

CITATION: *Police v TZ* [2024] NTYJC 5

PARTIES: *Police*
v
TZ
(a youth)

TITLE OF COURT: YOUTH JUSTICE COURT

JURISDICTION: CRIMINAL

FILE NO(s): 22138996

DELIVERED ON: 26 March 2024

DELIVERED AT: Darwin

HEARING DATE(s): 15 November 2022 to 2 October 2023

DECISION OF: Judge Macdonald

CATCHWORDS:

CRIMINAL LAW – Assault - In the performance of duty - Violent Act - Threatened to Injure or Cause Detriment - Lawfully Entitled – Authorisation - Justification – Evidentiary threshold - Proof beyond reasonable doubt - Separation - Reasonable Use of Force – Inference.

Criminal Code 1983 (NT) ss 26, 27, 29, 188, 188A, 200
Summary Offences Act 1923 (NT) s 47AA
Youth Justice Act 2005 (NT) ss 10, 151 to 157

Ashley v Millar [2015] NTSC 63
Binsaris & Ors v NTA [2020] HCA 22
Burkhart v Bradley [2012] NTSC 86
Burkhart v Bradley [2013] NTCA 05
CC & Ors v Oberg [2021] NTSC 15
CC & Ors v Oberg [2021] NTSC 20
Chamberlain v R (No. 2) (1984) 153 CLR 521
Coleman v Power (2004) 220 CLR 1
DPP v AM [2006] NSWSC 348
Edwards v Tasker [2014] NTSC 56
Fernando v Firth [2017] NTSC 67
Garrett v Nicholson [1999] WASCA 32
George v Rockett (1990) 170 CLR 104
Hofer v The Queen [2021] HCA 36
JB & Ors v NTA [2019] NTCA 1
Jenkins v Todd [2016] NTSC 4
Knight v R (1992) 175 CLR 495
LO & Ors v NTA [2017] NTSC 22
Majindi v Balchin [2011] NTSC 40
Mangurra v Rigby [2021] NTSC 6
MWJ V The Queen [2005] HCA 74
Nguyen v The Queen (2020) 269 CLR 299
Parker v Comptroller-General of Customs (2009) 83 ALJR 494

Queensland Bacon Pty Ltd v Rees (1966) 115 CLR 266
Re K (1993) 46 FCR 336
Robinson v Woolworths Ltd (2005) 64 NSWLR 612
R v Apostilides (1984) 154 CLR 563
R v Em [2003] NSWCCA 374
R v Hawes (1994) 35 NSWLR 294
R v Lawrence [2016] NTSC 6
R v Wilson-Anderson [2020] NTSC 39
Shepherd v The Queen (1990) 170 CLR 573
Tasmania v Seabourne [2010] TASSC 35
The Queen v Bonson [2019] NTSC 22
The Queen v Gehan [2019] NTSC 91
Thyer v Whittington [2017] NTSC 66
Timaepatua v Hutchinson [2023] NTSC 48
Whitehorn v The Queen (1983) 152 CLR 657
Zecevic v DPP (1987) 162 CLR 645

REPRESENTATION:

Counsel:

Police: Ms C McKay with her Ms R Everitt
Defendant: Mr J Lawrence SC with him Mr C Dane

Solicitors:

Police: ODPP
Defendant: Territory Criminal Lawyers

Decision category classification: B

Decision ID number: [2024] NTYJC 5

Number of paragraphs: 88

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22138996

BETWEEN:

Police

AND:

TZ (a youth)

Defendant

REASONS FOR DECISION

(Delivered 26 March 2024)

MACDONALD YJCJ

Background

1. On 1 March 2024 the eight criminal charges brought against a youth, TZ, were finally determined by ex tempore ruling. At that time parties were advised that written reasons were to be published. These are those reasons.
2. On Sunday 31 October 2021 shortly prior to 1:00pm (13:00) an incident involving four youth detainees, including TZ, arose at Don Dale Youth Detention Centre (DDYDC). That incident occurred in the TV room of A Wing of H Block, and escalated significantly at 13:27. The incident was against the background of TZ having been admitted into DDYDC on 22 October 2021 on remand. As at 31 October 2021 there were 39 youths detained at DDYDC, accommodated across five Blocks, with 28 youth justice officers on day duty. That staffing comprised a Team Leader (TL), three Senior Youth Justice Officers (SYJO) and 24 Youth Justice Officers (YJO).¹ It was common ground that the routine in H Block was the most restrictive and stringent of the five Blocks comprising DDYDC.²
3. During the period leading up to the incident H Block accommodated between 10 and 14 detainees, with a total of 12 across A and B Wing on 31 October 2021. Those in A Wing were referred to as "Group 1" and "Group 2", numbering a total of nine, with TZ and his three fellow inmates comprising Group 1. Detainees in B Wing numbered three.³ It was accepted that standard procedure in H Block was that detainees are generally locked down in their cells from

¹ Exhibit P14 - DDYDC Shift Report for 31.10.21.

² Education is conducted in the Block rather than in the DDYDC school-room, sporting and other activities are restricted to the Block, and some egress from H Block for external purposes which other detainees access does not generally occur.

³ Exhibit P14 - DDYDC Shift Report for 31.10.21.

6.30 pm or thereabouts to around 7.30 am the following morning, at which time unlock occurs. Also, that, depending on staffing, a further two lockdowns per day of 30 minutes each would often occur at 11.00 am and 3.00 pm in order to facilitate YJO staff breaks.⁴ In addition, a broad range of exigencies referred to by various witnesses, including Superintendent Adam Neep and TL Leon Rotumah, result in “rolling unlocks”. That procedure is effectively a ‘rolling lockdown’ across and within the Blocks of DDYDC due to operational reasons and necessities. Whether that process is to be applied on any particular day is decided each morning in principle by the Team Leader in a “Daily Plan”, having regard to the rostered staff and exigencies referred to. The Daily Plan is then confirmed or adjusted by an officer of the rank of Deputy Superintendent, or the Superintendent.⁵

4. It was clearly apparent from the evidence that Group 1 and Group 2 were unable to be ‘out of cell’ at the same time, including due to the real or realised risk of conflict between them. Shortly prior to 1.00 pm TZ and three other youths comprising Group 1 accommodated in A Wing of H Block were told they were to be locked down in their cells, which would include eating their barbecue lunch in their cells. That advice resulted in the four youths proceeding to and occupying the TV room, and refusing to proceed to their cells for lockdown. The consequence of that defiance or disobedience was that a second group of detainees accommodated in B Wing of H Block, Group 2, could not be unlocked in order to afford them ‘time out of cell’, in the form of recreation or otherwise.
5. From the time TZ and his collaborators occupied the TV room through to 1.27 pm there was effectively a stand-off. The youths and YJOs interacted freely and, on the basis of what can be seen on the CCTV, apparently without any significant concerns for officer safety.⁶ Various complaints and demands were made by TZ and, to a lesser extent, the other three youths. Although TZ’s primary grievance with the direction to go to their cells was the ‘unfairness’ of being subjected to ‘rolling lockdown’, his principal request or demand (as a quid pro quo to all four youths returning to their cells in compliance with the direction given by YJOs), was for a ‘stand-alone’ television. I infer that was due to no functioning television being present in his cell.⁷ YJOs advised more than once that this would not be possible, following which TZ’s recalcitrance and agitation increased. It was generally common ground that TZ played a lead role (although one other youth also had much to say) in the resistance, which was taken up and supported by the other three youths.
6. Shortly after 1.00 pm more than one YJO attended the doorway of the TV room and began engaging with the four youths. After a time several further YJOs entered and positioned themselves around the perimeter of the TV room, maintained their posts, and observed at least TL Rotumah and SYJO Theron engage and negotiate with TZ and the other youths. At 13:27 a further YJO entered the TV room and, shortly following, walked towards TZ. That aspect is the

⁴ Prosecution submissions of 28 September 2023; paragraph [21] and Supt. Neep’s evidence.

⁵ Issues affecting whether rolling lockdowns, as opposed to detainees having the available 11 hours out of cell, were the subject of evidence from Superintendent Neep and TL Rotumah and relevantly include; the extent of conflict within the detainee cohort, number of youths on separation ‘at risk’, court commitments, medical appointments, and staffing availability. On 31 October 2021 one absent YJO was unable to be replaced, but there were no external escorts to court, specialist appointments or the like, being a Sunday.

⁶ Youths entering and exiting the TV room, and being in close proximity to YJOs, well within striking distance.

⁷ At one point TZ can be seen ‘signing’ “TV” to the CCTV. He also made the request on several occasions to various of the officers who sought to engage him, recorded in the Officer Incident Reports exhibited.

subject of consideration below. TZ threw a paper cup and its content at that YJO then ran towards another YJO and sought to punch that officer, who then restrained TZ, took him to ground and applied a hands-on restraint known as MAYBO. TZ's behaviour also caused either the other youths to join in the resistance, or the other officers to seek to immediately restrain them, or both.⁸

7. As a result of the culmination of the incident, eight charges were ultimately brought against TZ (the Charges).⁹ Counts 6 to 8 were alleged as alternatives to counts 3 to 5.
8. The hearing was hard-fought, with significant dispute between the parties on a number of fronts. That included in relation to relevant witnesses having regard to the respective positions, which the Youth Justice Court (YJ court) did seek explanation of.¹⁰ Not until after the hearing commenced did the prosecution agree to call evidence from a Superintendent of DDYDC, being a course which the YJ court ruled it could not compel by direction.¹¹ The impasse at that point attracted Senior Counsel's chagrin, including;

"Well, res ipsa loquitur. This decision for itself speaks. Looney Tunes. And it does mean that I am going to drag through Youth Justice Officers who - I don't know what they are going to say when I suggest to them, "What do you think about s 4 as to the principles? What do you think about section this - what do you think about the regulations that require this to occur?" And what are they going to say? "Oh Nuremberg defence - it wasn't me, it was him. I was just following orders"".¹²
9. As matters transpired, an officer holding the rank of Superintendent was called (together with the Team Leader, one SYJO and six YJOs), and the 'Nuremberg defence' was not raised by any witness.
10. The respective cases may simply be described as, for the Crown, that on 31 October 2021 in relation to DDYDC staff, TZ behaved in a threatening and violent manner, then applied unlawful force to three YJOs in several forms, said to constitute assaults. For TZ, that the conditions and treatment accorded to him at DDYDC on 31 October 2021 and preceding fell outside the terms of the YJ Act, were an unlawful deprivation of liberty, and enlivened the concept of 'self-

⁸ The incident, at its most extreme, was categorised as Level 2, such that the incident prior to escalation (comprising refusal by TZ and his collaborators to proceed to their cells for a lockdown) was likely a Level 3 incident. See Transcript 23.3.23 page [19] and Shift Report Exhibit P14.

⁹ All of which entailed allegations of either threatening or applying unlawful violence, being alleged contraventions of ss 188(2), 188A and 200 of the Code and s 47AA of the *Summary Offences Act*. The maximum sentences prescribed ranged from 1 to 5 years, such that the Charges had a range of objective seriousness.

¹⁰ As endorsed by the High Court's guidance in *R v Apostilides* (1984) 154 CLR 563 at 575. The prosecution position at the height of the dispute was that; [We] consider our role to be to call evidence in order to establish the elements of the offence and not to run the defence case for them" - Transcript 8.12.23 at page [3].

¹¹ But noting the prosecution duties that "All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based", and of "fairness", being a bulwark against indecorous conduct prejudicial to defendants' rights; *Whitehorn v The Queen* (1983) 152 CLR 657 at 674 and *Nguyen v The Queen* (2020) 269 CLR 299 at [33] to [42] respectively.

¹² Transcript 8.12.22 page [7].

defence'. Also, that self-defence was enlivened in relation to the actions of the three complainant YJOs in any event.¹³

11. In the final analysis, the evidence of the force employed by TZ in relation to the three YJOs was largely uncontroversial, with the content and extent requiring determination.¹⁴

Relevant Law

12. Having regard to the various elements of the Charges and the stance adopted by TZ to them in his defence at hearing, provisions of both the *Criminal Code 1983* (Code) and the *Youth Justice Act 2005* (YJ Act) are relevant to more than one of the Charges. In relation to the use of force, I consider that both the authorisation and justification provided by ss 26 and 27 of the Code, and specific provisions of the YJ Act, might be relied on by a YJO in the circumstances.¹⁵ Although it is TZ who is charged, those provisions have the general effect of rendering force which may otherwise constitute an assault, to be lawful.¹⁶ Conversely, where force used by any YJO in relation to any Charge does not fall within ss 26 or 27, or satisfy the conditions prescribed by the YJ Act, the Crown may fail to prove the relevant offence beyond reasonable doubt.¹⁷ There is also the 'defensive conduct' asserted by TZ which must be considered.
13. Consequently, ss 26, 27 and 29 of the Code, 'Execution of laws', 'Circumstances in which force ... is justified' and 'Defensive conduct', are relevant to determination of the issues in dispute.¹⁸ In relation to 'authorised' or 'justified' force, without addressing the specific circumstances in which ss 26 or 27 may be enlivened, the legal principles and considerations relevant to determining issues concerning lawful application of force are discussed in *Mangurra v Rigby* [2021] NTSC 6 at [34] to [36] and *Jenkins v Todd* [2016] NTSC 4 at [67], [69] and [115] to [122].¹⁹

¹³ See paragraph 9 of Prosecution submissions dated 28 September 2023. It is noted that, in relation to some issues considered, the rule in *Browne v Dunn* may not have been strictly complied with. That defence counsel changed part way through the hearing did not assist, and nor did the fixed focus on 'unlawful deprivation of liberty'. Various consideration of the rule of professional practice in *MWJ V The Queen* [2005] HCA 74 at [16] to [19], *R v Birks* (1990) 19 NSWLR 677 at 688, *Garrett v Nicholson* [1999] WASCA 32 at [67], and particularly *Hofer v The Queen* [2021] HCA 36 at [27] to [37], may assist. In any event, the prosecution obligation to prove all elements of an offence beyond reasonable doubt persists, and it is also possible for a court to resolve issues in dispute on bases other than those primarily advanced at trial.

¹⁴ In addition to the CCTV, there was also the oral evidence of the 3 YJOs allegedly assaulted and of TZ. It is fair to state that by the end of the evidence TZ had generally acknowledged the force meted out by him to each officer.

¹⁵ Despite that written submissions did not address s 27 of the Code, perhaps because on one view only the authorities and restrictions provided by the YJ Act can apply, I do not consider the YJ Act must prevent any YJO from also raising s 27 of the Code. However, any force falling outside the authority of the former would constitute "unnecessary force" for the latter. In relation to count 1, to which Part IIAA applies, sections 43BE and 43BD are relevant. I also note the dichotomy found in *Jenkins v Todd* [2016] NTSC 4 at [122], and that s 27 was not there considered relevant or operative.

¹⁶ Section 25 of the Code.

¹⁷ Including in relation to one or more elements of any charge.

¹⁸ With Count 1 being subject to ss 43BD and 43BE or the Code, and the same provisions of the YJ Act.

¹⁹ See also *Majindi v Balchin* [2011] NTSC 40 at [7], *Ashley v Millar* [2015] NTSC 63 at [3] and *Thyer v Whittington* [2017] NTSC 66 at [18].

14. Section 26 of the Code provides “*authorization*” to the use of force by a person in various circumstances, most relevantly “*pursuant to authority ... lawfully granted*”.²⁰ In this case, authority granted under the YJ Act and, perhaps, “*to lawfully execute any ... warrant*” as provided by s 27 of the Code.²¹ A YJO is legally justified by s 27 of the Code in applying force to a detainee in certain circumstances, provided the force used is not “*unnecessary*”. The obverse of the premise is that ‘unnecessary force’ is not justified, and may be unlawful.²² The phrase “*unnecessary force*” is defined by s 1 of the Code to mean; “*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*”.²³
15. The justification provided by s 27 is broader and more general than through the YJ Act. The YJ Act provisions are more prescriptive and narrower. In addition to ensuring that their application of force is “*not unnecessary*” within the Code, YJOs are duty-bound to comply with the specific legislated prescriptions of the YJ Act which regulate the proper and lawful performance of their duties. I consider that any application of force on a youth in detention must satisfy the criteria provided by both s 27 and the YJ Act, in order to be lawful.
16. In relation to application of force to detainees in a Detention Centre, it should also be kept in mind that the office of Superintendent is the repository of all legislated responsibility for detainees, and authority in relation to application of force in relation to them.²⁴
17. The primary legislated source of all authority within DDYDC, including in relation to ‘separation’ and ‘use of force’ are ss 151 and 152 of the YJ Act, “*Superintendent of detention centre*” and “*Powers of superintendent*”. That authority is then delegated to various levels of the chain of command by statutory instrument executed under s 157 of the YJ Act. The Superintendent’s broad responsibilities for the “*physical, psychological and emotional welfare of detainees*” is qualified by “*as far as practicable*”, which responsibility is then provided detail by s 151(3), including obligations to “*maintain order and ensure the safe custody and protection of all persons*” and the “*maintenance and efficient conduct*” of DDYDC. Section 152(1) then expands the bounds of the obligations and responsibilities by making clear that the Superintendent “*has the powers that are necessary or convenient*” for the exercise of their functions.
18. In addition to ss 151 and 152, provisions of the YJ Act which are pivotal to the issues in dispute include ss 10, 153, 154 and 155A, namely “*Use of force generally*”, “*Prohibited actions*”, “*Use of force*” and “*Separation of detainees*”. Common themes of ‘reasonableness’ and ‘necessity’ inform those provisions, albeit excepted by concepts such as ‘emergency situation’ and ‘imminent risk’, ‘endangerment of persons’ and ‘serious threat to security’.

²⁰ Authorisation is also conferred where the person is exercising ‘a legal right’, or “*in execution of the law*”, or ‘in obedience to a lawful order’. Those bases are analogous, noting that the last criterion did not comprise any of the evidence in this matter.

²¹ TZ and his collaborators were not seeking ‘to escape’, or ‘rioting’, although some of their behaviour (the threats) may have been characterised as a ‘breach of the peace;’ or engaging in ‘commission of an offence’.

²² Any use of force by an officer holding coercive powers which exceeds their legislated authority or permission may be unlawful; *Coleman v Power* (2004) 220 CLR 1 at [117].

²³ Which concepts are roughly the opposite to those in which defensive conduct becomes lawful.

²⁴ See ss 151 to 155A inclusive of the YJ Act, Exhibit P11, and *CC & Ors v Oberg* [2021] NTSC 15 and *CC & Ors v Oberg* [2021] NTSC 20.

19. The prosecution's submissions focused particularly on ss 154 and 155A of the YJ Act, within the framework of the Superintendent's legislated obligations in respect of the "physical, psychological and emotional welfare" of detainees and to "maintain order and ensure the safe custody and protection of all persons" within DDYDC, together with the "maintenance and efficient conduct" of DDYDC. Section 153 prohibits the use of any force in relation to a detainee except in accordance with ss 10 and 154 of the YJ Act, and expressly proscribes the use of force "for the purpose of disciplining a detainee".
20. In relation to s 154, use of force is authorised only where the officer "**believes on reasonable grounds that the force is necessary**" to "**prevent an imminent risk**" of a detainee "harming another person" or to prevent conduct which would "endanger the safety of any person" or "**seriously threaten security**" of DDYDC (**emphasis added**).²⁵ The application of force in accordance with s 154 is also subject to compliance with the conditions and constraints prescribed by s 10. For force to be lawful, the objective (and subjective) state of mind must be proven, having regard to one or more of the criteria prescribed by s 154 (and s 10).²⁶
21. Section 10 of the YJ Act provides;

10 Use of force generally

- (1) *If this Act permits a person to use force on a youth, the person may only use force if:*
- (a) **all other reasonably practicable measures to resolve the situation have been attempted and those measures have failed to resolve the situation; and**
- (b) *the person using the force:*
- (i) *gives a clear warning of the intended use of force; and*
- (ii) **allows a reasonable amount of time for the youth to observe the warning; and**
- (iii) **uses no more force than the person considers to be necessary and reasonable in the circumstances as perceived by the person; and**
- (iv) *holds a current qualification in physical intervention techniques on youths.*
- (2) *Subsection (1)(a) and (b)(i) and (ii) do not apply if the force is used in an emergency situation.*
- (3) *For subsection (1)(b)(iii), a person considering what force is necessary and reasonable in the circumstances may have regard to the age, gender, physical and mental health, or background of the youth in relation to whom the force is to be used. (emphasis added).*

²⁵ Other criteria in s 154(1) are not relevant. In relation to "reasonable grounds to believe" see *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, *George v Rockett* (1990) 170 CLR 104, *The Queen v Gehan* [2019] NTSC 91 at [34] to [50], *R v Wilson-Anderson* [2020] NTSC 39 at [28] and *Timaepatua v Hutchinson* [2023] NTSC 48 at [35].

²⁶ The s 5 definition of "emergency situation" relevantly includes where "an imminent risk" of a detainee "harming another person" exists. The structure of s 154 is directed to "**prevent an imminent risk**", and 2 other alternative contingencies. Although an ordinary and natural reading of "prevent" points to prevention or avoidance of "imminent risk" (or the alternatives), rather than 'responding' to a 'clear and present risk', I consider a real and material risk is first required in order to support the preventative force authorised. The authorisation cannot operate in a vacuum.

22. It may be noticed that most of the conditions and constraints prescribed by s 10 of the YJ Act do not apply in an “*emergency situation*”.²⁷ However, s 154(1)(a) effectively incorporates the concept of “*emergency situation*”, with the authorisation being to “*prevent*” such situations. That preventative force is conditioned on a belief “*on reasonable grounds that force is necessary*”, which is primarily an objective criterion,²⁸ compared with the subjective proscription of “*no more force than the person considers to be necessary and reasonable in the circumstances as perceived by the person*” appearing in s 10(1)(b)(iii) of the YJ Act.
23. Section 155A of the YJ Act provides the Superintendent with authority to separate a detainee from others, and is the provision enabling the process known as ‘lockdown’. That process does not include “*overnight*”²⁹, or “*during a reasonable and necessary lockdown*” or “*during an emergency situation*”, and then proscribes any separation other than “*in accordance with this section*”.³⁰
24. There is also s 29 of the Code, which relevantly provides;

29 *Defensive conduct justified*

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

(2) *A person engages in defensive conduct only if:*

(a) *the person believes that the conduct is necessary:*

(i) *to defend himself or herself or another person;*

(ii) *to prevent or terminate the unlawful deprivation of his or her or another person's personal liberty;*

...

(b) *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.*

25. The circumstances prescribed by s 29(2)(a)(i) and (ii) are alternatives. Any arguable defence raised by TZ (under s 29 or otherwise) is subject to an evidentiary threshold. That includes in

²⁷ Section 10(2) of the YJ Act. The concept of “*emergency situation*” is defined (or at least illustrated) by s 5, noting the examples are inclusive rather than exhaustive.

²⁸ Albeit that the belief must also be genuinely and subjectively held; see *The Queen v Gehan* [2019] NTSC 91 at [35] and [55]

²⁹ So 6:30pm to 7:30am.

³⁰ Sections 155A(1AA) and (1), noting that subsection (1AA) was inserted into the YJ Act in 2019. Due to factors discussed later in these reasons, the interaction of the “*reasonable and necessary lockdown*” exception with ss (1) and (2) of s 155A may be problematic in some circumstances.

relation to the ss (2)(a) and (b) criteria and, at the least, to the qualification provided by ss (5).³¹ Where that threshold is met, the prosecution is obliged to then rebut, disprove or negative that defence to the standard of beyond reasonable doubt.³²

The Evidence and Discussion

26. The background to the incident of 31 October 2021 and Charges brought against TZ are set out above. Oral and documentary evidence was adduced over 15 November 2022 to 21 July 2023, followed by submissions on 28 September and 2 October 2023. Oral evidence was taken from six YJOs, being officers Aziegbe, Riley (nee Maison), Mangawai, Omoruyi, Skinnon and Erhirhie. SYJO Theron and TL Rotumah, and finally Superintendent Adam Neep, also gave evidence.
27. A total of 30 documents, including CCTV of the incident, were also tendered over the course of the hearing.³³ Although it did not include any audio, the CCTV was contemporaneous and independent evidence and became Exhibit P2. The footage from the TV room commences prior to 1.00 pm, with a large number of YJOs entering the room at different times. By 1:25 pm a number of YJOs were stationed around the perimeter of the room and, at 13:27:20, YJO Aziegbe enters the room. TZ immediately picks up the cup containing milk and spittle, holding it in anticipation of its subsequent use. The relevance of what the CCTV depicts is subject to further discussion below.
28. Due to the incident giving rise to the Charges having occurred on 31 October 2021, with the Officers' oral evidence being given over 15 November 2022 to 18 July 2023, the quality of some Officers' evidence was reduced (possibly also affected through not familiarising themselves with their statements, and records and 'notes' from the relevant time). The documentary evidence included the most relevant pages from the Block Journal, being pages 123 to 168, which became Exhibit D23, and the DDYDC Shift Report for 31 October 2021, which became Exhibit P14.³⁴
29. Other documents generated in DDYDC were also tendered into evidence. It may be assumed that the Officers' oral evidence followed written statements provided to investigators, however the most contemporaneous record of each of the witnesses were the Officer Incident Reports (OIR).³⁵ Each OIR includes a section; "*Response to the incident: include details about what was said and done, who did what, any use of restraints or force, separation, therapeutic measures attempted/completed with the young person (offers of a conversation, option to leave the area).*" Five of the seven OIRs submitted by YJOs and SYJO (including that of YJO Aziegbe) responded; "*Therapeutic communication, positive redirection before MAYBO techniques application and*

³¹ An alternative approach in relation to s 29(5) is that a defendant must disprove those disqualifying criteria to the standard of balance of probability, which approach I prefer, despite the section not saying so. See s 440 of the Code.

³² Sections 440 and 43BS to 43BV of the Code, and see *Fernando v Firth* [2017] NTSC 67 at [65] to [67].

³³ In addition to the CCTV, I consider the DDYDC Shift Report for 31 October 2021 (Exhibit P14) and the relevant pages from the Block Journal (Exhibit D23) to be the most probative of the exhibits.

³⁴ A full partially redacted edition of the Block Journal was produced by DDYDC in response to a summons to produce served on the Superintendent. Although the to and fro of parties at times appeared a saga, DDYDC made extensive efforts to produce all records falling within the broad Schedule.

³⁵ Excepting Superintendent Neep, who did not witness the incident and was not present in the aftermath.

*separation being the last resort.*³⁶ At best, resort to that pro forma approach renders the information worthless and, at worst, denigrates the veracity of any YJO's oral evidence. As matters stood, much of the oral evidence was afflicted by the passage of time.

30. The Officer in Charge of DDYDC on 31 October 2021, Superintendent Bain, was not available to give evidence on the hearing. The current Superintendent of DDYDC, Mr Adam Neep was called by the prosecution, and willingly gave evidence over 23 March and 18 July 2023. In that, it must be acknowledged both that Superintendent Neep was not responsible for DDYDC on 31 October 2021 and, except for fulfilling an 'on call duty officer' role on weekends at the time of the incident, had no direct responsibilities for the operational management of DDYDC at that time.³⁷
31. Superintendent Neep gave as good evidence as he could in the circumstances, including firsthand knowledge of how DDYDC operated in 2020 and 2022, during which years he was a senior officer at the Centre. His evidence included as to; the layout of DDYDC; the Shift Report for 31 October 2021; that detainee numbers at 31 October 2021 were "*quite high*", with operations being 'difficult'; programs generally delivered in H Block; lockdowns; and that staff safety and detainee safety is "*top of the list*" of priorities at DDYDC.³⁸
32. Noting the danger of holistic hindsight, in relation to the management and response to the incident of 31 October 2021, Superintendent Neep's evidence also included; "*I do feel that [one or more officers] could have - there was room for improvement from what I saw*" and "*If we look at the incident in isolation I think there were things that possibly could have been done better but I think if we're - we look at it holistically on what led to that event that maybe there wasn't*". And in response to the question; "*Do you think that they did anything wrong?---I don't believe so, no*"³⁹ Noting the distinction between "*wrong*" in the strict sense on the one hand, and capacity to improve or better on the other, those answers must also be considered in light of Superintendent Neep's clear and appropriate loyalty and commitment to the officers he commands, and DDYDC generally. That includes in the context of management and operations in October 2021 being particularly challenging due to, amongst other things, detainee numbers and the staffing difficulties referred to by various witnesses.
33. Team Leader Rotumah's evidence on 14 February 2023, including in relation to details concerning management of DDYDC on 31 October 2021, was seriously afflicted by the age of the incident, and in part due to the 'Daily Plan' he compiled not being preserved and kept as a record. That practice is accepted, but not of assistance to determining details in the event of dispute. TL Rotumah could generally state what his usual practice was, and what he would have done on 31 October 2021. Although TL Rotumah was able to recall some detail of his interactions with TZ and the other youths in the TV Room on the day,⁴⁰ his best evidence was probably the OIR completed by him following the incident. That included that the "*YP's in Hotel*

³⁶ See Exhibits P3 to P9.

³⁷ The 'on call' position appears to have been fulfilled at the Deputy Superintendent level.

³⁸ Transcript 23 March 2023 at pages [12] to [17], [18] to [21], [22], [31], [37] and [43] to [46] respectively.

³⁹ Transcript 23.3.23 - page [48]

⁴⁰ Including that 'unfair treatment' was an issue for TZ, and that he was threatening officers and inciting the other youths; Exhibit P3.

Block were being managed under rotational unlocks due to staffing numbers and the high numbers of YP's being managed by the staff."

34. Senior YJO Theron gave evidence on 22 March 2023. That included that she was rostered in H Block on 31 October 2021, and was told of TZ and others non-compliance by another officer, which included reference to the door of the TV room. On her attendance at the TV room; *"I entered and addressed the youth in the rec room and asked them to comply with the scheduled lockdown at that time"* and that *"I observed that there was paper stuck in the lock preventing the lock – the door from being locked"*.⁴¹ SYJO Theron recalled TZ making *"threat to officers"*, but not what that comprised.⁴² She summoned TL Rotumah, who reiterated to TZ that there were no freestanding TVs available, and then referred to YJO Aziegbe entering the room, and her recollection of his involvement, as follows;

*And was there a point in time at all where Joshua Aziegbe was present?---Yes, there was. He was walking past the block and I asked him, because I know he had a good rapport with the young people, and I asked him just to encourage them to go to their room and comply with the scheduled lockdown.*⁴³

So did Mr Aziegbe enter the rec room?---Yes, he did.

And can you just tell us in your own words, what happened when Mr Aziegbe entered the TV room, or the rec room?---Okay. He spoke to the youth and asked them to comply with the lockdowns and explained the schedule to them, again in detail. And said to them that they need to be fair with this, because the other youth need to have their recreational time as well and that, you know, everybody needs to work together.

And what was [TZ's] response to that conversation from Mr Aziegbe?---He was not happy with that conversation.

And why did you think that he wasn't happy about that conversation?---Because he just started swearing and threatening Mr Aziegbe.

*And what happened after that?---I just remember him taking a cup with what appears to be milk from the table and throwing it at Mr Aziegbe. (emphasis added)*⁴⁴

35. SYJO Theron's OIR was also tendered, which included that the circumstances leading up to the incident were that *"All YP's were displaying non-compliant, poor behaviour and refusing lockdown"* and that the detainees *"made demands in exchange for lockdowns. The demands were unrealistic and unfair towards the rest of the Hotel Block cohort"*, but that TZ's demands included for *"a freestanding TV"*, with threats of assault *"if their demands were not met"*.⁴⁵ In relation to the OIR's account of the watershed of escalation in the incident, it was suggested to SYJO Theron that YJO Aziegbe *"was advancing in the direction of [TZ]"* at the time TZ threw the cup and contents, which SYJO Theron denied. That evidence was later amended to *"I think what is happening is*

⁴¹ Transcript 22.3.23 page [46].

⁴² Later in chief, when the content of SYJO Theron's OIR was put to her, she stated that TZ's threats included to *"stab officers"*. She was not asked whether it was apparent if TZ had any weapon.

⁴³ It was later put to SYJO Theron that YJO Aziegbe and TZ in fact *"do not get on very well"*, which she denied; page [61] of Transcript of 22 March 2023.

⁴⁴ Transcript 21.3.23 page [48].

⁴⁵ Exhibit P9.

[YJO Aziegbe] is walking towards him and they're still talking about – like still negotiating with them to go into their rooms".⁴⁶

36. In relation to SYJO Theron's involvement in the ground stabilisation, restraint and removal of TZ from the TV room (only some of which can be clearly seen at the bottom of an enhanced screen of the CCTV), SYJO Theron agreed that TZ's face could be seen in the bottom left hand corner of the screen, then the following evidence ensued;

Dane : You're putting your foot on [TZ]'s face at this point in time, correct?

Witness : No, I can't – no.

Dane: What are you doing with your left leg – sorry, your right leg?

Witness: I'm not sure. I can't see my foot.

Dane: I suggest to you that at this point you're putting your foot on [TZ]'s face?

Witness: No, I don't think so. I really don't think so.

Dane: You don't think so?

Witness: No.

[and then]

Dane: Are you familiar with the term nipple cripple?

Witness: A what?

Dane: A nipple cripple?

Witness: No.

Dane: Where you grab somebody's nipple squeeze and twist it?

Witness: I didn't know that's what it's referred to but I know, yeah.

Dane: It's a method of inflicting pain which is often associated with bullies. Do you agree with that?

Witness: I know if someone does that it would be painful, yes.

Dane: Okay. Can we keep playing the footage, please. I'm just going to ask you to watch very carefully what you do to [TZ] here when he's picked up here in handcuffs. Right there. If we can stop there and perhaps go back a couple of seconds. Forward. And if we can pause right now.

Dane: That's you giving [TZ] a nipple cripple?

Witness: No. No. No, I don't think so. No.

Dane: You don't think so?

Witness: No, I can't see. No.

Dane: Well you appear to be reaching in, grabbing, squeezing and twisting his nipple, don't you?

Witness: No, that doesn't look like that to me.

Dane: Can we play it again? Just go back a few seconds. Yes, that should do. Is that not you giving [TZ] a nipple cripple?

Witness: I honestly can't see that. I honestly can't see that.

⁴⁶ Transcript 22 March 2023 page [62].

Dane: Well I'd suggest that's what you did?

Witness: (no audible response).

Dane: You'd have to agree that nipple crippling a child is a completely improper thing for a YJO to do. Would you agree with that?

Witness: Yes, it would be.

Dane: I'd suggest it's that reason why you don't want to agree to us today that you nipple crippled him?

Witness: No, that's not true.⁴⁷

[and then in re-examination]

McKay: To your memory, in the four years that you've worked as a Youth Justice Officer, have you ever assaulted a young person in Don Dale by grabbing their nipple?

Witness: No.

McKay: And in relation to this particular incident, did you have any intention to grab [TZ]'s nipple?

Witness: No.

McKay: To your memory on this particular day, did you grab [TZ] on the nipple?

Witness: No, I don't think so. No.⁴⁸

37. It is noted that, at the relevant time, SYJO Theron was acting in concert with YJOs to restrain TZ and transport him to his cell. The witness' evidence bears a comparison with what is depicted on the CCTV, with the prosecution obligation to disprove or negative any defence which may be validly raised on the evidence kept in mind.
38. YJO Aziegbe was at the centre of the most extreme aspects of the incident of 31 October 2021. According to the CCTV which became Exhibit P2, he entered the TV room at 1.27 pm. That footage shows that on entry YJO Aziegbe walked a few steps then leant on a wall with his hands resting in his pockets, adopting a relaxed stance. His positioning was particularly proximate to by far the largest and strongest of the youths, and also rendered him the YJO closest to TZ. Within a matter of seconds YJO Aziegbe says something to TZ then 'pushes off' the wall and advances on him.
39. In the OIR in relation to; "What time did you get involved and why?", YJO Aziegbe responded "At 1325. I got involved to ensure the safety of staff and YPs". His OIR also said; "Just as I proceeded to speak with [TZ] being the instigator as observed, he threw a cup of milk at me and then all the group one YPs ... attempted to physically assault staff by throwing punches and kicks to staff".⁴⁹ YJO Aziegbe's oral evidence on 15 November 2022 included that he was summoned into H Block by SYJO Theron, had a conversation with an officer in the nature of a "debrief" and then entered the TV room. His evidence then was; "I try to engage with them therapeutically, to encourage them to go to their room then. I was not there when everything started, you know, I don't know. So maybe...

⁴⁷ Transcript 21.3.23 pages [62] to [64].

⁴⁸ Transcript 21.3.23 pages [66] to [67].

⁴⁹ Exhibit P1.

a new person in the picture, they might, new negotiator, you know. They might want to listen to me. So just when I stepped in, just to support my staff, you know, just when I stepped in to try to explain and try to negotiate on what's going on ... that was when [TZ] threw a content in the cup at me." YJO Aziegbe's evidence also included that immediately prior to throwing the cup "[TZ] was in a standing position like is going to attack staff terrible", and demonstrated TZ holding the cup at shoulder height and "in an aggressive state".⁵⁰

40. In oral evidence concerning his actions and words upon entering the TV room, YJO Aziegbe said; *"And then I tried to open up, have open conversations with [TZ], you know. Tried to know what, I have tried to negotiate with him, and then he just threw the content at me. I was going with an open palms and like, the body language, I'm trying to negotiate"*. His recollection was that he said to TZ; *"What's going on, why have you refused to go to lockdown. Yeah. So he can tell me like an open question, you know, open-ended question"*. And in relation to therapeutic engagement, he said; *"Trying to listen to them, trying to empathy, trying to get them to express themselves. That's why I asked the open-ended question, like trying to know what, how we can help, you know to help manage the situation"*. Then in cross examination he said; *"He just like, they're refusing to go to lockdown, you know. So I tried to have an open conversation with [TZ]. I was like, 'hey bro, what's going on?' you know. 'Why don't you want to go to lockdown?' So he didn't want to respond to me. I was waiting for him to tell me what, how I can help him or how we can help him, you know. He didn't say, he just threw the cup at me straight up."*⁵¹
41. Lastly, YJO Aziegbe was also asked why TZ and the other three youths were being locked down at the unusual time of 1.30 pm, to which he answered; *"On that day there was not enough staff"*.⁵²
42. Other YJOs present in the TV room prior to, during and in the immediate aftermath of the incident of 31 October 2021 also gave evidence. Again, their OIRs were significant in gaining some contemporaneous insight into TZ's behaviour and position, its genesis in his perception of 'fairness' including concerning access to a television, and the YJOs perspective prior to the application of force occurring.
43. Some documentary evidence was of more assistance than others. In addition to the Shift Report for 31 October 2021⁵³, pages 123 to 169 of the Block Journal, an Activity Program for October 2021 and a table entitled Hotel Block Lock Down were also tendered.⁵⁴ Those last three items of evidence are referred to in descending order of accuracy, completeness and utility. It is not my conclusion that the Block Journal is exhaustive, complete and undoubtedly accurate in its content. However, with one exception, its content was generally contemporaneously recorded.⁵⁵ The Activity Program appears to at times have been aspirational, including due to being impacted by lockdowns. The Hotel Block Lock Down table is clearly incomplete when

⁵⁰ Transcript 15.11.22 page [34] onwards.

⁵¹ Transcript 15.11.22 page [35] onwards.

⁵² Transcript 15.11.2022 pages [48] to [49].

⁵³ Exhibit P14, containing detailed information concerning detainee numbers, YJOs on duty and their Block of posting, officers absent, incidents, and what youth were on separation 'at risk'.

⁵⁴ Exhibits D23, P21 and P17 respectively.

⁵⁵ The entry made at 14:45 on 30 October 2021 is apparently a narrative running from 07:50 through to 14:20 on that date. It is conceivable that the platform or database in which the Block Journal entries are made was simply left open with entries made in the nature of a 'running sheet', however that was not established.

compared to the Block Journal, with the only salient aspect being that, other than lockdowns for staff beaks, all but 1 lockdown was attributed to “*staff shortage*”.

44. What is clear from the Shift Report for 31 October 2021 is that, other than youths declared ‘at risk’ detained in B Block,⁵⁶ only the youths in H Block were subject to ‘rolling lockdowns’. It is also clear from the Block Journal that ‘rolling lockdown’ was also being applied to H Block on 30 October 2021.⁵⁷
45. Although he had a right to silence, the defendant TZ also gave evidence. As could be expected, his account of DDYDC was generally negative. The evidence he gave in relation to the incident of 31 October 2021 and the lead up to it was largely consistent with other evidence, albeit given from his perspective. TZ consistently maintained his view that the conditions at DDYDC at the relevant time were unhealthy and unfair.⁵⁸
46. The crux of TZ’s evidence in relation to the TV room incident, including the presence of YJOs, was that “*I knew they was going to grab us to put us in our room*”.⁵⁹ Also, that the extent of the ‘negotiation’, ‘therapeutic communication’ and ‘de-escalation’ amounted to “*Come on boys. Just go back to your room. Don’t make it harder for yourselves ...*”⁶⁰ And in relation to YJO Aziegbe’s involvement, that “*... he just walked in and said, what’s in the cup ... and he kept taking step forward, like trying to get closer. He can make his move...*” and that YJO Aziegbe was there to “*... grab one of us, tackle us, kick it all off.*”⁶¹
47. TZ did not deny that he had expectorated into the milk contained in the paper cup he held. In addition, a final analysis of TZ’s evidence concerning spitting once he had been ground stabilised, handcuffed and was being transported to his cell, is that he was well aware of the YJOs in close proximity to him, and that he spat in their general direction.

Findings

48. The legal positions arising from Part II of the Code and Division 2 of Part 8 of the YJ Act are referred to above. The incident giving rise to the Charges commenced at approximately 1.00 pm on 31 October 2021, upon the four youths refusing to comply with a direction to leave the TV room of A Wing of H Block and return to their cells to be locked down. The following findings are of general application to the Charges, with further findings being made in relation to particular Charges thereafter.
49. The youths’ recalcitrance was the product of exceptionally depriving conditions in H Block over the preceding days, particularly in the form of excessive time locked down in their cells, and the protection, seclusion and isolation of TZ ‘at risk’ under the ‘separation’ provisions of s 155A

⁵⁶ Noting that, if declared ‘at risk’, a youth is automatically separated and ‘locked down’, with ss 155A(4) to (8) and 155B then applying.

⁵⁷ See the first “31/10/21” entry on page 6 of Exhibit P14 and the “14:45” entry for 30.10.21 in Exhibit D23.

⁵⁸ It is noted that TZ spend a good deal of time between 22 and 31 October 2021 on separation ‘at risk’, due to his behaviours in relation to YJOs and in respect of himself, and his mental state.

⁵⁹ Transcript 21.7.23 paragraph [19]

⁶⁰ Transcript 21.7.23 at paragraph [44]

⁶¹ Transcript 21.7.23 at paragraph [14]

earlier in his custody.⁶² That deprivation was the result of a number of factors, some of which had been contributed to by TZ's misbehaviour or misconduct over that period, but was otherwise primarily the product of insufficient staff confounded by an excessive number of detainees in DDYDC.⁶³ YJO Aziegebe's simple and direct response to the reason for the extraordinary lockdown advised to TZ and Group 1 on 31 October 2021 being; "On that day there was not enough staff" is accepted.⁶⁴

50. Clearly from at least 30 October 2021 there were a number of youth (in addition to TZ and the rest of Group 1) detained in H Block who were presenting as resource intensive and 'high needs'. The extraordinary lockdowns had become necessary well prior to 31 October 2021, with Superintendent Neep's evidence including that the procedure of such lockdowns was ideally to be avoided.⁶⁵ The evidence at hearing did not include the extent to which additional YJO resources were or were not available, or as to the Executive considerations, constraints or impediments which prevailed in relation to DDYDC staffing at the time.⁶⁶ What is clear is that Parliament has provided that s 155A is to apply except where a lockdown is both "*reasonable and necessary*", or in an "*emergency situation*".⁶⁷ The former exception is a conjunctive phrase, and both criterion must be satisfied. The latter exception is at least illustrated and informed by the definition of s 5. It is my conclusion that s 155A of the YJ Act applied, because I am not satisfied that the lockdown directed to TZ and the rest of Group 1 was either reasonable or necessary.⁶⁸

⁶² Numerous references in the Block Journal comprising Exhibit D23, noting that TZ returned to H Block from 'at risk' seclusion in B Block at approximately 18:50 on 29.10.21. The conjoined entries comprising the Block Journal for day-shift on 30.10.21 raise a significant possibility of errors and omissions, but make clear that TZ was subject to extraordinary lock down at times between 08:25 and 12:05, with Group 1 being locked down again at 13:03. That date also included an incident in which youths detained in H block 'holed up' in the TV room and refused to return to their cells for an extraordinary lockdown. Exhibit P21 is of no reliable use in gauging the extent of lockdowns being applied.

⁶³ Again, the Shift Report and Block Journal comprising Exhibits P14 and D23, together with Exhibits P27 and P28 in relation to TZ, appear to be the best evidence of the extent of seclusion being applied to TZ and his collaborators in the period preceding the incident of 31.10.21.

⁶⁴ Transcript 15.11.22 page [49]. Several other witnesses made reference to the difficulties, in less direct terms.

⁶⁵ Even for the recognised YJOs mandatory breaks scheduled for 11:00 and 15:00.

⁶⁶ It would be surprising if the staffing dilemmas on 31 October 2021 was simply the product of parsimony, and could well have been a matter beyond the then Superintendent's immediate control. However, lack of resources cannot, of itself, significantly alter the ordinary and natural meaning of at least "*reasonable*". I also infer from the evidence that a direct correlation exists between staffing numbers and the extent to which detainees need to be subject to extraordinary lockdown. Similarly, an obvious relationship exists between both Officer and detainee safety and available staff.

⁶⁷ Although based on different provisions, and in relation to the composite phrase "*reasonably necessary*" in response to a clear emergency, various discussion in *LO & Ors v NTA* [2017] NTSC 22 at [132], [166] and [312] to [323], *JB & Ors v NTA* [2019] NTCA 1 at [27] to [28], [111], [128] to [135], [188], [219] and [277], and *Binsaris & Ors v NTA* [2020] HCA 22 at [30] to [37], [63], and [95] to [103] provide some insights into the concepts. There is also *Edwards v Tasker* [2014] NTSC 56 at [37] and [47] to [48].

⁶⁸ See also [23] to [32] of the Prosecution submissions dated 28.9.23. Paragraph [30], studiously or otherwise, refers to necessity but not reasonableness. The two concepts are interrelated but different. Necessity in this case was primarily dependent on staffing numbers, which various witnesses referred to as one determinant. Reasonableness is of broader import, having regard to circumstances beyond what may immediately be necessary.

51. It might be concluded that inveterate delinquent youth who behave with defiance and threaten violence within a structured and disciplined environment such as DDYDC should be met with decisive and uncompromising force. A contrary view is that that disrespect and violence begets those values. Regardless, such an approach is contrary to the intent of the YJ Act. Any application of force must be objectively “*necessary*”, and only in response to the prescribed circumstances.⁶⁹ Even then, any force must be not be “*unnecessary*” in its content or severity, having regard to the context of its deployment.⁷⁰
52. The youths, including TZ, were being defiant and, in doing so, were resisting YJO attempts to effect their purpose, including by issuing threats as to the physical conflict which would ensue if the YJOs sought to enforce their direction. It is patently clear from the interactions, body language and gesticulations depicted on the CCTV footage that the threats of violence and resistance given by TZ (and any others) were conditional. TZ and his companions made clear that they would not go to lockdown willingly, and would put up a fight to avoid that outcome.
53. As at 1.26 pm on 31 October 2021 the risks were not “*imminent*”, the ‘endangerment’ was not clear and present, and the threat to security had not reached a ‘serious’ level. Those conclusions are reached including having regard to s 10(1) of the YJ Act, reading the Act as a whole. The YJOs present up to 1.26 pm were seeking to manage the incident consistent with the YJ Act, albeit they had not succeeded in their objectives at that time.
54. In my view, up until YJO Aziegbe’s intercession, the incident was not an “*emergency situation*” within the meaning of s 10(2).⁷¹ Also, with one exception, attempted “*reasonably practicable measures*” to resolve the situation had been limited. The measures which YJOs sought to apply might be described as ‘de-escalation’, in that both TL Rotumah and SYJO Theron sought to reason with the youths and ‘talk them down’ from the elevated and intransigent position they had adopted. Regrettably, once it had been clearly communicated to TZ and the youths that no ‘stand-alone’ television would or could be provided and that extraordinary lockdown in their cell was non-negotiable, their intransigence and belligerence increased.
55. Given that the consequence of TZ and others’ defiance over 1.00 pm to 1.26 pm was to prevent other detainees being accorded the restricted liberty generally provided for by the YJ Act, reasonableness might be said to have informed YJO Aziegbe’s actions at 1.27 pm on 31 October 2021. The situation confronting him should not be equated with ‘a parent faced with child refusing to go to their room’. DDYDC is a detention centre in which the safety and security of both detainees and YJOs is paramount, and where good order, discipline and compliance are essential ingredients to that objective. However, the situation at 1.26 pm (as opposed to immediately prior to ‘lockdown overnight’) cannot be said to have clearly required deployment of the degree and level of force applied, being ‘taking down’, hands-on ground stabilisation through MAYBO tactics, followed by the inevitable application of mechanical restraints in the form of handcuffs.

⁶⁹ Section 154 of the YJ Act, and *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, *George v Rockett* (1990) 170 CLR 104, *The Queen v Gehan* [2019] NTSC 91 at [34] to [50], *R v Wilson-Anderson* [2020] NTSC 39 at [28] and *Timaepatua v Hutchinson* [2023] NTSC 48 at [35].

⁷⁰ The authority conferred by s 26 of the Code is circumscribed by the extent of the justification provided by s 27 of the Code.

56. I also find that, contrary to his evidence, YJO Aziegbe's involvement did not entail any extensive or detailed negotiation, or 'open palms', or attempts at de-escalation, or open or therapeutic communication, or positive redirection. That evidence, and evidence of SYJO Theron's which might be said to support that account, is not accepted. The CCTV footage belies YJO Aziegbe's evidence, with things said by him being lip-service to best practice. I infer that his purpose in leaving his position on the wall of the TV room and advancing on TZ was to lay hands on him and bring the incident to an end by force. His communication with TZ was far from the character and intent suggested at hearing, and was a ruse towards distracting TZ and enabling him to be within arm's reach. I also infer that YJO Aziegbe knew full well that his actions would escalate the incident to a physical confrontation in which significant force would be required and applied to each of the four youths and mechanical restraints would also be necessary.
57. Despite the escalation referred to, I infer YJO Aziegbe cannot have considered his unilateral decision at 1.27 pm to apply force to have been "*necessary*" based on a reasonable belief. That is in the circumstances which prevailed immediately preceding that decision, and in the context of the relevant provisions of Part 8 of the YJ Act. That includes having regard to s 10, which prohibits the use of force unless and until "*all other reasonably practicable measures to resolve the situation have been attempted and those measures have failed to resolve the situation*". The evidence of what measures (in addition to the dialogue referred to) had been considered or attempted was scant.
58. It may also be noticed that the change in TZ's demeanour upon YJO Aziegbe entering the room at 1.27 pm was palpable. That is not simply explicable in terms of the physical disparity between TZ and that YJO, the latter being in excess of 190 cm and 120 kg at that time. TZ immediately appears apprehensive at the entry, and picks up the paper cup, including in a fashion which would enable him to toss its content in a directed way at YJO Aziegbe.
59. The crux of TZ's evidence concerning the incident prior to and following YJO Aziegbe's entry to the TV room is set out above. Despite that (for whatever reason) TZ's evidence was at times imprecise and confused, and inconsistent in parts, I accept his evidence in crucial respects. That is, as to what YJO Aziegbe said and did upon his entry, and his intent and purpose in doing so.
60. Regardless of the issue of staff shortages, a direct relationship existed between the acuity and severity of the incident and the YJOs' approach and response to it.⁷² Until YJO Aziegbe inserted himself into the equation, the situation was being managed, contained and negotiated by the YJOs present, including TL Rotumah. It was not submitted that the situation which prevailed prior to the escalation at 1.27 pm was an "*emergency situation*", and I consider the circumstances in the TV room at 1.26 pm did not amount to that characterisation. Although the definition provided by s 5 is not exhaustive, the examples illustrate the intended meaning of the concept. TZ's actions were not self-harming, or constituting serious damage, and the risk of harm to YJOs was not "*imminent*". Nor was TZ or the others an immediate 'danger' or 'serious threat', the threatened violence being conditioned on being left alone and, to some extent, demands made.

⁷² It is clear that the rolling lockdowns were, to a significant extent, the product of staff shortages. No doubt a correlation exists between that aspect and the number of detainees at DDYDC at any one time. However, Team Leader Rotumah's evidence referred to staffing as an issue on numerous occasions, and YJO Aziegbe's evidence concerning the lockdowns on 31 October 2021 was "*On that day there was not enough staff*"; Transcript page [49].

61. It is accepted that the disobedience and defiance of TZ and his collaborators could not be permitted to persist indefinitely. For example, for operational reasons which need not be detailed, it would have been 'reasonable and necessary', and in fact essential, for the youths to be returned to their cells for the evening lockdown.⁷³ However, as matters stood at 1.26 pm on 31 October 2021, the product of TZ's recalcitrance was that the youths comprising Group 2 accommodated in A Wing of H Block could not be unlocked and released from their cells. TZ and his collaborators were ignoring those detainees' expectation or right to enjoy the limited freedom provided for by the Daily Plan. That resulted in unfairness to other detainees but, at that point in time, not a great deal more.
62. Once the interaction escalated to the youths engaging in physical resistance (regardless of precisely how or in what order that came about) and application of physical and mechanical restraints began, the circumstances transmogrified into an "emergency situation" as defined by s 5 of the YJ Act.⁷⁴ YJO Aziegbe's entry and almost immediate actions escalated the incident to one in which an "imminent risk" of harm to both YJOs and TZ precipitated.⁷⁵
63. In seeking to address the impasse in the way he did, YJO Aziegbe was exercising power and discretion delegated to him by the Superintendent. That delegated power could be exercised in accordance with orders given through the chain of command, or separately and discretely through his own independent discretion or decision. Despite the 'briefing' given to YJO Aziegbe prior to entering the TV room at H Block, his evidence did not include any element of direction, request or order from either SYJO Theron or TL Rotumah in relation to application of force. Clearly, despite my conclusion in relation to his evidence, no delegation was required in order to communicate or negotiate with the youths, including TZ. In the circumstances, YJO Aziegbe was acting individually, so personally accountable and responsible to ensure his actions were consistent with the YJ Act.⁷⁶
64. In my view, having regard to the circumstances which presented in the TV Room of A Wing of H Block on 31 October 2021, the use of force commenced by YJO Aziegbe did not comply with the requirements of the YJ Act. If so, for different reasons, ss 26 and 27 of the Code also cannot

⁷³ The focus of TZ's counsel on 'defensive conduct' to "prevent or terminate the unlawful deprivation of his ... personal liberty" is noted. However, without considering whether the YJOs conduct in the extraordinary lockdowns might generally be "unlawful", such conduct is only justified where it "...is **necessary** to prevent or terminate" that predicament, and is also "...a **reasonable** response in the circumstances as [TZ] reasonably perceives them" (**emphasis** added). Both *necessary* and *reasonable* must have some regard to the likely or possible outcome of the conduct. The prospects of any force employed by TZ producing an outcome which would relieve him from the predicament complained of were nought.

⁷⁴ Within the meaning of the definition provided by s 5, or as contemplated by ss 10, 155A or 156.

⁷⁵ And the various other matters set out in s 154(1) of the YJ Act.

⁷⁶ That includes the Youth Justice Regulations 2006, which legislative instrument was not the subject of any evidence or submissions. Despite the potential relevance of some Regulations I have not had primary regard to them for the purpose of determination. The YJO was entitled to rely on what he knew had occurred prior to his entry, but also held individual responsibility.

be relied upon.⁷⁷ If that approach is incorrect, it would still be my conclusion that the force used by YJO Aziegbe was “unnecessary” in the circumstances.⁷⁸

Count 1 – Violent conduct

65. Count 1 alleged a contravention of s 47AA(1) of the *Summary Offences Act 1923* (SO Act), essentially being ‘a violent act which would cause fear for safety in a person of reasonable firmness’. Part IIAA of the Code applies, such that either knowledge or recklessness may constitute the fault element, with s 43BD of the Code being the relevant ‘self-defence’ provision contended by TZ.
66. For quite some time prior to the physical aspect of the incident of 31 October 2021 arising, TZ and his collaborators were engaged in verbal exchange with a number of YJOs situated at or near the door of the recreation room. However, the charge was not particularised, and the evidence of the YJOs was variable and imprecise concerning what conduct or words were said to make out the charge.
67. No doubt the content of TZ and other youths’ speech was protesting, execrating and profane. At times TZ was the primary spokesperson, and I accept that some content included threats, but which were conditional in nature.⁷⁹ Effectively, that he and the others would put up a fight if the YJOs sought to lock them down by resort to physical force. That behaviour in public might contravene s 47 of the SO Act, but not s 47AA.⁸⁰
68. The definition of “violent act” includes “conduct capable of causing injury”. The first clear act TZ engaged in was to throw the contents of a paper cup at YJO Aziegbe. That was shortly followed by aiming a blow including a closed fist at YJO Mangawai’s head. Each of those acts are also the subject of counts 3 and 4 and 6 and 7, respectively. I am not satisfied beyond reasonable doubt that the charge is proven. TZ is not guilty and Count one is dismissed.

Count 2 - Threatened to injure or cause detriment

69. The alleged victim of this count is YJO Aziegbe. His evidence, and actions leading up to TZ throwing the paper cup and milk at him, are set out above. Most relevantly, it must be proven that the victim was “lawfully entitled” to seek to act in the way YJO Aziegbe did. For reasons articulated in relation to count 3 below, it is not proven beyond reasonable doubt that he was so “lawfully entitled”. TZ is not guilty and count 2 is dismissed.

⁷⁷ The action embarked on by YJO Aziegbe was not necessary to “lawfully execute” the warrant directed to the Superintendent in relation to TZ, nor to ‘prevent his escape’, or to “suppress a riot”. Prevention of the “continuance of a breach of the peace” is closer to the mark, and it is certainly the case that up until YJO Aziegbe’s intervention, the YJOs, SYJO and Team Leader were according TZ and the other inmates their ‘right to be heard’ under s 156 of the YJ Act. However, the behaviour and demeanour of the youth, including TZ, up until some point into 13:27 when the paper cup was thrown, fell short of both a “breach of the peace” and preparation for “commission of an offence”.

⁷⁸ I take that view notwithstanding their behaviour was within a detention centre, and included profane and threatening speech, and that their demands could apparently not be met at that time.

⁷⁹ See for example, *Fernando v Firth* [2017] NTSC 67 at [49] to [51].

⁸⁰ See *Watson v Trenerry* AP25 of 1997 NTCA 26 May 1998, but noting that to establish guilt, the behaviour must first be “sufficiently serious to warrant the interference of the criminal law”.

Count 3 - Unlawful assault in the performance of duties

70. As noted above, I do not accept YJO Aziegbe's evidence in relation to what he did and why. Despite that YJO Aziegbe received a 'debrief' prior to entering the TV room, from which he could certainly deduce that TZ and the other youths had been directed to return to lockdown more than once and had steadfastly disobeyed the direction, I find he remained individually responsible to comply with s 10(1)(b)(i) and (ii) of the YJ Act, and did not do so.
71. I also consider that, despite TZ and the other youths' recalcitrance, it is not been proven to any standard that s 10(1)(a) of the YJ Act was complied with. On the basis of the evidence, and despite that the behaviour of TZ and his collaborators caused significant disruption to the good "order", "protection of all persons" and "maintenance and efficient conduct" of DDYDC at the time, the incident up until YJO Aziegbe's intervention was not an "emergency situation" as defined by s 5 of the YJ Act, or one which clearly justified the force he used.⁸¹ It was a 'stand-off', the unfair consequences of which to other detainees is obvious. The situation also presented a real risk to "all persons", namely the youths and the YJOs.⁸² Whether that risk became immediate and was realised depended on its management.
72. The evidence in relation to attempts at "*all other reasonably practicable measures to resolve the situation*" was sparse (**emphasis** added). The Prosecution submissions that a television is not an "item of necessity", or that its absence would amount to some 'unlawfulness' in TZ's detention, are accepted.⁸³ Nonetheless, it is also my conclusion that the lockdown to which the youths were to be subjected falls within s 155A(1AA).
73. To the extent that it is necessary, I infer that YJO Aziegbe acted with the intent and purpose suggested by TZ in his evidence. In the circumstances, leaving aside TZ's evidence, it would nonetheless be my conclusion that no other reasonable or reasonably possible inference is open.⁸⁴ I conclude that YJO Aziegbe also did not properly or substantially comply with other requirements of the YJ Act.⁸⁵
74. Due to the proposition that unlawful conduct takes a YJO outside the performance of their duty, and particularly because that performance is an element of count 3 (and counts 4 and 5), the prosecution bears an onus of proving beyond reasonable doubt that, at the relevant time, each YJO was acting in the proper performance of their duty. That has not been proven in relation to count 3, such that TZ is not guilty. The charge is dismissed.

⁸¹ The exception of "emergency situation" exempts YJOs from compliance with s 10 and also renders any seclusion or isolation of a detainee to fall outside s 155A, where it otherwise would constitute a "separation".

⁸² Section 151(3)(c) of the YJ Act.

⁸³ Although I note the requirements prescribed by s 155B(c) of the YJ Act that "education", "recreation" and "reading" materials must be provided to any youth subjected to separation under s 155A. Those materials are in addition to the "basic human necessities" also prescribed. However, a fair and possibly available reading of s 155B is that it should not apply in its entirety to s 155A(1AA). The Youth Justice Regulations also indicate that some meaningful engagement should be provided during 'separation'.

⁸⁴ *Chamberlain v R (No. 2)* (1984) 153 CLR 521, *Shepherd v The Queen* (1990) 170 CLR 573 and *Knight v R* (1992) 175 CLR 495.

⁸⁵ The dictates of provisions of the YJ Act may not sit comfortably with expeditious operational perspectives and procedures, including where it would assist a YJO to not 'show their hand'. However, its terms govern the manner in which youths must be dealt with in custody.

75. If that finding were wrong, it would also be my conclusion that s 29 of the Code applied in the circumstances of the force foreshadowed by YJO Aziegebe's advance and apprehended by TZ, and the level and degree of TZ's response, and that TZ had some basis to seriously doubt that the YJOs threatened actions were lawful. The principles in relation to defensive conduct are generally well settled.⁸⁶ The High Court's caution that; "*No doubt it will often also be desirable to remind the jury that in the context of self-defence it should approach its task in a practical manner without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection*" is also relevant.⁸⁷
76. Defensive conduct by TZ would not have been negated beyond reasonable doubt in the circumstances.

Count 4 - Unlawful assault in the performance of duties

77. Once TZ had thrown the cup and milk, then turned and ran, the die was cast. The incident had transmogrified into an "*emergency situation*".⁸⁸ YJO Mangawai's actions at 1.27 pm and leading up to it were consistent with the YJ Act and, in the circumstances, it is proven beyond reasonable doubt that YJO Mangawai was in the proper performance of his duties.⁸⁹ Also, that TZ sought to assault him.
78. Even assuming TZ believed that the lockdown to be "*unlawful*" within the meaning of s 29(2)(a)(ii) of the Code, TZ could not have believed that seeking to assault YJO Mangawai was "*necessary*" to "*prevent unlawful deprivation of his liberty*". Nor was TZ's response "*reasonable*" within the meaning of s 29(2)(b) and, in any event, once the incident degenerated to TZ seeking to apply physical force on him, YJO Mangawai was engaged in "*lawful conduct*". TZ is guilty of count 4.
79. Due to the depiction on CCTV of TZ's actions in relation to YJO Mangawai, it is not proven that he was struck on the chin or in the head. What is clear is that TZ using a closed fist aimed a blow at the YJO's head, which missed its mark and may have glanced the top of his head.

Count 5 - Unlawful assault on the performance of duties

80. I note the premise that, regardless of whether any other YJO may have acted outside the execution of their duty at a material time, Complainant Maison was always within the scope of proper performance of her duties, such that TZ's alleged assault on that YJO contrary to s 188A must be unaffected. It is accepted that YJO Maison remained within the proper performance of her duties at all times. However, it is certainly not proven beyond reasonable doubt that SYJO Theron was also at all times within the proper performance of duties.
81. It is also clear that, from the point of takedown onwards, all YJOs and the SYJO involved in ground stabilising, restraining and transporting TZ were acting in concert. That is regardless of

⁸⁶ *Zecevic v DPP* (1987) 162 CLR 645, *R v Hawes* (1994) 35 NSWLR 294 and, in relation to the Code, *Burkhart v Bradley* [2013] NTCA 05.

⁸⁷ *Zecevic v DPP* (1987) 162 CLR 645 at 662 to 663.

⁸⁸ That is regardless of the fact that the whole of the incident was categorised as Level 2 in the Shift Report comprising Exhibit P 14.

⁸⁹ On the concept, but in relation to police officers, see Full Federal Court in *Re K* (1993) 46 FCR 336.

the variety of roles they fulfilled at any particular point in time. What is not clear is the time which elapsed between SYJO Theron's involvement and TZ spitting in the direction of YJOs.

82. I do consider TZ was simply angry or enraged, partly due to the treatment he believed he had received immediately prior to being carried out of the TV room. I find that the prosecution has negated defensive conduct beyond reasonable doubt. However, due to the collaborative nature of the task YJOs were engaged in from the point in time that TZ was taken down through to lockdown in his cell, with one officer not having been proven to be properly in the performance of duties, I am left with a reasonable doubt. That is, it is not my conclusion that there is no reasonable doubt YJO Maison's performance of duties must be unaffected by a failure to prove the essential element in relation to all officers acting as one. It is noted that not such concern would affect count 5 in respect of YJO Maison.

Count 6 - Unlawful assault

83. For particular reasons set out in relation to count 3, but based solely on s 29 of the Code being raised to the necessary evidentiary threshold, TZ is not guilty of count 6. Self-defence has not been disproven beyond reasonable doubt. The charge is dismissed.

Count 7 - Unlawful assault

84. This charge was brought in alternative to count 4, so need not be addressed. The charge is dismissed.

Count 8 - Unlawful assault

85. This charge was brought as an alternative to count 5, and does not include as an essential element that Complainant Maison must be proven to have been in the proper performance of her duties.⁹⁰
86. Despite some inconsistencies and query arising in relation to aspects of Complainant Maison's evidence, I accept her evidence on the physical consequences of TZ's spitting. For the reasons referred to at [78] above, I do not consider the defensive conduct provided by s 29 to have been raised to any necessary level. It may be that TZ's behaviour was explicable retaliation, however temporal and evidentiary impediments prevent any characterisation as defensive conduct. That includes because TZ's response was not a "*reasonable response*" regardless of precisely how he perceived the circumstances, and nor could TZ have believed the act of spitting to be "*necessary*", many seconds following any conduct which might have required defence. TZ's actions were beyond the pale, and is guilty of count 8.
87. In the event that counts 1, 2, 3, 5 and 6 were not disposed of in the manner determined, I would have proceeded to consider whether any of the evidence led might have been excluded under s 138 of the ENULA. There is also ss 59 and 64A of the YJ Act. That TZ's defence of the Charges passed through two counsel, and that it was only late in the piece that s 138 was raised as a possibility in the hearing, militated against such consideration. Such a course would have required clear adverse findings (albeit that the discretion is not reliant simply on 'unlawfulness')

⁹⁰ Although the decisions and relevant charge (aggravated assault) in *Burkhart v Bradley* [2012] NTSC 86 and *Burkhart v Bradley* [2013] NTCA 05 are noted.

per se) on more than one aspect of the evidence.⁹¹ The escalating factor aside, whether enforcement of minimum standards expected in the resourcing of institutions such as DDYDC falls within the principles regulating the application of s 138 (or other exclusionary provisions) would, at the least, have been a conundrum.⁹²

88. In summary, in relation to the eight Charges brought on file 22138996, I find TZ;
- (i) Not guilty of counts 1, 2, 3, 5 and 6;
 - (ii) Guilty of counts 4 and 8.
 - (iii) Count 7 is an alternative to count 7, so need not be determined, and is dismissed.
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⁹¹ *R v Em* [2003] NSWCCA 374, *DPP v AM* [2006] NSWSC 348, *R v Hunt* [2014] NTSC 19 and *The Queen v Bonson* [2019] NTSC 22.

⁹² As applied in authorities such as *Robinson v Woolworths Ltd* (2005) 64 NSWLR 612 at 618, *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494, *Tasmania v Seabourne* [2010] TASSC 35 at [27] and *R v Lawrence* [2016] NTSC 65 at [93] to [114].