I do not intend to address it at any great length but I do need to determine whether it was raised on the evidence and, if so, whether it was negatived beyond reasonable doubt.

94. Section 27 of the *Criminal Code* relevantly provides as follows:

> In the circumstances following, the application of force is justified provided it is not unnecessary force and it is not intended and it is not such as is likely to cause death or serious harm:
> …
> (e) to prevent the commission of an offence;

…

95. In the *Criminal Code* unnecessary force is defined as:

> "..force that the user of such force knows is unnecessary for and disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion."

96. I consider this defence was raised on the evidence.

97. On the evidence I found there were no grounds on which to conclude that Mamarika was about to commit an offence. Although Mamarika was talking loudly and gesticulating, that was well explained by and consistent with her allegedly having been the victim of an assault. I found that she was not moving towards anybody, nor was she making any threatening movements with her arms. Her language was not threatening.

98. An ordinary person similarly circumstanced to the defendant would be a police officer with approximately 12 years' experience, experienced in general duties including attending domestic violence type incidents involving Aboriginal persons and trained in police policies concerning the use of force. I am satisfied that such a person would consider the use of force against an unarmed, frail, distressed, complainant, who posed no threat unnecessary.

99. I found this defence negatived beyond reasonable doubt.

Alternate defences: s 29 defensive conduct

100. As this defence was not ultimately relied on by the defence I do not intend to address it at any great length but I do need to determine whether it was raised on the evidence and, if so, whether it was negatived beyond reasonable doubt.

101. Section 29 relevantly provides:

> (1)Defensive conduct is justified and a person who does, makes or causes an act, omission or event by engaging in defensive conduct is not criminally responsible for the act, omission or event.

(2)A person engages in defensive conduct only if:
(a) the person believes that the conduct is necessary:
(i) to defend himself or herself or another person; and
…
(c)the conduct is a reasonable response in the circumstances as the person reasonably perceives them.
...
(5)A person does not engage in defensive conduct if:
(a)he or she is responding to the lawful conduct of another person; and
(b)he or she knows that the other person's conduct is lawful.
(6)Nothing in subsection (5) is to be taken to prevent a person from engaging in defensive conduct in circumstances where the other person's conduct is lawful merely because he or she would be excused from criminal responsibility for that conduct.

102. I consider this defence was raised on the evidence. Essentially, the defendant claimed that when he pushed Mamarika he did so to defend himself, from further spitting, and to defend both himself and Mr Solomon Mamarika, from some anticipated potential escalating aggression. However, I do not accept that the defendant genuinely held those beliefs. As noted elsewhere, his version changed over time and he exaggerated the risk Mamarika might pose. I also note that Senior Constable Smithers did not identify Mamarika as a threat and I accepted his evidence.

103. If the defendant genuinely held those beliefs, then on the evidence, I found there was no reasonable basis for that belief. Mamarika was not abusive, she was not aggressive in her hand gestures and she made took no steps towards the defendant or her father. Mamarika's behaviours were well explained and consistent with her being the victim of an assault not an aggressor. In addition, I considered that her conduct was lawful and the defendant must have known that it was lawful.

104. I was satisfied on the evidence that the prosecution had negatived defensive conduct beyond a reasonable doubt.

Result Charge 1: Aggravated assault on Mamarika

105. I find the offence and circumstances of aggravation proven.

Charge 2: Aggravated assault on Ms Lalara

106. Ms Lalara is clearly depicted in Exhibits 1 and 4. She is a shortish, older looking female with grey, sparse hair. Exhibits 1 and 4 reveal that Ms Lalara was sitting on a lounge, posing no threat and showing no aggression, when the defendant approached Mamarika. When the defendant pushed Mamarika to the ground Ms Lalara got up and approached the defendant with her right hand outstretched towards the defendant's left shoulder. Ms Lalara held a phone in her left hand. It is not possible to say from the BWV whether or not Ms Lalara's right hand made contact with the defendant's left shoulder but the defendant turned to her and said "You step back as well", almost instantaneously pushed her, and Ms Lalara fell backwards to the ground.

107. Although she agreed under cross-examination that she "went quickly" to the police officer, it is in my view clear from the BWV that Ms Lalara did not approach the defendant with any particular speed. In fact she was somewhat obstructed by some washing which she had to go around. Her arm was already outstretched on approach. If there was a touch it did not appear on the BWV to be accompanied by any degree of force. Her hand was not clenched and the only momentum was from her forward movement, there was no additional pushing movement of the arm.

108. Later, after Mr Solomon Mamarika was arrested, the defendant approached Ms Lalara who was still sitting on the grass. He said "You don't come and push me, right" and Ms Lalara responded "I didn't push you". I considered that denial to be spontaneous and it was maintained by Ms Lalara in her evidence.

109. When Ms Lalara asked for the defendant's name he initially declined to give it. Shortly after, the defendant threw his name card on the ground in front of Ms Lalara.

110. As a result of the fall, Ms Lalara said she hurt her left arm and her wrist. Her arm was painful for about a week, and she went to Danila Dilba and got "a rub". I accepted Ms Lalara's evidence that she experienced pain in her arm for some days and was given pain relief.

111. Apart from seeing the defendant push Ms Lalara, none of the other witnesses take the evidence much further.

112. Turning to the defendant's accounts:

(i) The defendant does not address the push to Ms Lalara in Exhibit 6.

(ii) (a) In Exhibit 7 the defendant said:

"..Mamarika fell to the grass and mud. Although this manoeuvre was effective it caused her mother Wendy Lalara 17/08/1962 to approach Neilson-Scott and try to push him in the left shoulder. Another Dive manoeuvre was performed to push her back to maintain a safe distance, she also fell to a seated position, no injuries were reported by Wendy from the manoeuvre".

(b) According to Exhibit 7 the defendant knew that it was the mother, Ms Lalara who approached him and that she did so in response to him having pushed Mamarika. Notably, in this version the defendant does not positively assert that he was pushed, instead he said that Ms Lalara was "trying" to push him.

(iii) (a) In his statutory declaration, Exhibit 8, the defendant said:

"…(Mamarika) stumbled back and fell to the grass and mud. This made Mamarika's mother, who I now know to be Wendy Lalara, approach me and abuse me. She put her hand out and pushed my left shoulder. I told her to step back and performed the same Dive manoeuvre on her as well. Wendy stumbled back and slowly fell to her bottom on the grass. The force I used on both those females was enough to move them back and cause them to fall to the ground but not so hard to cause them to strike the ground hard. The ground was soft under my feet from recent rain."

(b) According to Exhibit 8 the defendant knew that it was the mother who approached him. However, the version has now changed to an actual push and "abuse" has been added. However the BWV shows that Ms Lalara did not abuse the defendant. She was pushed before she could say anything.

(iv) (a) In his evidence in chief the defendant said:

"I saw in my peripheral vision another lady, who I now know as Wendy Lalara, approach …she approached me quite quickly, I saw in my peripheral vision. I turned, I think it all happened at the same time…I saw someone approaching me, I felt a push or contact with my left shoulder. And I turned and pushed out in a Dive as well, to create distance of an approaching subject…It happened very, very quickly…I felt contact with my left shoulder, and I was turning because I had seen it in my peripheral vision. And I turned and performed the Dive,…like when Wendy came from my left I had to react and come up as well, and I felt that contact, and I pushed out like that and did the Dive. And as I did that I said "you get back as well"."

(b) In this version the defendant now claims to have seen not Ms Lalara but an "approaching subject" and only in his peripheral vision. The defendant is now seemingly suggesting some doubt in his mind as to who was approaching which was not apparent in the earlier versions. In addition the defendant now allows for some uncertainty concerning whether there was a "push" or simply "contact" with his shoulder.

(v) (a) In cross-examination the defendant was challenged about the accuracy of his BWV statement to police communications that "they were going off their nutters and trying to assault us". The defendant said:

"Q: ..no one was trying to assault you?- I possibly thought that Lalara would.
Q: The little old lady?- I didn't know that it was her at the time that I pushed her..because she came up so quickly.
Q: …Who did you think she was, Solomon Mamarika 2 or something? -I don't know what I thought…I responded to someone approaching into my personal space."

(b) In this exchange the defendant again seemingly claims that he was unsure as to who was approaching him after he pushed Mamarika, which is different to what he asserted in Exhibits 7 and 8. Given that Ms Lalara was the only other female person present and located to the left of the defendant, even allowing for peripheral vision, I do not accept that there was any doubt in the defendant's mind as to who was approaching him in a floral dress with grey hair.

(vi) (a) The defendant was also cross examined about Ms Lalara's retort "I didn't push you":

"Q: So, she didn't (push you), did she?- I believe she did.

Q:…Well that's an odd thing to say, isn't it, "I believe she did"?- I felt she did.
Q: Well what does that mean? – That's when I turned, I felt contact with my left shoulder.
Q: So describe that contact? – I felt like she pushed me.
-…I've described it as contact with my left shoulder…Enough to think that it was a push…When I turned the woman was square onto me.."

113. I consider that the defendant initially exaggerated the threat posed by Ms Lalara. His version of events then changed to incorporate uncertainty as to who was approaching, likely because he recognised the absurdity of suggesting that Ms Lalara was a threat. In addition, the defendant's version became vaguer concerning the "push", likely because there was no clear push depicted in the BWV. Having considered all of the evidence, I reject the defendant's claimed uncertainty as to who was approaching, his claim that Ms Lalara offered abuse, and his claim that Ms Lalara posed a threat. I find that Ms Lalara was an older, non-threatening female. As she approached the defendant, she was not moving with force or speed. If there was "contact" between her outstretched arm and the defendant's shoulder it could only have been brief and light contact. I do not accept that it could properly be described as a "push" and, hence, I accepted Ms Lalara's denial of any "push". It is clear on the BWV and I am satisfied that it was equally clear to the defendant on the night, that Ms Lalara was approaching to protest his treatment of her daughter, Mamarika. It was entirely natural and lawful for Ms Lalara to remonstrate with the defendant to prevent any further harmful interaction between him and her daughter. I consider that Ms Lalara's response was entirely consistent with and explained by her desire to protect her daughter. Ms Lalara did nothing further that could have been misconstrued as aggression against or a threat towards the defendant.

Did the prosecution negative the raised defences beyond reasonable doubt?

Section 208E of the *Criminal Code*

114. I was satisfied that this possible defence was raised to the required evidential standard on the evidence taken at its highest.

115. As discussed earlier the defendant's duties included ensuring the safety of persons, including his own safety, and the prevention of further offending. If he had honestly believed that he was about to be assaulted by Ms Lalara, then I would have considered that a push using minimal force to prevent such an assault would fall within the range of "acting in the course of his duty". However, I did not accept his evidence. Instead I found on the evidence that Ms Lalara was simply responding to his assault on Mamarika and that he could not have misconstrued her approach as a threat requiring a defensive reaction. In those circumstances, no force at all was warranted and I was satisfied beyond reasonable doubt that the defendant was not "acting in the course of his duty" when he pushed Ms Lalara.

116. In addition I find the push occurred in the following circumstances:

(i) The defendant was an officer with 12 years' experience, use of force training and experienced in general duties, domestic violence incidents, and dealing with Aboriginal persons;

(ii) Mr Solomon Mamarika was unarmed;

(iii) Mr Solomon Mamarika was effectively under the guard of Senior Constable Smithers, and remained so even when he stood up;

(iv) Mamarika was on her side on the ground having just been pushed by the defendant;

(v) Ms Lalara was an older, shortish, Aboriginal female who had been sitting;

(vi) Ms Lalara saw the defendant push her daughter to the ground and she got up and approached him with an outstretched arm and attempted to say something;

(vii) Ms Lalara was responding to the defendant's treatment of Mamarika;

(viii) Ms Lalara was acting protectively of her daughter;

(ix) Ms Lalara was not abusive or aggressive;

(x) The defendant was much bigger and stronger than Ms Lalara;

(xi) The defendant said "you step back as well" but pushed Ms Lalara before she had a chance to respond to his command.

117. In light of those circumstances, I consider the force used was unnecessary, excessive, and without basis. The situation did not justify a use of force and for the defendant to introduce force was not reasonable in law. I found the second limb of s 208E of the *Criminal Code* to be negatived beyond reasonable doubt.

Alternate defences: s 27 *Criminal Code*

118. Taking the defendant's evidence at its highest, I accept that this defence was raised to the evidential standard. However, I rejected the defendant's evidence that Ms Lalara was about to commit an assault on him or did commit an assault on him by having some contact with his shoulder. Accordingly, the defence is negatived.

119. If I am wrong and there was contact with the defendant's shoulder which in law amounted to an assault and the defendant applied force to prevent the commission or continued commission of that offence then, taking into account the circumstances (i) – (xi) above, I consider that the force used (and that an ordinary person similarly circumstanced would regard the force used) as unnecessary and disproportionate to the anticipated offence.

Alternate defences: s 29 defensive conduct

120. Taking the defendant's evidence at its highest, I accept that this defence was raised to the evidential standard. However, although the defendant claimed he pushed Ms Lalara to protect himself from an assault, I do not accept that he genuinely held that belief. I consider that it must have been obvious to the defendant that Ms Lalara was lawfully remonstrating to prevent any further harm to her daughter. Ms Lalara was not abusive, aggressive or threatening. I was satisfied this defence was negatived.

121. If I am wrong and the defendant genuinely held the belief that he was being assaulted or was about to be assaulted by Ms Lalara, I was satisfied that any

assault or anticipated assault must have been at the very lowest end of gravity for an assault, noting Ms Lalara's age, size and stature. In those circumstances, I consider that a push with sufficient force to knock Ms Lalara onto the ground was excessive and not a reasonable response in the circumstances.

Result Charge 2: Aggravated assault on Ms Lalara

122. I find the offence and circumstances of aggravation proven.

Charge 3: Assault on Mr Solomon Mamarika

123. When the defendant pushed Mamarika to the ground, Mr Solomon Mamarika also stood up in apparent protest. He took some steps towards the defendant but stopped approaching when he was a little over a metre from the defendant. The distance between the two men is clearly shown in Exhibit 4. Senior Constable Smithers was to the right of Mr Solomon Mamarika and to the left of the defendant. With an outstretched arm Mr Solomon Mamarika wagged his finger at the defendant and said, "You shouldn't be doing that. You shouldn't be doing that". The defendant was facing Mr Solomon Mamarika and also pointed and said, "You step back as well." Mr Solomon Mamarika said, "Don't push women around". Senior Constable Smithers said, "Stay back, stay back", apparently to Mr Solomon Mamarika.

124. Senior Constable Smithers and the defendant then attempted take hold of Mr Solomon Mamarika's arms. The defendant moved in a forceful forward motion, initially grabbing Mr Solomon Mamarika's left arm but continuing in a driving motion to push Mr Solomon Mamarika back against the unit wall. Mr Solomon Mamarika flailed his arms as he was driven backwards and said, "Hello" and, "Come on, come on". The defendant grabbed Mr Solomon Mamarika's hair. Mr Solomon Mamarika's raised both arms in a surrender type gesture, and each officer took an arm and sat Mr Solomon Mamarika down. While getting him onto the ground the defendant said, "Get on the ground, get on the ground, you don't punch me mate". Mr Solomon Mamarika said, "You shouldn't be doing that to a woman."

125. It is clear on the BWV that the first physical contact between Mr Solomon Mamarika and the police was when both officers grabbed for his arms. Up until that point there had only been mutual pointing and a verbal exchange. Mr Solomon Mamarika was not moving towards the defendant, had not formed a fist or motioned with his arm to strike, and was not using threatening language. He was simply pointing, shaking his hand and protesting what had happened to the women. On reviewing the BWV, I am satisfied that it does not depict any punch by Mr Solomon Mamarika, but it does show him flailing his arms as he is forced backwards.

126. Shortly after Mr Solomon Mamarika's arrest, the BWV records a conversation between the defendant and Mr Solomon Mamarika. The defendant said that the BWV would show Mr Solomon Mamarika "acting like a fool towards me and you're going for assault police mate". Mr Solomon Mamarika said, "I didn't assault you, sorry". I consider this to be an immediate denial of any punch or assault. In cross-examination Mr Solomon Mamarika agreed he got angry with the policeman for pushing his daughter and pointed at the policeman, but he maintained his denial that he did not hit the defendant.

127. At about 11.44 the BWV records the defendant speaking to Senior Constable Smithers about the alleged assault by Mr Solomon Mamarika. The defendant said, "I can't remember where he collected me, sort of through here", and indicated the right side of his head. It seems that even shortly after the alleged punch the defendant was unsure about it.

128. Senior Constable Smithers gave evidence and described the events between the defendant and Mr Solomon Mamarika consistent with what is shown on his BWV. Although he heard the defendant say to Mr Solomon Mamarika, "you don't punch me", Senior Constable Smithers said that he did not see a punch. The BWV reveals that Senior Constable Smithers was focussed on Mr Solomon Mamarika

throughout the incident and in very close range. In my view, had a punch been thrown or attempted to be thrown, it is most unlikely that Senior Constable Smithers would have missed seeing it.

129. Turning to the defendant's accounts:

(i)(a) In Exhibit 6 the defendant said:

> *"(Mr) Mamarika then got up and approached Neilson-Scott. He showed several pre-attack indicators (lowered his tone, pointing, staring), he raised his hand pointing out at police and abusing members about the incident. Neilson-Scott took hold of (Mr) Mamarika's arm to secure him in an attempt to de-escalate the situation and make it safe for police. Mamarika lashed out and swung his left arm which struck the right side of Neilson-Scott's head near the body worn camera. Mamarika started challenging police saying "come on", another clearance Dive manoeuvre was performed to create distance and then Mamarika was taken to the ground and secured in cuffs".*

(b) In this version the defendant no longer alleges a punch and instead alleges that Mr Solomon Mamarika "lashed out and swung". When compared against the BWV I consider this version misrepresents the incident. Mr Solomon Mamarika did point and stare, but he was not abusive. Mr Solomon Mamarika was clearly upset about the women being pushed and he moved forward but then stopped and verbalised his complaint. Nothing on the BWV depicts Mr Solomon Mamarika lashing out although he does flail as he is pushed backwards. When Mr Solomon Mamarika said the words "come on" his back was against the wall and he immediately raised his arms in surrender, in my view the words were not said as an invitation to fight but rather as an expression of disbelief or resignation.

(ii) (a) In Exhibit 7 the defendant largely repeats the Exhibit 6 version. However, he adds that Mr Solomon Mamarika approached him in "a combative way" and alleges the strike was to the left side of his head.

(b)My concerns about Exhibit 6 apply equally to Exhibit 7. In addition and significantly, the defendant changes the location of the alleged strike from the right side (BWV and Exhibit 6) to the left side of his head. If the defendant

had been struck as alleged, it is very odd that he then gets the site of impact wrong.

(iii) In Exhibit 8, the defendant adds that "I tried to tell him (Mr Solomon Mamarika) that (Mamarika) was spitting on my face". However this attempted explanation is not borne out on the BWV and in cross examination the defendant conceded was not given.

(iv) In his evidence in chief the defendant gave a detailed explanation using quite a deal of police jargon to describe his actions with Mr Solomon Mamarika. In reference to his own actions he spoke of observing "pre-attack indicators", the attempted arm grasp was further detailed by reference to the "new ISR package as an arm drag", the push was again described as a "Dive manoeuvre", and his further actions were couched in technical terms such as: "intercept, stabilise and resolve", "take down manoeuvres" and so on. However, concerning the alleged contact with his head, the defendant became rather vague and said:

"I felt a strike on the right side of my head... I remember feeling the magnet that's on behind my camera…I remember feeling that hit my head...I initially thought that maybe he tried to grab my head or punch me."

130. Having considered all of the evidence I consider the defendant's evidence to be largely self-serving. It changed in significant ways over time and I found him to be unreliable. I consider that the defendant exaggerated the actions of Mr Solomon Mamarika to paint him as the aggressor. Conversely, the defendant's gave his own actions a veneer of legitimacy by couching them in technical police jargon. I rejected the defendant's evidence that he was punched or otherwise deliberately struck by Mr Solomon Mamarika.

Did the prosecution negative the raised defences beyond reasonable doubt?

Section 208E of the *Criminal Code*

131. I was satisfied that this possible defence was raised to the required evidential standard on the evidence taken at its highest.

132. As discussed earlier, the defendant's duties included ensuring the safety of persons, including his own safety, and the prevention of further offending. If he had honestly believed that he was about to be assaulted by Mr Solomon Mamarika, then I would have considered that a grapple, push and arrest to prevent such an assault would fall within the range of "acting in the course of his duty". However, I did not accept the defendant's evidence. Instead I found on the evidence that Mr Solomon Mamarika was lawfully remonstrating against the defendant's treatment of the two women. Mr Solomon Mamarika was waggling his finger and complaining but he was not moving forward or closing the gap between himself and the defendant. He did not abuse the defendant or raise a fist. The defendant could not have genuinely misconstrued his acts as a precursor to an assault requiring a defensive reaction. I am satisfied that no force at all was required to contain or control Mr Solomon Mamarika. In those circumstances I was satisfied beyond reasonable doubt that when he introduced force and pushed Mr Solomon Mamarika the defendant was not "acting in the course of his duty".

133. In addition I find the push occurred in the following circumstances:

(i) The defendant was an officer with 12 years' experience, use of force training and experienced in general duties, domestic violence incidents, and dealing with Aboriginal persons;
(ii) Mr Solomon Mamarika was a solidly built, older male;
(iii) Mr Solomon Mamarika was unarmed;
(iv) Mr Solomon Mamarika was intoxicated;
(v) Mr Solomon Mamarika was apparently compliant with police directions;
(vi) Mr Solomon Mamarika was under the effective guard of Senior Constable Smithers, which did not change even though Mr Solomon Mamarika stood up;

(vii) Mamarika was on her side on the ground having just been pushed by the defendant;

(viii) Ms Lalara was on the ground having just been pushed by the defendant;

(ix) There were two police to one Mr Solomon Mamarika;

(x) Mr Solomon Mamarika was complaining but not abusive;

(xi) Mr Solomon Mamarika was waggling his finger but had not clenched his hand;

(xii) Mr Solomon Mamarika had stopped moving forward and there was over a metre between the defendant and Mr Solomon Mamarika;

(xiii) Mr Solomon Mamarika was complying with the direction to stay back;

(xiv) The first application of force was by the police to Mr Solomon Mamarika; and

(xv) Mr Solomon Mamarika did not throw a punch but flailed his arms as he went backwards.

134. In those circumstances I was satisfied that Mr Solomon Mamarika was well contained by the two police officers. He was acting lawfully. It was neither appropriate nor necessary to introduce force. I found the second limb negatived beyond reasonable doubt.

Alternate defences: s 27 *Criminal Code*

135. Taking the defendant's evidence at its highest, I consider this defence was raised to the evidential standard. However, I rejected the defendant's evidence that Mr Solomon Mamarika assaulted him by punching or swinging at him. Accordingly the defence is negatived.

136. If I am wrong and there was a punch or swing to the defendant's head and the defendant used force to prevent the commission or continued commission of an assault then, taking into account the circumstances (i) – (xiv) above, I would have considered that the force used (and that an ordinary person similarly circumstanced would regard the force used) was reasonable.

Alternate defences: s 29 defensive conduct

137. Taking the defendant's evidence at its highest, I consider that this defence was raised to the evidential standard. However, although the defendant claimed he was responding to an assault on him, I find there was no such assault and I do not accept that the defendant genuinely believed he had been assaulted. I consider that it must have been clear to the defendant that Mr Solomon Mamarika was verbally remonstrating against the defendant's treatment of the two women, which he was entitled to do. In remonstrating Mr Solomon Mamarika was acting lawfully. He was not abusive, aggressive or threatening. I was satisfied this defence was negatived.

138. If I am wrong and the defendant genuinely held the belief that he had been assaulted by Mr Solomon Mamarika, then I still would not have been satisfied that there were reasonable grounds for that belief, as it is clear on the BWV that there was no punch or swing by Mr Solomon Mamarika before the force was introduced and his behaviour was neither aggressive nor abusive. Accordingly there was no reasonable basis for the defendant's belief that he had been assaulted.

Result Charge 3: Assault on Mr Solomon Mamarika

139. I find the offence proven.

Ruling

140. Weighing all of the evidence, I found the defendant's evidence changed over time, was internally inconsistent, was inconsistent with the BWV and was, at times, exaggerated. Overall, I found the defendant's evidence unreliable and unconvincing. Where his evidence differed from what was shown on the BWV, I gave it little weight.

141. I found that the defendant's behaviour fell markedly below the minimum standards expected of a police officer.

142. I find the defendant guilty on each of the three charges and on each circumstance of aggravation.

Dated this 20 March 2020

Judge Armitage
LOCAL COURT JUDGE