
JURISDICTION : CHILDREN'S COURT OF WESTERN AUSTRALIA
IN CRIMINAL

LOCATION : PERTH

CITATION : THE STATE OF WESTERN AUSTRALIA -v- JR

CORAM : JUDGE REYNOLDS

HEARD : 3-20 FEBRUARY 2014, 24-28 FEBRUARY 2014

DELIVERED : 28 MARCH 2014

FILE NO/S : CCPE 198 of 2014

BETWEEN : THE STATE OF WESTERN AUSTRALIA
Prosecution

AND

JR
Accused

FILE NO/S : CCPE 196 of 2014

BETWEEN : THE STATE OF WESTERN AUSTRALIA
Prosecution

AND

DVH
Accused

FILE NO/S : CCPE 200 of 2014

BETWEEN : THE STATE OF WESTERN AUSTRALIA
Prosecution

AND

EW

Accused

FILE NO/S : CCPE 197 of 2014

BETWEEN : THE STATE OF WESTERN AUSTRALIA
Prosecution

AND

HCJ
Accused

FILE NO/S : CCPE 195 of 2014

BETWEEN : THE STATE OF WESTERN AUSTRALIA
Prosecution

AND

TB
Accused

Catchwords:

Murder - Manslaughter - Accident - Deceased chased and falls over a wall - Threatening or intimidating behaviour - Separation of act done and unlawful purpose - Children - Turns on own fact

Legislation:

Criminal Code (WA

Result:

JR, DVH, EW and TB - not guilty of Murder and guilty of Manslaughter.
HCJ - not guilty of Murder, Manslaughter and Assault causing death.

Representation:

CCPE 198 of 2014

Counsel:

Prosecution : Ms A L Forrester & Mr S M Stocks
Accused : Ms E C J Needham & Ms K A Clohessy

Solicitors:

Prosecution : Director of Public Prosecutions (WA)
Accused : Hammond Legal

CCPE 196 of 2014

Counsel:

Prosecution : Ms A L Forrester & Mr S M Stocks
Accused : Mr S Corish & Mr R F Owen

Solicitors:

Prosecution : Director of Public Prosecutions (WA)
Accused : Aboriginal Legal Service

CCPE 200 of 2014

Counsel:

Prosecution : Ms A L Forrester & Mr S M Stocks
Accused : Mr S B Watters & Mr P A Brindal

Solicitors:

Prosecution : Director of Public Prosecutions (WA)
Accused : Peter A Brindal & Co

CCPE 197 of 2014

Counsel:

Prosecution : Ms A L Forrester & Mr S M Stocks

Accused : Ms M R Barone & Mr N J Terry

Solicitors:

Prosecution : Director of Public Prosecutions (WA)
Accused : Barone Criminal Lawyers

CCPE 195 of 2014

Counsel:

Prosecution : Ms A L Forrester & Mr S M Stocks
Accused : Mr B S Hanbury & Mr D R Walls

Solicitors:

Prosecution : Director of Public Prosecutions (WA)
Accused : B S Hanbury

Case(s) referred to in judgment(s):

Campbell v R [1981] WAR 286
Hooper v R [2000] WASCA 394
Johnston v The State of Western Australia [2012] WASCA 98
Krakouer v Western Australia [2006] WASCA 81
McAuliffe v R (1995) 183 CLR 108
Raux v The State of Western Australia [2012] WASCA 1
Royall v The Queen (1991) 172 CLR 378

JUDGE REYNOLDS:

Introduction

1 Each of JR, DVH, EW, HCJ and TB is charged with the offence that
on 17 March 2013 at Mandurah he murdered Tauri Litchfield (Mr
Litchfield).

2 JR was born on 21 October 1997 and so on 17 March 2013 he was
15 years and 5 months of age.

3 DVH was born on 10 March 1999 and so on 17 March 2013 he had
just turned 14 years of age.

4 EW was born on 16 October 1998 and so on 17 March 2013 he was
14 years and 5 months of age.

5 HCJ was born on 26 May 1998 and so on 17 March 2013 he was 14
years and 10 months of age.

6 TB was born on 16 January 1999 and so on 17 March 2013 he was
14 years and 2 months of age.

7 As at 17 March 2013, Mr Litchfield was 28 years of age. He was
living with his partner, Lisa Emes (Ms Emes) in a suburb of Mandurah. At
about 8:00pm on 17 March 2013 Mr Litchfield was found lying on his
back and unconscious in the car park in front of the business premises of
Taubman Paints which fronts Pinjarra Road and is on the north east corner
of Pinjarra Road and George Street, Mandurah. He was taken to hospital
by ambulance but died later that night. The cause of death was later
determined by Dr Cooke, a State Pathologist, to be head injury. I will
refer to the evidence in more detail later, suffice to say at this point that it
is clear from all of the evidence that Mr Litchfield fell to the ground in the
car park and that when he did, the left side of his head contacted the
bitumen surface. He suffered a fractured skull and a traumatic brain injury
with heavy bleeding on the right side of his brain. Such injury is
commonly referred to as a contrecoup injury.

8 In brief, and to provide a broad outline by way of introduction, it is
alleged by the State that after Mr Litchfield had been assaulted and
property stolen from him, the five defendants threatened or intimidated
Mr Litchfield by chasing him in a westerly direction, i.e. towards the
foreshore, on the northern side of Pinjarra Road. It is alleged, that in the
course of Mr Litchfield trying to escape from the defendants, that he
jumped or tripped over a brick wall separating a higher level car park of

the business premises immediately east of the Taubmans Paints business premises and the lower level car park of the Taubmans Paints business premises. The drop from the top of the brick wall to the ground level of the car park in front of the Taubmans Paints business premises was about 1.19 metres.

9 Each of the five defendants has pleaded not guilty.

10 When the hearing commenced, there were actually six defendants before the Court charged with murder. The other defendant named on the prosecution notice was AU, who was born on 22 October 1997 and so was 15 years and 5 months of age as at 17 March 2013. The six defendants were part of a larger group of nine young persons who were together in Mandurah on the afternoon and early night of 17 March 2013. Three young persons of the group were not charged. After the hearing had commenced and the State had called a number of witnesses including two of the three young persons not charged, the State decided to discontinue the charge against AU.

Outline of the State case

11 A clear understanding of the State case against each defendant can be arrived at by reading the relevant provisions in the *Criminal Code* (WA) and the opening address of the learned State prosecutor.

Sections 272, 279, 280 and 281 of the *Criminal Code*

272. Causing death by threat

A person who, by threats or intimidation of any kind, or by deceit, causes another person to do an act or make an omission which results in the death of that other person, is deemed to have killed him.

279. Murder

- (1) If a person unlawfully kills another person and —
- (a) the person intends to cause the death of the person killed or another person; or
 - (b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person; or
 - (c) the death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life,

the person is guilty of murder.

Alternative offence: s. 280, 281, 283, 284, 290 or 291 or *Road Traffic Act 1974* s. 59.

- (2) For the purposes of subsection (1)(a) and (b), it is immaterial that the person did not intend to hurt the person killed.
- (3) For the purposes of subsection (1)(c), it is immaterial that the person did not intend to hurt any person.
- (4) A person, other than a child, who is guilty of murder must be sentenced to life imprisonment unless —
 - (a) that sentence would be clearly unjust given the circumstances of the offence and the person; and
 - (b) the person is unlikely to be a threat to the safety of the community when released from imprisonment,

in which case the person is liable to imprisonment for 20 years.
- (5) A child who is guilty of murder is liable to either —
 - (a) life imprisonment; or
 - (b) detention in a place determined from time to time by the Governor or under another written law until released by order of the Governor.
- (6) A court that does not sentence a person guilty of murder to life imprisonment must give written reasons why life imprisonment was not imposed.

280. Manslaughter

If a person unlawfully kills another person under such circumstances as not to constitute murder, the person is guilty of manslaughter and is liable to imprisonment for life.

281. Unlawful assault causing death

- (1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.
- (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

12 For a killing to be unlawful, the State must prove that it was not authorised, justified or excused by law. That brings the provisions of s 23B of the *Criminal Code* into play and I will refer to it later. Suffice to say at this point, that for the State to prove that the death of Mr Litchfield was not an event which occurred by accident it would have to prove in the case of each defendant that, subjectively, he intended or foresaw it, or objectively, it was reasonably foreseeable. I will expand on that later.

Relevant remarks of the State prosecutor in opening

13 The learned State prosecutor articulated the State case in the following terms in her opening address:

Each of the accused is charged with murder. The State case is that liability arises pursuant to section 279(1)(c), in that Tauri Litchfield's death was caused by means of an act done in the prosecution of an unlawful purpose, which act was of such a nature as to endanger life. The unlawful purpose being prosecuted was to assault the deceased or to steal from him, whether with or without an assault.

The act done in prosecution of the unlawful purpose was the chasing of the deceased, in the context of him already having been assaulted and/or detained by a member or members of the accused's group. The State case is that that act constituted a threat or intimidation, which caused the deceased to do an act which caused his death; namely, to run and fall and hit his head on a bitumised surface.

As I said, pursuant to section 272 of the Code, if that is proved beyond reasonable doubt against the accused, those who engaged in the threats or intimidation are deemed to have caused his death, as are those who were a party to that act, pursuant to section 7 or 8 of the Code. The State case is that the act, being the chasing, was of such a nature as to be likely to endanger life, having regard to the following factors:

Firstly, the apprehension of further violence which, to the knowledge of each of the accused, the deceased must have felt at the time that that act was committed; secondly, the environment in which the act was committed; thirdly, the time of night at which it was committed; fourthly, the fact that the deceased had already been significantly assaulted and had, at least at one stage, already been knocked to the ground, whether he temporarily lost consciousness or not; fifth, the state of intoxication of the deceased, which the accused either did appreciate or should have appreciated; sixth, the fact that the conduct of the accused, prior to the act had already caused the deceased to run into the middle of the road with approaching traffic, in an effort to get help and escape the accused.

The State case is that each of the accused, by engaging in the chase, is a principal offender. In the case of [JR], [TB], [EW] and [DVH], each is

additionally alleged to have made contact with the deceased or attempted to do so in the course of the chase for the purpose of apprehending him.

In the alternative, be engaging in the chase in the manner in which they did, including their individual acts in the course of it, each of the accused is said to have done an act for the purpose of enabling or aiding another or other members of the group to commit an act which killed Mr Litchfield, with the intention of aiding or enabling the prosecution of the unlawful purpose by another or others.

Further, the State says, by doing their individual acts and engaging in the chase, each of the accused aided another or other members of the group to commit the act with the intention of aiding the prosecution of the unlawful purpose by another or others.

In the prosecution of that unlawful purpose, murder within the meaning of section 279(1)(c) was committed. Murder, in that context, was a probable consequence, the State says, of the prosecution of that unlawful purpose. Your Honour, I don't propose at this stage to go through the law in any detail. The State must, of course, prove that the accused unlawfully killed Mr Litchfield. It must also prove that the act which caused his death was done in the prosecution of an unlawful purpose and that that act was of such a nature as to endanger Mr Litchfield's life.

The State, of course, bears the onus of proving the case against each accused; that is, each element of the offence, beyond reasonable doubt. If the State fails in that respect of any one of the accused or more of them in that task, your Honour will need to consider the alternatives of manslaughter and unlawful assault causing death.

- 14 I should add that subsequent to the opening address, the learned prosecutor abandoned any alternative basis for criminal responsibility based on s 8 of the *Criminal Code*.

Legal principles to be applied

- 15 In all criminal trials it is necessary for well settled legal principles to be applied to the evidence to reach preliminary findings of fact and the ultimate finding in each case. Given that I am both judge and jury it is necessary for me to set out key legal principles that I must direct myself of and apply in the consideration of each case.

- 16 The first point that I wish to make is that there are five defendants and each has to be the subject of a separate decision. Essentially I have been engaged in conducting five separate hearings at once. There is much evidence which is general and which applies to the case of each and every one of the five defendants. Examples of the evidence which applies generally includes the evidence of witnesses who were with Mr Litchfield

earlier in the day and before he walked off alone down Pinjarra Road, witnesses who saw Mr Litchfield and/or the group of which the five defendants were members, prior to the incident preceding Mr Litchfield's death, the members of the public who attended the scene in the car park and cared for Mr Litchfield before ambulance officers arrived, ambulance officers, medical experts who gave evidence on the injuries sustained by Mr Litchfield and the cause of death, and members of the public who were in cars or on a motorcycle travelling on Pinjarra Road and observed things happening either during or after the incident which preceded Mr Litchfield's death. I have also heard from police officers on a variety of matters in relation to the investigation concerning the death of Mr Litchfield. I have also heard evidence from EHW and JJW who are two of the three members of the group who were not charged.

17 During the hearing I watched and listened to discs of recorded records of interview for each of JR, EW, HCJ and TB. It is essential for me to state that the recorded record of interview of each defendant can only be used in the case of that particular defendant. Because of that rule, nothing said by one defendant in his recorded record of interview can be used in any way at all when considering the case of another defendant.

18 I am also very mindful, that the State carries the onus or burden of proof, that each defendant does not have to prove anything, of what is commonly known as the Liberato direction in relation to onus and evidence, that the standard of proof in criminal matters is beyond reasonable doubt, and that the State must prove that any killing was unlawful and so it must prove that any killing was not an accident. I am also very mindful that the defendants are children and so any subjective and objective considerations must factor that in.

The evidence

19 In the early stages of the hearing I heard and looked at a lot of evidence which provided a background against which I can consider the key issues in this case. I do not propose to set out much detail of or comment on that evidence. That said, there are some matters that I need to cover.

20 Lisa Emes (Ms Emes) was Mr Litchfield's partner. They lived together in a suburb of Mandurah. Giving evidence was no doubt a very difficult experience for her. I found her to be a very credible and reliable witness.

21 Ms Emes said that she and Mr Litchfield went to the Crab Fest, in Mandurah, on the afternoon of 17 March 2013. She met up with a girlfriend and Mr Litchfield joined a friend and they went their separate ways until they met later at the Brighton Hotel. It was St Patrick's Day. Mr Litchfield had been drinking and was in a good mood and each of them had a couple of beers. Mr Litchfield was playing pool.

22 There was an issue between Mr Litchfield and another patron at the pool table. I consider that I do not need to go into it. Suffice to say that it concerned the custom of money on the table. Having watched a video of the incident and heard from witnesses, including the other person involved with Mr Litchfield, I find that there was nothing of any significance in it, and certainly nothing that influenced Mr Litchfield's mood later.

23 It was decided to leave the hotel and have some dinner. Ms Emes thought that Mr Litchfield had had too much to drink and that he should not drive. She was not sure whether Mr Litchfield would have been over the limit or not and very properly decided to take the cautious approach. She conveyed this to Mr Litchfield and got a friend to drive her car. Mr Litchfield was a bit agitated by that and decided to walk home. Ms Emes' car was parked near the IGA store on the Halls Head side of the Old Mandurah Bridge.

24 Ms Emes described Mr Litchfield as confident and assertive when he needed to be. He was pretty fit and enjoyed sport.

25 Ms Emes said that Mr Litchfield was a bit agitated when he left the IGA car park. He was irritated on the day, which she put down to a lack of sleep because they had visited a friend in hospital late the night before. She said that he was intoxicated in the sense of being affected by alcohol but he could walk and talk alright.

26 After Mr Litchfield walked off from the IGA car park, he came into contact with a number of people. He also went into the IGA store. The net effect of all of this evidence is that Mr Litchfield could be noted to have been drinking but was polite, calm and happy.

27 Can I say at the outset that there is nothing in the evidence and nothing at all about Mr Litchfield's behaviour on the night to reasonably suggest that he was unduly aggressive or hostile in any way because of the consumption of alcohol and/or cannabis.

28 After hearing from witnesses who attended the car park after the incident, members of the public and ambulance officers, and looking at

photos of the scene, I am satisfied that Mr Litchfield did not move from the position he landed on the car park after his fall until he was taken to hospital by ambulance later that night.

29 There was also evidence given about behaviour of the group or members of the group during the time they were in Mandurah and before the incident. While I see no need to refer to it, I should nevertheless say that I proceed to consider this case on the basis that it could not be said or suggested at all that the group, or any member(s) of the group, had any propensity to behave in any particular way at all. Can I put it simply and say that I start my considerations with a blank page.

30 I have heard evidence from a number of Police officers who were involved in the investigation in this case. There are numerous exhibits. I do not propose to detail them all. Rather, I will refer to them when I need to during the course of my reasons. That particularly applies to the photographs and CCTV footage.

31 There is some forensic evidence. In particular a hand print of TB was located on the top of the wall in question separating the upper car park of Jaycar from the lower car park of Taubmans Paints. Jaycar was the business immediately east of Taubmans Paints. TB accepts in an interview with Police that he went over the wall and so that readily explains his hand print. Of course, how and why and the circumstances involved with that will need to be considered.

32 I will refer to the medical evidence when I deal with the issue of causation.

33 Peter Dawson (Mr Dawson) was driving his car west on Pinjarra Road in the kerbside lane when he noticed the car ahead of him look like it swerved a little bit and its break lights came on. He travelled further down Pinjarra Road and saw a person on the left hand kerb. He got a good view of the person. That person was obviously Mr Litchfield. He was looking to the other side of the road. He stretched out both of his arms and showed open palms when facing the other side of the road. He stepped on the road and looked at Mr Dawson's car. Mr Dawson flashed his lights. He said that he was about 15 metres away from Mr Litchfield when he did that. Mr Litchfield then stepped back on to the pavement. He looked like he was stumbling. Mr Dawson thought that he was drunk.

34 Mr Dawson said that out of the corner of his right eye, there was a silhouette of what looked like three or four people. He said that he was

going pretty slow by the time he got to Mr Litchfield, crawling, 20 to 25 kilometres per hour.

35 Pauline Bell (Ms Bell) was driving her car on Boundary Road and turning left to head west on Pinjarra Road. The Mercedes Benz car yard is on the south-west corner of Boundary Road and Pinjarra Road. She said that it was about 7:30pm and dark and that she had her car lights on. Her son, Brodie Kerry was a passenger in the front of her car.

36 There are two lanes each way on Pinjarra Road at this location. Ms Bell said that she turned into the lane closer to the middle. She noted about three aboriginal youths to her right on the other side of the road. She was not sure whether or not they were on the footpath. She had her car window down and heard a really loud yell. She did not know what was said. She said that the three youths that she had observed took off towards the yelling which was towards the Mandurah Forum. That is an easterly direction.

37 While there is no doubt that Ms Bell entered Pinjarra Road from Boundary Road, I think that when photographs were shown to Ms Bell that she got mixed up with where in particular she was on Pinjarra Road. She placed what she had seen a block further west along Pinjarra Road from where it actually happened.

38 Brodie Kerry was in the front passenger seat of the car being driven by Ms Bell, his mum. He said that his mum turned into the kerbside lane to travel west on Pinjarra Road. The Mercedes Benz CCTV footage confirms that. Brodie Kerry said that when they got to the corner he looked east and then west. When they turned around the corner he saw a guy on the left hand side of the road standing on the footpath. That would have been Mr Litchfield. He said that there was an aboriginal guy towards the other side of the road between the broken line. That broken line was no doubt the line separating the two lanes for traffic travelling east on Pinjarra Road. He said that the aboriginal guy kept going to the centre of the road. He said that both of them were in the centre of the road and his mum drove her car straight past them in the kerbside lane. Again, the Mercedes Benz CCTV footage confirms that people on the road were to the right hand side of Ms Bell's car when she drove past. I should mention that Mr Litchfield had crossed the southern kerbside lane of Pinjarra Road before Ms Bell came along and so she did not have to break to avoid him. Brodie Kerry said that he was 100 percent sure that Mr Litchfield had walked in front of his mum's car. Reference to the CCTV footage from Mercedes Benz shows that this is actually true, but that Mr Litchfield did

so when Ms Bell turned off Boundary Road in to Pinjarra Road and not when she had travelled further west on Pinjarra Road.

39 Brodie Kerry said that he saw the aboriginal guy with his arms up and both fists out and the guy, who was Mr Litchfield, with both arms out to the side with his palms showing. He said that the aboriginal seemed to be staggering a little bit and that the white guy (Mr Litchfield) was standing up pretty straight and not staggering. I will say now that I accept Mr Dawson's observation of Mr Litchfield and not Brodie Kerry's.

EHW

40 EHW is now 17 years of age. He was a member of the group of nine young people, including the five defendants, who went to the Crab Fest in Mandurah.

41 It was obvious to me from EHW's demeanour and how he responded to some of the questioning that he felt under considerable pressure when he gave his evidence. That is not at all surprising in the circumstances. He was one of a group of young people who were socialising together on this day during the afternoon and into the night. If not good friends, they were at least associating together on a friendly basis. EHW had stayed at DVH's house the night before after they had been to a party. DVH is his cousin. Further to that, when he gave his evidence, AU was still a defendant in the hearing and AU is his nephew. EHW gave the following evidence.

42 Relatively soon after the nine members of the group began walking away from the Mandurah CBD area and in an easterly direction on Pinjarra Road, there were two groups. One was a group of seven in front and the other consisted of two behind that larger group, being JR and DVH. It is clear from what EHW said in combination with CCTV footage taken from Bridgestone Tyres located on the north west side of the intersection of Pinjarra Road and George Street, that by the time they all reached that location, all nine were walking together with Mr Litchfield.

43 EHW identified himself on the CCTV footage. Initially he was walking at the back of the group and it appears on the footage that he was using a phone. He gave evidence that he was using a phone to communicate with his girlfriend on Facebook. No issue was taken with that by any party. EHW gave evidence that as he walked in an easterly direction alongside Pinjarra Road his attention changed from time to time from the group and Mr Litchfield to communicating with his girlfriend on Facebook.

44 The relevant CCTV footage which shows the group and Mr Litchfield approaching George Street and then walking east of it, shows that various members of the group were moving about changing their relative positions. Indeed EHW can be seen to stop using his phone and move from the back of the group to merge in with the group by the time they got to George Street. Some members of the group may have stepped on to the road from time to time but essentially they all walked in an easterly direction on the footpath on the northern side of Pinjarra Road. EHW said that he did not remember seeing the Taubmans Paints premises on the north east corner of the intersection of Pinjarra Road and George Street from when he walked past it on the night in question.

45 EHW gave evidence that he saw DVH trying to pick pocket Mr Litchfield's back pocket. This happened near some bushes near an Aussie Home Loans sign. The location of these bushes, the sign and the premises of Aussie Home Loans can be seen in various photographs in evidence. The Aussie Home Loans business was located in the fourth building east of the Pinjarra Road and George Street intersection. The first building housed Taubmans Paints, the second, the Jaycar business, the third, the AutoWest business, and then the fourth building. Aussie Home Loans was the second business going from west to east in this fourth building.

46 By reference to EXHIBIT 12.3 which is an aerial photograph of the relevant section of Pinjarra Road showing various buildings and features, and which has a measurement scale on it, it can be easily concluded that this bush area is about 50 metres or so to the east of the wall in question which separated the Taubmans Paints and Jaycar premises.

47 EHW said that DVH put his hand in Mr Litchfield's back pocket. He said that most of the other boys were around when DVH did that. He was cross-examined on this by counsel for DVH. During that cross-examination he said that he saw DVH touch Mr Litchfield's pocket but not put his hand in Mr Litchfield's pocket. He then went on to say that DVH tried to pick pocket Mr Litchfield. The precise detail on this matter of fact does not really matter.

48 It was at this location near the bushes that EHW said that he saw Mr Litchfield slap DVH on the back of the head with an open palm. He said that the contact knocked DVH's head forward a bit. He then saw DVH hit Mr Litchfield pretty hard with a left closed fist to the jaw which knocked him back first in the bush. He said that he was about two to three metres away from DVH when DVH punched Mr Litchfield. He also indicated that the other boys were closer around Mr Litchfield, closer than he was,

when DVH punched Mr Litchfield. He also said that EW was on the other side of DVH when DVH punched Mr Litchfield. EHW also said that he kept walking after DVH punched Mr Litchfield and that Mr Litchfield was awake and got back up after he had been punched.

49 EHW said that he, JJW and BS kept walking (in an easterly direction) after DVH had hit Mr Litchfield. While EHW was walking, at times he was communicating with his girlfriend on Facebook and at other times he was looking back to see what was happening. He indicated that he ended up walking to the next street corner east of George Street, which is the corner of Forrest Street and Pinjarra Road.

50 EHW went on to say that when Mr Litchfield got up from in the bush, he just ran, not that fast, across the road. There were a couple of cars on the road and he thinks that Mr Litchfield ran in front of a car.

51 EHW gave evidence that the rest of the boys, 'the rest of the six', followed Mr Litchfield and were in different places rather than altogether. He referred to six because he was further east with JJW and BS. The closest the boys got to Mr Litchfield was about two metres away from him. EHW gave evidence that Mr Litchfield went to just before the curb, not the footpath (on the south side of Pinjarra Road).

52 EHW said that DVH and EW were shaping up to Mr Litchfield, like trying to fight him. He then said in his evidence in chief that EW was not shaping up to Mr Litchfield but rather just surrounding him. He limited the shaping up to DVH and indicated that by shaping up he meant putting two fists up. Later when cross-examined by counsel for EW, EHW said that they were all shaping up to Mr Litchfield. He acknowledged that he did not mention in his police statement that EW shaped up. When cross-examined by counsel for DVH, EHW said that he could not really remember if DVH put his fists up when Mr Litchfield walked towards DVH but also said that DVH did do that when he was around Mr Litchfield somewhere.

53 When EHW gave evidence on when Mr Litchfield was moving back to the north side of Pinjarra Road, he said that the boys were not on the (northern) footpath, and were spread out a bit. He said that Mr Litchfield was telling them to stop, 'just leave me alone'. He said that Mr Litchfield was just trying to keep himself up. He added that Mr Litchfield was a bit drunk.

54 EHW said that when Mr Litchfield came back across the road, he did so 'a bit down the road'. By that he obviously meant further west and

towards the foreshore. He described Mr Litchfield coming back 'diagonally'. He gave evidence that no one touched anyone when they were on the road. When EHW said that Mr Litchfield ran 'diagonally', he was then asked 'did anyone else go there?' and he replied 'yeah, they followed him, chased him'. When asked 'who did?', he said, 'the boys'. At that time BS and JJW remained with him and AU also remained behind.

55 When EHW was asked in cross-examination on whether the boys moved where Mr Litchfield came back over the road, he said that 'they were following him, yeah' and agreed that he saw them move down the road. Later in cross-examination he agreed that when he first saw his friends start to run they did not all start to run at the same time and that some ran off and he said that some walked after. He later again in cross-examination said that EW was one who walked not ran.

56 What EHW meant when he said 'some walked after' was not made clear to me but that does not matter in my overall assessment of the evidence. EHW said that when Mr Litchfield got back to his side of the road (i.e. the northern side), 'then when he got into the car park I said that there was a bush right there and I couldn't see behind that'. He explained that he meant the bushes near the Aussie Home Loans sign.

57 JJW is now 17 years old. He was also a member of the group of nine young people, including the five defendants, who attended the Crab Fest in Mandurah. He was also part of the whole group that met up with Mr Litchfield on Pinjarra Road.

58 JJW is related to two of the other boys in the group. AU is a second cousin and both DVH and EW are first cousins. JJW gave the following evidence.

59 JJW gave evidence that when the group was on the western side, i.e. the ocean side of the Old Mandurah Bridge, that all of the group went to the IGA store and that none of them stayed at the skate park. That was obviously wrong but on my overall assessment of the evidence, nothing turns on it. He remembered Mr Litchfield walking with the group on Pinjarra Road. He recalled that Mr Litchfield was wearing a blue shirt, thongs and a hat. He said that Mr Litchfield was in a good mood and was staggering.

60 JJW said that he and AU spoke to Mr Litchfield about smokes. Mr Litchfield told them that he had no smokes. JJW also said in cross-examination that when he and AU were asking Mr Litchfield for smokes, both JR and EW were touching Mr Litchfield's pockets. JJW

recalled that Mr Litchfield said 'don't touch me please' to 'all of us'. He said that in response to Mr Litchfield saying that, 'we' started walking faster.

61 I am not sure in particular who 'we' was a reference to, but he said that the pick pocketing did not stop and that he and AU got away from Mr Litchfield. Later in cross-examination he expanded on that when he agreed with counsel for JR, that he was walking in front of Mr Litchfield. It was in that context that he said that he did not see JR try to take anything from Mr Litchfield's pockets.

62 In the context of JJW's evidence, it was after all of that, and when he was about 100 metres up the road, that he saw Mr Litchfield hit, like a smack, DVH to the back of his head with an open hand. He added that it 'just rocked his [DVH's] head'. He said that this 'just made DVH angry', which upon objection by counsel for DVH, he changed to 'made him [DVH] retaliate'.

63 JJW said that when Mr Litchfield smacked DVH, that Mr Litchfield also said 'fuck off, get away'. JJW also said that after Mr Litchfield smacked DVH, that 'then he [DVH] started harassing him, yeah, like attacking him'. He said that he saw DVH throw a punch at Mr Litchfield's head, he thought his face, but that he did not see it connect. He said that he saw that when he was still running down the road 'trying to stop him [DVH]' and 'from them attacking him [Mr Litchfield]'.

64 JJW said that it was DVH, EW and TB who were attacking Mr Litchfield and no one else. He described TB as 'like, a little friend of ours'. He went on to say that the others were down there and indirectly identified the others as those other than him, AU and EHW. He described the position of the others relative to the position of DVH, EW, and TB as 'just there'. He said that 'they wasn't hitting him or nothing like that, yeah...just trying to steal stuff off him'.

65 There was an objection to the reference to 'trying to steal stuff off him' but really that needed to stay in evidence simply and only for the purpose of understanding that JJW was saying that they were doing something but that the something did not involve or include hitting Mr Litchfield.

66 JJW said that the attack on Mr Litchfield happened on the footpath. He said that Mr Litchfield remained standing. He then observed Mr Litchfield run to the middle of the road and 'DVH' and 'most of them boys'

go on the road. He said that he did not see anyone not go on to the road. He said that DVH went on to the road and towards Mr Litchfield.

67 JJW accepted in cross-examination that he had stated in his police statement that most of the boys were not on the road. He gave evidence that he meant 'most of them was on the road' and that he cannot remember saying to the police that 'most of them wasn't on the road'.

68 JJW gave evidence that when this part of the incident was happening that he was still up the road with AU and EHW. He did not see how close DVH got to Mr Litchfield and he did not see DVH or any of the others do anything to Mr Litchfield.

69 JJW gave evidence that when Mr Litchfield was in the middle of the road 'he was swearing at us - swearing at them, yeah', 'yeah, like tell them to stop'. When JJW was asked how many times Mr Litchfield said that, he replied 'good enough'. He said that Mr Litchfield 'kept saying' it.

70 JJW recalled observing Mr Litchfield put his arms up in front of himself and holding both palms forward, indicating 'like stop', when he was walking back towards the north side of Pinjarra Road. JJW observed this when he looked back from about 100 metres up the road. In cross-examination JJW was asked how come he was 100 metres up the road? He replied as follows:

Good. You were a hundred metres up the road, you said, didn't you?---
Yeah.

How come you were a hundred metres up the road?--- Cos I knew they was going - like, touching him and that - touching him, like, in a bad way and then do something like this.

But touching the pockets? --- Yeah.

All right. And then you've shot through, have you? You've run up the road? --- well, started - started walking faster, yeah.

71 When JJW was also asked in cross-examination what made him turn around and look back, he replied 'shouting - heard them - help it - heard people shouting behind'.

72 JJW was asked in cross-examination what he did and saw when he turned around. He was asked and replied as follows:

What did you do yourself? Like, when you turned around, what did - - - ? -
-- I just stood there, like, look at these dumb fucks here.

And how long after you turned around and you looked did you see the - the man - the deceased man run? --- I seen him like - I seen him - not - not running yet but I just standed up there waited for a bit, so - that's when I seen the boys started like - seen - seen [DVH] swinging but don't know if it connected him or not.

73 When JJW was asked whether Mr Litchfield stayed on the road he replied 'no, he took off running'..'to a building with a car park' and that the boys went 'running', 'chasing him'. He identified the boys who chased Mr Litchfield as DVH, TB , JR, HCJ and EW.

74 JJW said that the boys were on the footpath when Mr Litchfield ran from them. When asked whether anything happened in relation to the bush located around where Mr Litchfield ran from the boys, he replied 'not that I know of'. He then said that he did not see anyone in the bush. This was a reference to the bush near the Aussie Home Loans sign.

75 JJW said that he and AU started to run 'after them' because BS had come running up to him and called out his name. He also said that he ran because he wanted to try and stop 'them' from chasing Mr Litchfield.

76 In JJW's evidence in chief he put an 'X' on a large aerial map of the Mandurah area relevant to this case. He indicated that the 'X' represented how far east he went on Pinjarra Road before he ran back down after Mr Litchfield had run on to the road. In cross-examination, on the factual issue of him running after the boys who were chasing Mr Litchfield, he was asked and replied as follows:

Corish, Mr: And you remember putting an "X" on that - that map of the big Mandurah area? --- Yeah.

And that's as far as you got before you turned around and saw people running. Is that right? ---Yeah.

And if you're not sure about something, please just say so. Okay? --- Pardon? Say that again?

That's - that "X" you put on the big map - - - ? ---Yeah.

- - - that's as far as you got?---Yeah.

All right. And you left that point when you saw people running. Is that right? ---Yeah.

And did you run back - back down the hill? ---Yeah. Once [BS] come and told me.

Sorry? ---Once [BS] runned up towards me.

Did [BS] come and tell you something, did he? ---Yeah.

All right? ---Not told me but he, like, shouted my name.

All right. And then did you start running? ---Pardon?

Then did you start running down the hill? ---Yeah.

Or walking down the hill? ---Started running.

All right. Full speed? ---Good enough, yeah.

All right. Were you trying to catch up with the other boys who were running? ---Yeah.

Did you catch up with them? ---Nah.

No. Were you trying to hang back so you weren't with the boys who were running? ---Nah.

All right. Did they appear to you to be running fast or running slow? ---Pardon?

The boys who were running, who you say you could see running, did they appear to be running fast or running slow? ---Probably their pace or a bit faster.

All right. Same speed as you or faster than you or slower than you? ---I don't know. I'm not them, yeah.

Yes. Well, you could see them, couldn't you? ---Yeah, I could just - yeah.

Were you catching them? ---Nah.

No. So did you run full speed down the hill or you just jogged down the hill? ---I run good enough, yeah.

Is that full speed? ---Nah.

You were just jogging down - - -? ---Yeah, full - full speed, I started running, yeah.

All right. Were you trying to catch up with them? ---Yeah.

All right. You caught up with them when they were down in the car park[sic] - car park where the white man was laying on his back, that that right? ---That's right.

78 JJW positioned both EHW and BS as being up the road after he and AU had run after the boys. He said that both EHW and BS only walked half way down (i.e. half way down from where they were towards the Taubmans Paints car park where Mr Litchfield came to rest) and that EHW and BS met up with the others when the others came back up from the car park. Given how JJW explained this part of the incident, both JJW and AU would have also run back from the Taubmans car park area to meet up again with EHW and BS further east up Pinjarra Road.

79 In JJW's evidence in chief, in relation to him running after the boys and what he saw, he was asked and replied as follows:

Did they stop running? ---Yeah.

When did they stop running?---When he fell, yeah.

Did you see him fall?---No.

So tell us, did you catch up to them after they stopped running?---Yeah.

And what did you see when you caught up to them?---I seen him laying on the ground.

Seen him laying on the ground? ---Yeah.

Who?--- That man.

And where was he lying on the ground? ---The car park.

And how was he lying on the ground? ---On his back, yeah.

On his back. Where were the boys that had run down there? ---Standing round.

Was everybody standing in the same place? ---As where, like?

Okay. That's -you're right. Thank you [JJW]. You said the man was lying on his back in the car park? ---Yeah.

Were there people standing in the car park? ---Yeah.

Who?---[DVH], [TB], [HCJ] and [EW].

Where was [JR]?---He was standing up on the brick wall.

Standing up on the brick wall?---Yeah.

And where did you run to? ---I was, I run too along the footpath, yeah.

Did you go into the car park at all? ---No.

What about [AU]? ---Nah.

I need to make that clear. Did [AU] run down on the footpath with you or some other way? ---He run - yeah, he run down the footpath with me. Yeah.

And did he go into the car park? ---No.

What about [BS] and [EHW], where were they? ---They was up the road.

Up the road. Did you ever see either of them come down when you and [AU] ran down? ---No, they just walked halfway, I think yeah, and met up with them.

Okay. So when you saw that man lying on the road - sorry; on the car park, was he awake?---I don't know, yeah.

How good a look did you have at him? ---I just looked and, like "Let's go".

Pardon? ---Panicking, yeah.

...

You panicked? ---Yeah.

Did the man move? ---Yeah.

How did he move?---Like, a bit.

Like, what did he move; what part?---His feet and his arms.

And did you see his eyes open?---Nah.

And - - - ?---Too far from him.

Could you see any injuries on him? ---No.

The other boys who were standing in the car park, did you see anyone touch the man?---[DVH].

What did he do?---Give him a kick.

Where did he give him a kick? ---To the head.

Do you know what part of his head?---No.

Did it do anything to the man lying on the ground? ---I don't know, like, yeah.

What did it do?---Just moved his head.

Made his head do what? ---Move.

Are you able to say how hard that kick was? ---No.

Was [DVH] wearing shoes?---Yes.

80 Later in JJW's evidence in chief he said that when DVH kicked Mr Litchfield in the car park, he was coming down on the footpath and was about 10 metres away. When asked about the lighting and whether there were any cars going past when he says that he observed that, he said 'good enough, yeah'.

81 JJW was cross-examined by counsel for DVH on this aspect of his evidence in chief. In cross-examination he was asked and replied as follows:

Did you actually get down to the car park when the boys were down in the car park? ---Yeah.

How long did you say the boys were standing around in the car park for?--
-About - before I got there?

Yes?---I don't know. About 15 -15, 20 seconds.

All right. You said in your evidence that you saw [DVH] kick the man while he was lying on his back in the car park area to the head somewhere. Is that right? ---That's right.

You never got close enough to the man in the car park to see that. Correct or not correct? ---No, I just like - I was - I was getting there.

You were getting there? ---Yeah.

82 JJW also gave evidence that other than him seeing DVH kick Mr Litchfield when Mr Litchfield was lying in the car park, he did not see anyone else touch Mr Litchfield when he was lying there.

83 Counsel for HCJ cross-examined JJW on his recollection of where HCJ was at various points in time during the incident. As previously mentioned, JJW had included HCJ as one of the five boys who chased Mr Litchfield down towards the wall and the car park. JJW could not recall where HCJ was when Mr Litchfield was being pick pocketed or touched when the group walked up Pinjarra Road, when DVH threw a punch at Mr Litchfield after Mr Litchfield had smacked DVH to the back of the head, when Mr Litchfield was in the middle of the road, and when the boys were on or about the footpath on the north side of Pinjarra Road when Mr Litchfield was returning back to the northern side.

84 JJW was referred to his prior statement to the Police made on 28 March 2013 in which he stated that four boys ran after Mr Litchfield, namely, DVH, TB, JR and EW. There was no mention of HCJ. Of course, those contents of that statement are not admissible against DVH, TB, JR and EW. However, JJW then went on to give evidence in the hearing that it was those four boys, i.e. DVH, TB, JR and EW, who ran after Mr Litchfield, and not HCJ.

85 JJW also gave evidence when cross-examined by counsel for HCJ, that when he ran down towards the car park, he overtook HCJ on the footpath and got down there (i.e. to near the car park) before HCJ. JJW agreed that HCJ was separate from DVH, TB, JR and EW.

86 JJW also agreed with counsel for HCJ that he had previously told the Police that he saw EW, DVH and TB go over the wall and that he made no mention of HCJ doing so. Again, I must make it clear that what JJW told the Police is not admissible against any of EW, DVH and TB on this point and at all. So I do not use it at all against any of them. However, in relation to HCJ only, JJW agreed in evidence that HCJ did not go over the wall and that he could not remember if HCJ went near Mr Litchfield in the car park.

87 JJW gave evidence that when he was on the footpath near the car park, he told the boys 'lets go' and that he was swearing at them. He said that he panicked. He said that all of them started walking and then 'most of us run'. He said that he caught up with EHW and BS up on top of the hill. After that, all of the boys stuck together and went to the train station. The Mandurah train station is located east of the scene of this incident.

88 It is clear from all of the evidence that a phone that Mr Litchfield had in his possession on the night, came into the possession of EW. It is also clear from all of the evidence that when all of the members of the group later caught a train from the Mandurah train station, that when on the train they looked at photographs on Mr Litchfield's phone.

89 JJW in his evidence in chief said that JR had told him that he had pick pocketed the phone from Mr Litchfield's pocket. When cross-examined by counsel for JR, JJW said that he did not see JR take anything from Mr Litchfield. He said that he saw JR pick the phone up from off the ground and not from Mr Litchfield's pocket. JJW said that JR later said 'who wants this phone?' and EW took it from him. In cross-examination, JJW said that JR could have said 'who's phone is this?'

90 I should also mention that when JJW was cross-examined by counsel for HCJ he admitted that he initially lied to the Police on whether the members of the group got together at DVH's place after the incident and talked about it. Initially he told the Police that they did not. He now agrees that they did. He explained the lie on the basis that he was worried because he was the oldest.

Credibility and reliability of witnesses

91 When considering the credibility and reliability of EHW as a witness and the evidence he gave, it is necessary to refer to and comment on some evidence he gave near the end of his cross-examination by counsel for DVH. EHW was being cross-examined on whether and when in particular he saw DVH put his fists up at Mr Litchfield. It reached the point where EHW said as follows:

Okay?---Look, all I can remember is [DVH] hitting him, him falling, trying to get away, them boys coming back from the thing saying he fell over. That's all I can remember.

92 Through no fault of anyone's, EHW gave that evidence at about 4:00pm after he had spent much of the day in the witness box. Counsel for DVH was the fourth counsel in line to cross-examine EHW. None of that could be helped other than by rest breaks which we had. It was very shortly after this evidence that I adjourned for the day at about 4:06pm because EHW was showing signs of tiredness and extreme frustration.

93 EHW presented as an unsophisticated young person and so one who could be reasonably said would struggle with having to make distinctions on points of detail over a prolonged period of time. It was in the interests of justice for there to be a break at that point so that he could continue his evidence the next day freshened up.

94 At the beginning of the next morning of the hearing, counsel for DVH asked and EHW replied as follows:

[EHW], I know it was a long day yesterday. I'm just going to ask you a few more questions. Okay?---Yeah.

All right. Towards the end of that long day; and I'm not being critical of you here for a moment, you, can I suggest, lost your - your temper ever so slightly but gave a - a very neat summary of what you remember. And I'm just going to remind you of what you said. Okay? I'm just going to read from the transcript. Is that okay? ---Yeah.

All right. You said:

Look, all I can remember is [DVH] hitting him, him falling, trying to get away, them boys coming back from the thing saying, "He fell over". That's all I can remember.

It might sound like an obvious lawyer's question, but firstly, do you remember saying those words yesterday?---Yeah.

All right. And that's correct, isn't it? That's all you can remember?---Yeah.

95 On my assessment of EHW's evidence, it is my firm view that he could and did accurately recall much more of the incident and the lead up to it and subsequent events than he said he did in the passage that I have now just referred to twice. That evidence was given out of extreme frustration. By the time he first gave it, he had just had enough and wanted to give up. His responses on the following morning simply but importantly show that his extreme frustration from the day before was irretrievable.

96 Early in counsel's cross-examination of EHW, CCTV footage was shown of Mr Litchfield walking up Pinjarra Road with the nine boys in the group. It could be seen from the footage that Mr Litchfield was wearing shorts and a blue top. After the footage was played to EHW, the following exchanges were made:

Okay. You can see a - and I understand you said you can't remember what he was wearing, but you can see a person with a blue top there, is that right? ---Yep.

Assuming that the colours on the CCTV footage are correctish, you can certainly see a blue coloured top?---Yeah.

Does that refresh your memory or -or make your memory better about what the white guy was wearing? ---Nah.

All right. Have you got any idea what he was wearing?---No, I can't remember.

Pants, clothes (inaudible)?---Can't remember.

Butt naked? ---Can't remember.

All right. Are you saying you can't remember whether he was naked or not?---I don't know what he was wearing.

All right?---I can't remember.

He had clothes on?---Yeah, he had clothes on but I can't remember what he was wearing.

Right. What else - I'll withdraw that. In your evidence you said he was staggering?---Yeah, he looked like he was a bit drunk.

So you remember that bit, you just can't remember whether he had clothes on or not?

FORRESTER, MS: No, that's not true.

REYNOLDS, CCJ: No, no, sorry.

THE WITNESS: I just can't remember what he was wearing, mate.

CORISH, MR: All right, okay. Describe how he was staggering for me?--
-Well, how would you stagger if you was drunk?

Did you understand my question, [EHW]?

FORRESTER, MS: (Indistinct).

...

Did you understand my question? ---No.

I want you, in your own words, to describe what he was doing when he was staggering?---Staggering.

Right?---Like anyone else would stagger when they're a bit drunk.

97 Clearly the factual issue that counsel wanted to canvas was EHW's evidence that Mr Litchfield was staggering. That said, I am not sure what the purpose was to put to or ask EHW whether Mr Litchfield was 'butt naked'. EHW's answer to that question of 'can't remember' taken in the context of what was asked and replied immediately before and after, very clearly shows that EHW was simply saying that he could not remember what Mr Litchfield was wearing. It is against that background that counsel then put to EHW 'so you can remember that bit, you just can't remember whether he had clothes on or not'. EHW was clearly not suggesting that he could not remember whether Mr Litchfield had clothes on or not.

98 The point that I wish to make from this, is that EHW became extremely frustrated with counsel and the cross-examination very early on. That was obvious from EHW's demeanour. I am in no way being critical of anyone, including counsel, but rather just stating the fact based on my overall assessment.

99 After EHW was then cross-examined on his evidence that Mr Litchfield was staggering, the following exchanges were had by counsel and EHW:

There was only one white guy amongst your - your - that group of people as you walked along Pinjarra - Pinjarra Road, is that right? ---Yep.

Yep?---Mm hmm.

All right. He was the guy with the bright blue shirt on, wasn't he? ---That's what you reckon.

So you - are you prepared to answer my questions, or listen to my questions and answer them, [EHW]?---Yeah.

Or do you want to have a break?---But I told you I can't remember what he was wearing, didn't I?

All right. But you remember this white guy staggering? ---Mm.

100 In my view those exchanges lend further support to my assessment that EHW was extremely frustrated.

101 Further, on my assessment, EHW's extreme frustration was certainly maintained, if not made worse, after the following exchanges between counsel and EHW on the factual issue of pick pocketing:

[DVH] touches the white man's back pocket. What's the next thing that happens?---He feels him touching his back pocket.

Well, is that you just reading someone's mind or guessing? ---Well, what if someone touched you on the back pocket? Would you feel it?

Is that - I mean, you've just given evidence about what the - what - the white man could feel?---Yeah. He obviously - - -

Are you just guessing that?---Nah. He obviously felt him touch it and when he felt him he slapped him on the back of the head.

102 There is no issue on behalf of DVH that he was pick pocketing Mr Litchfield and that it immediately preceded Mr Litchfield smacking DVH to the back of the head. Anyway, that is the overwhelming evidence and there is nothing to the contrary. EHW clearly inferred that Mr Litchfield felt DVH at least attempting to pick pocket him. It is the only reasonable inference open. Indeed, even DVH said this himself in a telephone call on 9 July 2013 which was intercepted and recorded and which I will refer to in more detail later. It is against all of that, and by reference to EHW's demeanour and his responses that I have no doubt that EHW felt that counsel was being unnecessarily argumentative. Again, it is not a case of what counsel intended, but rather the effect on the witness which matters.

103 In addition to the specific instances, by the time EHW expressed the limited recollection of the incident as previously set out, he had been further challenged, albeit fairly on points of detail. As I have mentioned it is the effect on him which matters.

104 It also needs to be borne in mind that all of this is in addition to the pressure that EHW no doubt felt by reason of giving evidence in a case against his friends and/or associates.

105 Having made all of these observations and comments, I now wish to set out EHW's statement of limited recollection together with other things he said at the time, which in my view puts it in a context which both supports and confirms my view.

The man. And where do you say that was? ---On the road.

Whereabouts on the road?---On the other side.

Sorry?---On the other side.

On the other side of the road?---Or on this side.

On the Mercedes' side of the road?---Can't really remember.

Do you want to have a break, [EHW]?---No, I just want to get this over and done with.

Okay. Did you say it was on the other side of the road, the Mercedes' side of the road or the side of the road that you were on?---Mercedes' side.

All right. Well, that's not true at all, [EHW]. You just made that up?---No.

Correct or not correct?---Never made it up.

Okay?---Look, all I can remember is [DVH] hitting him, him falling, trying to get away, them boys coming back from the thing saying he fell over. That's all I can remember.

I understand that absolutely?---Yeah.

The white guy was on the other side of the road though, wasn't he?---Yeah.

Only once, wasn't he?---Then he came back over.

Sorry? Only once, yes or not - or no?---Yes and then he came back over.

Right. Came back over and was walking towards [DVH], is that right?---Think so.

Yes. Then there was some argument?---Yeah.

And then there was a chase?---Yeah.

106 For all these reasons I find that EHW's recollection of the incident and related matters is not limited to the extent he expressed out of extreme frustration and wanting to bring his evidence to an end.

107 I note that EHW got the car parks of Taubmans Paints and Jaycar mixed up when he showed where Mr Litchfield came to rest. In my view that was a genuine mistake and of no significance.

108 JJW seems to be a more outgoing, confident and assertive sort of person compared to EHW. I find him to have been a credible witness and generally reliable. The fact that he corrected himself on the evidence he initially gave about HCJ does not cause me to conclude that any other material parts of his evidence are unreliable.

109 I find that Mr Dawson, Ms Bell and Brodie Kerry were all generally credible and reliable witnesses subject to the comments that I have previously made.

TB

110 TB participated in a recorded interview with the Police on 27 March 2013. He was accompanied during the interview with his uncle as his next friend. He was about 14 years 2 months of age at the time of the interview. He was attending school on an academic and sporting scholarship at the time.

111 At the beginning of the interview, TB gave the following narrative responses:

A. Oh, well, um, like we was in Mandurah and like think we was coming up that like I think that's like Pinjarra Ave like the car dealers and that over that side and the shops on the other side, like motor bike shops and we was walking up that street and like this guy who was like walking in front of us and then like, he stopped and then, I don't know. For some matter, he ended up talking to us and then like, one of the boys asked him for a cigarette and then he said he hasn't got none and then another boy asked him for a cigarette -

A. Oh and then, um, then, like he - and then, when another boy asked him for a cigarette, he slapped him across the back of the head and he said, "I thought I told youse", and then he started swearing and then he, um, he like, he said that. Then like he was walking and that's when one of the boys - the boy that he slapped, pushed him and then he like - then I looked at him and the boy - the boy hit him and then - that's all I can say about that - and then, um, oh, a bit after that, after some other things happened,

that's when, um, like, he was like he got up and he ran, like, through the thing and when he was running, I grabbed his shirt - about - good enough distance, about five or ten metres away from the ledge, saying "There's a ledge there", pointing at the ledge and like he like - - -

A. I was trying to prevent him from like, falling off the ledge and falling - tripping over the ledge, 'cause the ledge was like, built higher and then it was a big drop on the other side - and then three of the other boys ran up to him and helped me try and grab him and one of the boys said "It would be easier if we could get him to hit the floor before then", so he like, he kicked his ankle and then he didn't go down and he started running faster and by then he like - he was already at the ledge and he jumped over the bricks and then he looked, like the ledge was there and then he, like landed like on the side of his ankle, like on the side of his ankle. He landed on the side of his ankle, like that and spun, like he spun and landed on his head.

A. And, um, when he hit the floor, like that's when I got over the ledge and I looked down and he was bleeding and so I jumped down and I checked if he was breathing and like I checked his neck for a pulse and I said, "He's breathing", and that's when I said, "Let's go, he should be all right", and that's when we walked, like started walking. We like, stood up and when I stood up and I ran and then like, I just ran and ran and then like, when we stopped, I said, "One of you boys ring the ambulance and tell them", and 'cause I didn't have a phone on me and one of the boys said, "Yeah, I will when I get to the train station", and - and I don't think he did ring the ambulance and like, he was breathing fast, like when I checked him, he was like breathing fast and then we left. We ran to the train station, um, oh, and there was - there was, yeah, I think there was eight of us.

112 During the interview, there were times when TB did not want to and did not name other people, and also answer questions. He of course has a right to silence and so none of that can be used and I do not use any of it against him at all.

113 TB said that Mr Litchfield talked to them as they walked up Pinjarra Road. He said that he sounded drunk because he was angry. He later added that he thought that Mr Litchfield was angry because he was 'like frustrated' and 'like his words were mumbled up and he was loud'. He agreed that Mr Litchfield was slurring his words saying 'yeah, all mumbled up and stuff'.

114 TB said that 'the boy' asked for a cigarette when they were on Pinjarra Road on the other side from the Mercedes Benz business. He did not want to name 'the boy'. He was entitled to take that position and so I do not use it against him at all. When asked what happened after the boy asked for a cigarette, he said:

Q. Okay so the boy's asked him for a cigarette and what's happened then?

A. And that's when he started swearing and he slapped that boy across the back of the head.

Q. Yep.

A. And then that's when I don't want to say that bit in between that and him running away from us.

Q. All right, well where were you standing when he slapped the boy across the back of the head?

A. I was standing next to that boy.

Q. So you were standing next to that boy when he slapped him across the back of the head.

A. Yep.

Q. So what did he do then when he got slapped across the back of the head?

A. He - I don't want to say anything. I -

115 I again mention that I put aside TB's refusals to answer questions because he was simply but importantly exercising his right to silence. But what is admissible and relevant is that TB said that the slap followed a request for a cigarette and that he was standing next to the boy who got slapped. I will comment on that later in relation to my assessment of TB's credibility and reliability, mindful at all times of course that it is the State which carries the onus or burden of proof and that TB does not have to prove anything.

116 TB said that after the boy got slapped, the other boys just laughed. He said that the boy got angry. When asked what happened then, he said:

Q. Okay so then what happened?

A. That's when he - he - that's when he got up off the floor and that's when he started running from us and I grabbed him and I lost my grip from his shirt and he ran.

117 At that stage TB had not indicated how Mr Litchfield had got on the floor (the ground). He said that Mr Litchfield ran back towards the old bridge, i.e. west. When asked how far he would have had to run (to the ledge) he replied 'he probably ran 20 metres, 30 metres. Then he jumped down the thing'.

118 The Police interviewer asked TB whereabouts on the ground Mr Litchfield fell. TB said that he fell in the bushes. He said that 'the bushes was like in front of the car park'. On the whole of the evidence, the reference there by TB to 'the car park' was clearly a reference to the car park in front of Aussie Home Loans further east of the car park in front of Taubmans Paints, and not the car park in front of Taubmans Paints where Mr Litchfield came to rest.

119 When TB was asked where he grabbed Mr Litchfield and what happened when Mr Litchfield did not stop he replied:

A. I grabbed him when he first started like, just after he first started running, when I noticed the ledge.

Q. Where did you grab him?

A. Oh, I grabbed his shirt.

Q. Did you say anything to him?

A. I said, "Stop, the ledge".

Q. Yep.

A. And then he didn't stop.

Q. What happened when he didn't stop?

A. That's when the other three boys came running up and started trying to stop him.

Q. So the other three boys came running up to try and stop him?

A. Yeah.

Q. All right so, um, what did they do or say to him?

A. They just said, "Stop".

120 TB spoke about one of the other boys trying to trip Mr Litchfield so that he would not reach the ledge. He added that this other boy said 'I'm going to make him fall before he gets to the ledge'. He added that the boy tried to make Mr Litchfield fall, but he did not fall.

121 TB also said in his interview that the other boy tried to ankle tap Mr Litchfield about five metres from the ledge. When asked to describe the ankle tap he said that the other boy 'didn't get it'.

122 The following exchanges cover the location and how TB says that he tried to grab Mr Litchfield:

Q. Okay so when he got up from the bush - - -

A. Yeah.

Q. - - - did he run backwards did he?

A. He ran like that around the bush and around the other side of the bush.

Q. Okay.

A. And I jumped through the bush and told him to go - pointed him towards, like up towards the way he was walking.

Q. So he runs this way - - -

A. Yeah.

Q. - - - you ran through the bush?

A. Yeah.

Q. You try to grab him?

A. Yeah.

Q. He - your hand, your grip slips - - -

A. Yeah.

Q. - - - he continues running.

A. And then I yelled out to the boys when he got about there and they all run over and he was about there when the boy tried to trip him.

123 TB described to the Police how Mr Litchfield jumped, landed on his left leg, and rolled his ankle, spun and then faced them and landed backwards with a thumping sound. When asked where he was when Mr Litchfield landed he said:

Q. Backwards on his back, okay and what happened then so he's come backwards on his back, where were you then?

A. I was - I was - like them three boys were standing there and I was coming like, I was standing behind them, like looking over the ledge.

124 TB added that he was standing about a step or two from the ledge when he was behind the others looking over the ledge. He said that he

could see Mr Litchfield's chest moving quick and blood coming from underneath his head.

125 TB then said that all four of us jumped down and one of the other boys said 'run, run'. He made it clear that it was a case of 'we' rather than 'I' who jumped down from the ledge into the car park.

126 One of the Police witnesses sought to further clarify this point later when he asked TB who was the first one to go over to check Mr Litchfield. TB said 'oh, one of them other three boys'.

127 Later in the interview on the issues of how Mr Litchfield landed and when TB went down into the car park, TB was asked and replied:

Q. He kept spinning so when he actually hits the ground, he's actually backwards?

A. Yeah. He's backwards.

Q. Okay and then did he just stop there when he hit the ground?

A. Yeah. He just bang and then that's when - by the time he hit the ground, I was probably about there.

Q. You were?

A. Yeah and them boys was here.

Q. Okay. What did you guys say when that happened?

A. That's when one of the boys said - one of the boys said, "Let's quickly check him", and then we all jumped down and then checked him.

128 Later again TB was asked and replied:

Q. - - - how were - you were standing about a step back from the ledge, right and did you go over the ledge to go and see how he was?

A. Yeah. We all jumped down.

129 TB told the Police that when he jumped down into the carpark, he felt around Mr Litchfield's neck to try and feel for a pulse. He said that he felt something beating so he said to the others 'let's go, he should be alright'. TB also said that Mr Litchfield's eyes were closed. He added that he was not sure if Mr Litchfield was awake 'but his eyes was like, blinking'. TB said that he thought that they should call an ambulance. He also told the Police that he thought that Mr Litchfield was 'not really hurt'.

130 The Police executed a search warrant on TB's home and seized items of clothing. They were looking for a blue t-shirt with the motif 'Wanted' on it. TB was wearing that t-shirt on the day and night in question. TB was asked and replied to questions on the clothing he wore as follows:

Q. - - - on the front, okay. We seized that item today. Was that the t-shirt you were wearing on Sunday?

A. I'm not sure.

Q. You can't remember?

A. Yeah, I can't remember.

Q. All right. We were also looking for some pink shorts. We seized some shorts today, which is like a - - -

A. Like an apricot colour.

Q. Apricot, yep. Excellent, you are better with colours than I am. Okay, were you wearing those shorts last Sunday on the seventeenth of March?

A. No they are not mine.

Q. Okay. We were also looking for some light coloured shoes.

A. Yeah.

Q. Right. Do you remember what shoes you were wearing on that Sunday, the seventeenth of March?

A. No.

Q. You can't remember?

A. I think I was wearing like, white slip on.

Q. Where are those white slip on's now?

A. I don't think - I think I ripped a hole in them, I think and chucked them out.

131 These responses by TB on my assessment are examples of him being deliberately evasive.

132 Later in the night, and on the resumption after a break in the interview, TB was told by the Police that they had spoken with EHW. When TB was asked if he knew EHW he said 'who's that?'. Again, that was TB being deliberately evasive.

133 Further upon the resumption of the interview, TB was asked a very long, fact filled question occupying 21 lines in the transcript, to which he answered 'yeah, nothing of that is true'. Included in the question was mention that EHW had told Police that DVH assaulted Mr Litchfield. Clearly DVH did hit Mr Litchfield before Mr Litchfield ran on to Pinjarra Road. I have no doubt that TB well knew that that had happened. On his own admission he was standing next to DVH when Mr Litchfield slapped him across the back of the head. Accepting the evidence of EHW and JJW, it was immediately after that that DVH punched Mr Litchfield, although JJW did not see it connect. Despite all of that, I do not use TB's answer against him in any way because that particular factual issue of DVH assaulting Mr Litchfield was so buried in the question that it would be dangerous to do so.

134 I now turn to refer to and comment on some of the starnet calls, being recorded telephone calls between TB and another or others when TB was on remand in custody at Banksia Hill Detention Centre. On 1 April 2013, TB had the following conversation:

R Are they goin' witness against youse?

TB Yeah.

R Fuckin' little maggots.

TB Yeah. That's happened to the one that kicked his head in, too.

R Who?

TB [J].

R Unna?

TB Yeah.

R Little dogs, hey.

TB Yeah. I wonder what [JJW] said to the [indistinct].

R Yeah. He's not even in the [indistinct].

TB No, he's not. But then again, he done nothin'. But wonder what he said he seen?

R Yeah, unna?

TB He might have said he seen us three kick his head in.

R Mmm.

TB He's a [c---]. If he did he's a dog, too, and [indistinct].

135 There are two parts of this conversation, each of which requires separate comment. The first part concerns TB's response 'yeah. That's happened to the one that kicked his head in, too'. That, of course, is not evidence that could be used at all against any other accused. That said, it is admissible in the case of TB because it goes to his state of knowledge of what happened to Mr Litchfield.

136 The second part of the conversation concerns what JJW may have said to the Police. The State rely on TB's statement 'he might have said he seen us three kick his head in' in the context of what was said, as an admission by TB that he kicked Mr Litchfield in the head. In my view this statement by TB is not an unequivocal admission. TB may be speculating on what someone else, albeit someone else who was present at the scene, may have said to the Police. People can and do tell the Police things that are not true. What TB said, is in my view, not necessarily an unequivocal admission of the truth of the content of what he said. Accordingly, I will not use this piece of evidence adverse to TB at all or in any way at all. In short, I will ignore it.

137 There is a second starnet call relied on by the State. On 30 April 2013 TB had a conversation with a to be identified female as follows:

TB And they still, they still charged us and we never ever done it.

TBIF I know, when he done it to himself.

TB Yeah.

TBIF And what they don't realise is when someone falls off so high and they don't try and stop themselves, you can do damage to your own fucking head.

TB Yeah.

TBIF And he fell on fucking cement, it's not like he fell on fucking grass.

TB Yeah.

TBIF If he fell on grass it would have been fucking different.

TB Mmm.

TBIF Mm. But yeah. And so I'll put this on ten or eleven?

TB I mean, the fellow, if the fellow was a black fellow, but he would have gotten up.

TBIF Oh.

TB Because he didn't even look that bad, he was looking around at us. He was moving his head looking at us.

TBIF Yeah.

TB And I was saying, get up, get up, but he wouldn't get up. And so yeah.

138 I will comment on this piece of the evidence later when I deal with the issue of accident.

Analysis of TB's case

139 TB and what he had to say in his recorded record of interview needs to be considered within an overall assessment of the evidence as a whole in his case. That includes the evidence which applies generally in the cases of all of the accused, but of course, as mentioned, not any of the recorded interviews and starnet calls of any of the other accused.

140 That said, I make the following comments and findings on TB and what he had to say in his recorded interview. On my assessment he told a number of lies to the Police. By a lie, I mean a deliberate untruth on a material matter of fact. Knowing the truth of the material fact, he deliberately stated an untruth on it. In no particular order of priority, TB's lies are as follows.

141 First, TB stated that Mr Litchfield slapped the boy who asked for a cigarette. TB was there and on his own admission he was next to DVH. I have no doubt that he would have known that DVH was trying to pick pocket Mr Litchfield. DVH was not asking for a cigarette. I accept JJW's evidence that Mr Litchfield had earlier said to all of them, 'don't touch me please'. I have no doubt that TB would have heard that. I also have no doubt that TB would have also heard Mr Litchfield tell DVH to 'fuck off, get away' as JJW also said. I also accept JJW's evidence that TB also attacked Mr Litchfield, together with DVH and EW, after Mr Litchfield slapped DVH. This is not an instance of TB exercising his right to silence and refusing to say why Mr Litchfield slapped DVH. He positively lied about it rather than tell the truth which would have revealed a wrongdoing by DVH, a member of the group.

142 Secondly, I find that TB deliberately lied when he said on several occasions that he stopped with three other boys at the top of the ledge and checked out Mr Litchfield before they then all jumped down into the car park to have a closer look.

143 The combination of the aerial photograph of the scene with the measurement scale, EXHIBIT 12.3, and the CCTV footage from Jaycar and Bridgestone Tyres, EXHIBIT 20, shows that four boys were chasing Mr Litchfield at speed proximate to their approach to the ledge, within about 10 metres or so, and that Mr Litchfield went over the ledge at speed with one boy following very close behind him, and then both of them closely followed by another two, and then another one.

144 Further to all of that, the enhanced Bridgestone CCTV footage, by itself, does not show four boys standing on the high side at the ledge looking at Mr Litchfield lying down in the car park below. While the quality of this footage is poor, it does show two boys standing on the high side at the ledge, and who were obviously looking at the boys in the car park below near Mr Litchfield. If the CCTV footage showed that, then it would have shown TB and three others standing in that same position on the high side at the ledge if that had actually happened.

145 There is simply no reasonable possibility at all that TB and three other boys stopped on the high side of the ledge and paused to check out Mr Litchfield after he had landed, before then going down into the car park to have a closer look.

146 The State does not rely on lies of TB as 'Edwards Lies' that go to establish a consciousness of guilt on the part of TB. Rather, the State simply but importantly seeks to rely on lies told by TB as credibility lies. I approach my consideration of the evidence on that basis.

147 On my assessment of TB's recorded interview, he clearly admits chasing Mr Litchfield. He admits grabbing Mr Litchfield's shirt when Mr Litchfield was running away from him and others. He also admits that this did not happen within five metres or so of the ledge but rather some 20 to 30 metres further up Pinjarra Road at or about the bushes.

148 What TB also does, is to seek to give an explanation on why he chased Mr Litchfield. The explanation was to try and stop Mr Litchfield from falling over the ledge or going over the ledge and then falling over. I positively reject that explanation. It is blatant nonsense and a complete fabrication. TB presented to me as having no credibility and reliability at all in relation to the exculpatory statements he made.

149 It is well established that the fact finder, whether it be in a hearing by
judge alone or in a trial by judge and jury, can accept some part or parts of
what a person says and reject another or other parts. It is not necessarily
an all or nothing thing.

150 It can be noted that I have used evidence of both EHW and JJW in
combination on the factual issue of DVH pick pocketing Mr Litchfield
and Mr Litchfield complaining about that aloud and slapping DVH when
TB on his own admission was positioned right next to DVH, to find that
TB told a lie in his recorded interview with the Police.

151 I also wish to say that in addition to my findings that TB admitted in
his recorded interview to chasing Mr Litchfield, that I am also satisfied
beyond reasonable doubt from a consideration of all of the other evidence
which is admissible generally against all of the accused, that TB chased
Mr Litchfield.

152 That evidence includes the evidence of Mr Dawson, Ms Bell, Brodie
Kerry, EHW, JJW, and photographs and CCTV footage in evidence.

153 I accept the evidence of JJW generally and in particular that, TB was
one of the boys who attacked Mr Litchfield, as he described it, after Mr
Litchfield smacked DVH and DVH then threw a punch at Mr Litchfield. I
also accept JJW's evidence that TB was one of the four boys, as he
ultimately said, who chased Mr Litchfield. I should also add that I am also
satisfied beyond a reasonable doubt that JJW had accurately identified
each of DVH, JR and EW as the other three boys, who with TB, chased
Mr Litchfield.

154 Before progressing further, I should say that the CCTV footage by
itself would have limited probative value. It is essential to consider it
against the rest of the evidence as a whole including in particular the
evidence of EHW and JJW, and also the evidence of Mr Dawson, Mrs
Bell and Brodie Kerry. When considered with the evidence as a whole, it
is very useful. That can be properly said despite obvious shortcomings in
its quality, due in part at least, to distance and resonance. The evidence of
EHW and JJW when applied to the CCTV footage, is particularly useful
given that both of them have given evidence about who was where at
various points in time.

155 When considering the whole of the evidence in the way that I have
just described, I have no doubt that the enhanced CCTV footage taken
from Mercedes Benz shows the following. DVH, EW and JR leave the
left of the screen with Mr Litchfield at about 1 minute 15 seconds into the

footage. I should mention that the times I am referring to are times on the time counter for the footage and not 24 hour clock time. It also shows a person, who on my assessment of the whole of the evidence can be concluded beyond reasonable doubt to be TB, leave the left of the screen at about 1 minute 26 seconds. That then results in four boys left of the screen, i.e. west towards the old bridge, and five boys to the east. Three of those five boys can be seen on the screen before they run to the west at about 1 minute 46 seconds. The first of those five boys, from west to east, was walking up and down on the left of the screen and not far to the east of the bush that has been spoken about near the Aussie Home Loans sign. I should mention that that bush is not on screen but on my assessment of all of the evidence it would be just to the left, or to the west of the screen. I will return to identify that boy in a moment.

156 Accepting the evidence of both EHW and JJW, I am satisfied beyond reasonable doubt and find that the next two boys to the east, who can also be seen on the screen and who run to the west at about 1 minute 46 seconds, are AU and JJW. I am also satisfied beyond reasonable doubt and find that the remaining two boys who were further again to the east and who did not go down to the car park, are BS and EHW.

157 All of that said, I go back to the boy walking up and down and furthest west on the screen and first up from the bush. That is therefore undoubtedly HCJ. Given the visual quality of the CCTV footage, I by no means rely on the clothing alone of that person to conclude that it is HCJ. However the white socks, shorts and blue/green top of that person, as it appears to me, most closely matched the clothing of HCJ.

158 After the CCTV footage shows TB move to the left of screen at 1 minute 26 seconds, as mentioned, it is not until about 1 minute 46 seconds that the three boys who I have identified as HCJ, JJW and AU, start to run west down Pinjarra Road. I refer to JJW's evidence which indicates that he started running when he saw people running. On the strength of that I am satisfied beyond reasonable doubt that each of HCJ, JJW and AU watched something happening off screen to the west for about 20 seconds after TB had left the screen to the west, and about 25 seconds after DVH, JR and EW had finally left the screen to the west at about 1 minute 21 seconds. I am satisfied beyond reasonable doubt, and indeed I have no doubt, that what HCJ, JJW and AU were watching was something happening involving Mr Litchfield and each of DVH, JR, EW and TB. It was within this period of time that JJW gave evidence that Mr Litchfield got attacked which he also described as 'getting ganked', 'like, someone was going to steal everything off him, then, like, attacking'. It was also

within this period of time that JJW said that he saw DVH swing at Mr Litchfield but not know if it connected him.

159 To take this further, I wish to go to the unenhanced CCTV footage from Bridgestone Tyres, EXHIBIT 20, title 28. Before I specifically refer to it, I should mention that to usefully and accurately compare one CCTV footage with another, it is necessary to be able to compare the actual live time for both of them. There is a problem with comparing these two items of CCTV footage, time wise, because the Mercedes Benz footage has no time clock, and although the Bridgestone Tyre footage has a time clock, the various time clocks real time checks video in evidence does not include a time check by Police during the course of the investigation for Bridgestone Tyres.

160 I have been able to properly overcome this problem to enable me to relate these two items of CCTV footage to each other by using the evidence in the following way.

161 Both items of CCTV footage clearly show Mr Dawson put the lights of his car on high beam. He said and I accept that he did this when Mr Litchfield went to walk in front of his car and then stepped back to the pavement on the south side of Pinjarra Road. Therefore, I have used Mr Dawson's car headlights going on to high beam as the anchor point for comparison of the two items of footage.

162 It is easy by reference to the evidence, to reliably establish Mr Dawson's car on both items of CCTV footage. Mr Dawson's car can be seen to slow down behind the car in front as he described and Ms Bell can also be seen to come from behind, i.e. further west, and turn out of Boundary Road and left on to Pinjarra Road. I now move forward on that basis.

163 The unenhanced Bridgestone Tyres footage shows the high beam go on at 3 minutes 49 seconds.

164 I have noted the following from the Bridgestone Tyres footage:

3.43 - Mr Litchfield goes to the south side of Pinjarra Road and in front of the first car.

3.49 - Mr Dawson's car's high beam lights turned on.

3.59 - Mr Litchfield crosses to the north side of Pinjarra Road.

4.10 - Movement on north side of Pinjarra Road.

4.24 - At least two people on the footpath/roadway on the north side of Pinjarra Road.

4.27 - People move back to or about the footpath on the north side of Pinjarra Road.

4.50 - The first person, namely Mr Litchfield, goes over the wall.

165 The Mercedes Benz footage shows the high beam of Mr Dawson's car go on at 1 minute and 0 seconds.

166 The Mercedes Benz footage shows the following:

0.49 - People in the left of screen.

0.53 - Incident occurring behind a tree/bushes on the north side of Pinjarra Road.

0.58 - First car arrives travelling west on Pinjarra Road in front of Mercedes Benz.

1.00 - The second car of Mr Dawson arrives and the high beam is turned on.

1.03 - Mr Dawson slows his car down considerably and at least almost to a stop.

1.07 - Mr Litchfield starts walking over to the north side of Pinjarra Road.

Mr Litchfield is on or about the road near the southern curb or the footpath on the south side of Pinjarra Road.

1.11 - Ms Bell turns out of Boundary Road and left on to Pinjarra Road.

1.13 - Mr Litchfield arrives at the north side of Pinjarra Road.

1.14 - Mr Litchfield leaves the left side of the screen with three boys.

1.18 - People appear on the left side of the screen, one appearing to be Mr Litchfield.

1.21 - Mr Litchfield and boys again leave the left side of the screen.

1.26 - A boy, I find to be TB, walks to the west off the left of screen.

1.46 - Three boys further up Pinjarra Road, spaced and start to run to the west one behind the other.

167 On the enhanced Mercedes Benz footage, EXHIBIT 20, title 35, the time between the high beam and:

1. Mr Litchfield and three boys finally leaving the left of the screen, i.e. to the west, is about 21 seconds.
2. The fourth boy (who I conclude is TB) leaving the left of screen i.e. to the west is about 26 seconds.
3. The three boys remaining on screen and then running to the left of screen, i.e. to the west is about 46 seconds.

168 On the unenhanced Bridgestone Tyres footage, EXHIBIT 20, title 28, the time between the high beam and:

1. Movement of people on the northern side of Pinjarra Road and at times appearing to spill out on to the roadway and finally moving back, most likely to the footpath, visibly coming to an end, is about 38 seconds.
2. The first person (Mr Litchfield) over the wall is about 61 seconds.

169 I do not want this to be seen as a mathematical exercise at all and certainly not one of precision. That said, the points that I wish to make are that (1) TB left the west of screen very soon after the three boys who were with Mr Litchfield, and (2) that there was clearly visible movement in the area up Pinjarra Road and east of Jaycar of at least 12 seconds after TB had moved to the west of screen, and (3) that the other three boys stood or walked about further east on Pinjarra Road and opposite Mercedes Benz for about 20 seconds after TB had left the screen and before they started to run to the west, i.e. towards the wall, and (4) that Mr Litchfield went over the wall about 16 seconds after the three boys further east and opposite Mercedes Benz started to run.

170 I now wish to go to the unenhanced Jaycar footage, EXHIBIT 20, title 37. At 28 seconds on the timer, it first shows the group walking past in an easterly direction on Pinjarra Road. At about 3 minutes and 10 seconds it shows a person, who is on all of the evidence obviously Mr Litchfield, and there is no issue about that by any of the parties, running past. Within about a second or so of him, there are three boys running behind. The first of the three is within about a pace of Mr Litchfield and all three boys are within a few paces of each other. A fourth boy is running about three to four seconds behind Mr Litchfield. Although the footage is black and white, the combination of the clothing of the fourth

boy, the length of the shorts, the t-shirt, their colours and particularly the relative brighter colour of the shorts, the length of the socks, and also the boys body shape, relative to the other boys, and accepting the evidence of JJW that TB was one of the four who chased Mr Litchfield, supports a finding that this fourth boy is TB. Although I am satisfied of that in particular, I must also say that on my overall assessment of all of the evidence admissible in TB's case, I do not even need to go that far before being able to find, as I do, that TB did chase Mr Litchfield and not to try and protect him from falling because of the wall.

171 The Jaycar CCTV camera is located at the front entrance to the building. By reference to the aerial photograph with the measurement scale, EXHIBIT 12.3, the total width of the frontage of the Jaycar building is about 15 metres. On the visual evidence of the scene, the entrance and the camera are located in the eastern half of the front of the building. The point is, that all of Mr Litchfield and the four boys can be seen to be running at a speed which could be fairly described as fast, not jogging, and within only about 10 metres or so of the wall.

172 The footage also shows two other boys, i.e. a fifth and a sixth boy, run past about another four seconds or so after the fourth boy. I find that these two other boys are two of the three boys who had been further east and opposite Mercedes Benz and watching what was happening before they started to run to the west. The point of distinction between these two and the fourth boy running behind Mr Litchfield, is that they had been further east and watching and not part of what was happening with Mr Litchfield.

173 The footage also shows that Mr Litchfield and the four boys chasing him, were all running on the car park in front of Jaycar and not on the footpath. They were running parallel to the footpath. That is consistent with them all going over the wall, which as I have said, was only a short distance away. It appears that of the two boys who followed the first four boys, one was running at an angle across the car park from the footpath and the other was running on the footpath.

174 Given that there were two boys further up Pinjarra Road, namely EHW and BS, I am not sure where the last remaining boy of the nine boys was, but I have no doubt that his position was of no significance.

JR

175 JR participated in a recorded interview with Police on 27 March 2013. He was accompanied during the interview with his mother as his

next friend. He was about 15 years 5 months of age at the time of the interview. He was enrolled in year 10 at high school but was not attending school at the time.

176 At the start of the interview when asked what he knew about the incident, JR gave the following narrative:

A. Um, well, it's like an, um, and then, um, um, there was a car comin' and we was just looking out, 'cos we was like on the, not the footpath but just where the bikes ride along, along the road. And then we was looking at the car and the boy was in front of us. And, um, my cousin saying he (indistinct) where his wallet was, and he said he'd tried to pick, pick pocket him, and he slapped him in the back of the head. And then he, he punched him and, and then he run; the person runned off. And then there was a little ledge and then his foot hit the ledge, and then he, he landed on his feet and he tried to turn around when he just landed, and he smashed his head on the ground.

177 It can be noted that JR made no mention of Mr Litchfield moving to the other side of Pinjarra Road and back and then JR and/or any of the other boys chasing him west towards the wall.

178 JR's interview is riddled with lies. In no particular order of priority they are as follows.

179 First, he said that he first saw Mr Litchfield's phone when EW had it when they were on the train. He later said that he thought that it was taken at the time of 'the fight'. That was no doubt a reference to when DVH punched Mr Litchfield. He said that he did not see the phone get taken.

180 There was then a break of about 42 minutes in the interview. Upon the resumption of the interview he said:

Q. - - - opportunity. You don't have to tell us, but if you want to this is your time.

A. Yeah, well, um, well, when we was talking I forgot, like, most of the things what happened, and when you had left us in the room here I remembered that, um, there was, um, a black phone on the ground and I picked it up and then, then, um, put it in my pocket and then, ah, [EW], [EW] said, "Where's that phone?" and I said, "Oh here", I just gave it to him. I didn't know whose phone was it.

Q. Where did you pick the phone up from?

A. On the ground.

Q. Whereabouts on the ground?

A. Like, I don't know, um, I can't remember whereabouts.

Q. Okay. We'll take you to, we'll take you back to just try to prompt your memory, okay. Um, are we talking on the ground around where Tauri was laying?

A. No, it was when they was, like, fighting, like, when [DVH] hit him and he fell over. And then when he jumped up it was, um, I don't know whereabouts but there was that phone on the ground. And I grabbed it and I put it in my pocket, didn't know whose it was, and then, um, [EW] said, "Where's that phone?" and I just gave it to him, just like - - -

181 Secondly, JR said that when they ran off from the car park and back up Pinjarra Road that no one went back. Later and when he was told that the Police had footage which showed three people walk back, he said that he was pretty sure that he went back up to where the fight first happened and then went back with DVH and HCJ or TB.

182 Thirdly, JR initially told the Police that there was only one hit that night. When asked if he saw any kicks or jumping on Mr Litchfield, he said 'nuh, I never seen no kicks or jumping on him'. He later changed that by saying that DVH hit Mr Litchfield and also that DVH 'was like, just kicking him, not that hard but like in the chest. I only seen ones in the chest'. He then changed that again to say that he was 'pretty sure some [kicks] was in the face' and then 'he kicked him, like, about, most times would have been, like, about, about eight, something, something like that', 'just to the chest and head'. He also said that he was pretty sure that DVH was kicking Mr Litchfield when he was trying to get up.

183 Fourthly, JR initially said that Mr Litchfield took about five seconds to get up when he was first punched by DVH. He later after further questioning changed that to 30 to 40 seconds.

184 Before I mention what is clearly the most significant lie told by JR, I wish to set out some other things said by JR. He said that, (1) Mr Litchfield was 'a bit drunk'. He thought that because of Mr Litchfield's 'reactions, and you can smell it'. And (2) that 'yeah, it was pretty dark', with street lights on and cars driving past, and (3) that when DVH punched Mr Litchfield to the chin he fell over and it dazed him, and (4) that Mr Litchfield and someone else, who he did not know, were in the middle of the road about five metres apart swearing at each other.

185 The most significant lie that JR initially told the Police was that he did not chase Mr Litchfield. He said that at least four times before late in

his interview when the Police mentioned the existence of CCTV footage from Jaycar and he admitted to chasing Mr Litchfield.

186 At various points during the interview he said:

Q. What, what did he do? What actions did you see him do when he's hit that wall? Do you know what I mean?

A. Nah. I think he was just like, like, he was knocked out. And then we just all ranned off.

Q. Have youse gone up to him?

A. Yep. When he first hit his head we went up there. And then we thought he was right, and then we just ranned off.

Q. Have you chased him down to that wall?

A. Nah. Nah.

Q. Which boys chased him down to the wall, because it's a bit of a distance?

A. I can't remember.

Q. Did you?

A. Nah.

187 And then:

Q. You saw his head hit the ground?

A. Yep.

Q. Okay. Where were you from him?

A. I was, I was like here when the happened.

Q. So just over the other side of the fence?

A. Yep.

Q. Okay. Who was with you?

A. Um, [DVH], [EW], I think [TB], and [HCJ].

Q. So you were chasing him?

A. I wasn't chasing him.

Q. How did you get from the road, the verge, into the car park, um?

A. I was just walkin' to see what was going on, mate.

Q. Okay. So who - - -

A. I - - -

Q. Who was chasing him?

A. Um, I'm pretty sure it was [DVH] and [EW].

188 And then:

Q. Mhmm. The photo, and I know it's not clear, there's ah, footage from outside of where, um, just down from where the fight happened and it shows about six lots of feet run -, um people running chasing, um, or in the direction that Mr Litchfield or Tauri ran. Um, were you chasing him?

A. No.

189 And then:

Q. You all, at the start when you said that you, um, you hadn't got close enough, you were just walking through the car, where the first fight happened and then the wall, which is probably about twenty/thirty metre, well, probably thirty metres away, that you said you were walking but then you were able to see him jump, hit the fence, being that it's night time - - -

A. What do you mean hit the fence?

Q. Well, when he's gone to jump the fence you were able to see his foot hit the fence. You were able to see him - - -

A. I was, I was behind him.

Q. How far?

A. I wasn't, I was, like, ten metres behind him.

Q. Okay. If he's running and you're only walking, you just told me that you weren't chasing him - - -

A. Yeah, and I wasn't chasing him.

...

A. When he, when he runned onto the road he come back - - -

Q. Yeah.

A. Onto the other side - - -

Q. Yeah.

A. And that's where the fence was, and he runned up here and I was walking down and them boys was chasing him.

Q. The others were chasing him?

A. Nuh. Oh, I can't explain it properly but.

Q. Okay.

A. When he was running then, I mean he run straight past me and then he's clipped his foot on the fence and then he, when he landed he smacked his head on the ground and then I run to him.

Q. You ran up to him?

A. Yes.

Q. Why did you run up to him?

A. To see what was wrong with him. Why else?

190

And then:

Q. Yep. See, that's the, that's the problem that I'm getting at, is that he's running and you are walking along the path and then walking to the wall but you've been, when he's fallen, and I've got video footage which is, it's pretty much, a split second to when he's jumped the wall, he's actually taken two or three steps and then you guys are around him, okay? Jumping the fence, running around the side. So your story is that you were just walking, following him, you were back and you've gone from ten metres behind him to, now we know somebody was trying to, [DVH]'s tried to kick his le-, his foot as he's jumping to, through the car park to you guys are, pretty much, on him as he's gone over that fence. So what's happening? You, what's the truth, mate?

A. Like, I was walking along and then them boys said, um, "Grab him" and I just run, I run, it wasn't that far behind. [DVH] kicked his legs and then he's, like, he was, like, stumbling but he kept his balance and he's running good and then I've been, like, about to that wall, to that wall behind him and then he clipped his leg and then I was, then I was, like, on the thingy when he's, I was on the, like, fence bit when he smashed his head and then I just, like, I can't

Q. What are you, just, just tell me what you're picturing, what happened, and we'll, we'll work it out. Whatever words come to your mind?

A. When I was, like, when they said "Grab him" I run and then he, look, the fence would've been like that there, the cliff, to that wall and that's when he would've just been on it and I'd have been, like, at this table. Then when I got on it he smashed his head on the ground and I was on the ground when he was already, like, laying.

...

Q. [EW] jumped the fence. And the others, where have they gone? Which direction?

A. I can't, I can't really remember because I was, like, in front, like the closest to when that boy smashed his head.

191 And then finally after all of that:

Okay. Just before you've chased the, um, ah, - Tauri, and he's gone over the small - or that brick wall, there's a, a store called Jaycar which had some footage and it shows seven people. Although it's very blurry, it's more the feet; seven people running and then six running back, so we'll take it that the seven were including Tauri but because he's obviously fallen to the ground or been on the ground, there's six of youse running back. Does that prompt you or does that help you to say who ran and chased him over the wall?

A. Just it was only me, [DVH] and [EW].

Q. What about [TB]?

A. Oh, nah, I'm not sure.

Q. You don't remember [TB] jumping over the wall cos you did mention later on - - -

A. I know that he was there but - because like, I was the closest to him and like, basically in front, I didn't see.

192 Again, the State does not rely on lies told by JR to establish any consciousness of guilt. They are only relied on as credibility lies. In the final analysis, JR's lies are really superfluous given his clear and unequivocal admissions that he went to grab Mr Litchfield and that he chased him over the wall.

193 Further and in addition to JR's admissions, I also accept the evidence of JJW that JR chased Mr Litchfield. Further again, I am also satisfied beyond reasonable doubt that the combination of the evidence of JJW and of the CCTV footage from Mercedes Benz and Jaycar, to which I have previously referred and analysed, also proves that JR chased Mr Litchfield.

EW

194 EW participated in a recorded interview with Police on 27 March 2013. He was accompanied during the interview by a next friend. He was

about 14 years 5 months of age at the time of the interview. He was attending school and in year 9.

195 At the very start of the interview when EW was asked what happened, he said 'that I only hit him once'. He said that the man (Mr Litchfield) and his cousin, DVH, 'was arguing' and 'then my cousin was walking behind him and he thought my cousin tried to steal something out of his back pocket'. When asked what time that happened he said 'dark, it was getting dark'. He later said that there was enough lighting to see the wall.

196 EW told Police that when they were walking up Pinjarra Road, that BS was arguing with Mr Litchfield and that BS asked Mr Litchfield 'want me to hit you, [c---]'. He indicated that BS said this when they were a block or two west of Mercedes Benz. He said that BS shaped up to Mr Litchfield.

197 EW said that Mr Litchfield said to DVH 'why are you trying to grab something out of my pocket?' and then he 'slapped DVH to the back of the head'. DVH then punched Mr Litchfield to the face causing him to go 'staggering into the trees and then he got back up'. EW thinks that DVH kicked Mr Litchfield before Mr Litchfield ran on to the road. EW said that Mr Litchfield came running back to the car park towards him and he then hit Mr Litchfield to the neck as he ran past.

198 EW said that he punched Mr Litchfield because Mr Litchfield had slapped DVH in the back of the head. He went on to say, that after he punched Mr Litchfield that he then started jogging behind him. He said that DVH and JR were already in the car park when he got there and that Mr Litchfield was lying on the car park.

199 When EW was told that other guys had spoken to Police and that one had said that he (EW) had knocked Mr Litchfield out, EW said that it was DVH who knocked him out and started kicking him in the head and that 'just his eyes just rolled and then he got back up'.

200 EW said that DVH did a little stomp on Mr Litchfield's head, 'not like stomp-stomp, like a little swing there', when Mr Litchfield was getting up where the tree is. EW thinks that when Mr Litchfield went out from the bush that one of the boys chased him and then Mr Litchfield came running back.

201 EW said that he did not know what he was going to do if he got hold of Mr Litchfield. EW said that when Mr Litchfield came running back

from over the road that Mr Litchfield said 'fuck youse' or something like that. EW added that he did not think that it was said in a threatening way.

202 EW described his punch to Mr Litchfield's neck as a jab and rated it as being five or six out of ten for hardness.

203 EW said that when Mr Litchfield came back from over the road, that he went back into and out of the bushes about where he was first punched. He said that he did not see Mr Litchfield put his arms out. EW said that he came 'down the footpath' and not 'down behind the bushes'. The way he described it, he thought that when they came down that they first went into the car park further up where the bushes were rather than the Jaycar car park.

204 EW gave the order that they were running, as Mr Litchfield, then JR, then DVH, and then him. He said that he did not see Mr Litchfield's head hit the ground when he fell because from his position the brick wall was in the way.

205 When EW was asked if he was saying that none of him, DVH or JR went into the car park, he said 'yeah'. When he was then told that he was going to be shown some footage, he said 'I don't know, I think I did', 'it was two weeks ago you know'. I have no doubt that he knew that he did go into the car park when he was first asked.

206 There was a break in the interview and EW was shown some CCTV footage. He was then asked what he now remembered happening. Soon after that he admitted chasing Mr Litchfield. He was asked and said:

Q. Yeah. Okay. Did they stay at the top of the hill or did they run down?

A. I think they stayed up the top.

Q. Okay. Um, then you guys have chased Mr Litchfield down the hill.

A. Yeah.

207 He then gave further information when he was asked and said:

Q. Okay. Okay. Okay. Um, now with the fight, and this is one of the other boys, with the fight, um, with [DVH] and Mr Litchfield, um, Mr Litchfield tried running away with his hands in the air. Do you remember that?

A. No.

Q. No? Okay. And that [DVH] grabbed hold of Mr Litchfield and dragged him back to fight him more.

A. Yeah. I only seen that.

Q. Sorry?

A. I only seen [DVH] drag him back to the car and tried to fight with him.

Q. Sorry, did you say you did or didn't?

A. I only seen [DVH] drag him back and try to - -

Q. Okay. Can you tell me about what you saw there, [DVH] dragged him back?

A. Yeah. He ran on the road and [DVH] just grabbed him by the shirt I think and dragged him back and tried to hit him.

Q. Okay.

A. But then he ran off and that's when I think I hit him in the neck and, yeah.

208 The interview was then stopped again. It was resumed just over four hours later. EW then volunteered more information than he had given before. He said that he saw DVH use his right hand to reach for Mr Litchfield's back right pocket and JR bumped DVH. He said that he did not really see Mr Litchfield slap DVH. He said that DVH told him later that it dazed him. He said that it made DVH mad. He saw DVH kicking Mr Litchfield, 'a little hard and soft'.

209 EW made several significant admissions in the following passages:

Q. Okay. Sorry. Um, okay. The man goes out onto the road. Um, did he try to get into a car?

A. I think he tried to stop a car.

Q. Okay. Tell me about that.

A. He just ran out trying to run in front of it and think he said "Stop." and yeah.

Q. Okay. What, what did you do at that point?

A. I was just standing there.

Q. Where?

A. On the footpath.

Q. Still on the footpath?

A. Oh, just off the kerb, just on the road.

Q. Okay. So you'd come out onto the road as well?

A. Yeah. Like right there.

Q. Yeah.

A. Where I was showing you.

Q. Okay. Did you circle around the man?

A. Circle around him?

Q. Yeah. So like, um - okay [EHW] says basically that you guys went around him to stop him running away.

A. Yeah.

Q. Yeah. Is that what happened?

A. But not all the way across the road. He just ran on the road and ran back.

Q. So just in the middle of the road here

A. Yeah.

Q. To stop him from running away?

A. (nodded)

Q. Is that what you were doing?

A. Mm.

Q. Why were you doing that?

A. So he couldn't get hit by a car.

Q. Okay. Why didn't you just let him go?

A. Dunno.

Q. Okay. Um, is that in the road here, when you were there, what was [DVH] doing?

A. (indistinct) with [DVH]. [DVH] was trying to grab him.

Q. Okay. And you said earlier that [DVH] pulled him back to hit him more.

A. Yeah. I think so.

Q. Okay. Why do you think so?

A. Cos I can't remember all of it.

Q. Okay. Do you remember that happening?

A. Only [DVH] grabbing him.

Q: You remember [DVH] grabbing him. And what did [DVH] do with him when he grabbed him?

A. Just like, slung him around to get him back on the kerb.

Q. Okay. And when he got him back on the kerb, what happened then?

A. Then he took off running and - we were in the car park then and that's when I hit him and then we started running after him and he jumped off the brick wall.

Q. Okay. All right. So when [DVH] dragged him back, did he punch him or kick him or do anything to him again?

A. I think tried kicking him in the back I think.

Q. He tried - - ?

A. Kicking him in the back or leg, I can't - -

Q. Kicking him in the back? Um, did you hear, um, Mr Litchfield say no more?

A. Yeah.

Q. When did he say that?

A. Um, when [DVH] grabbed him and tried to slung him.

Q. Okay. So [DVH] was still fighting with him when he's pulled him back?

A. Yeah.

Q. So it wasn't to save him from the car was it?

A. (shook head) Probably not.

Q. Okay. Okay. So that's when, um, Mr Litchfield started running.

A. Yeah.

Q. Again, and you've punched him in the neck?

A. Yeah.

210 I previously mentioned that it is open to a fact finder to accept some parts of what a person says and reject others. That said, in the above passage, I reject the reason given by EW for circling Mr Litchfield. He said that it was 'so he couldn't get hit by a car'. I note that even EW himself retreated from that reason soon after he gave it.

211 EW was also asked and replied as follows:

Q. Something of his. Yeah. Okay. Um, [AU], um, like I said, has also been talking to us. Um, and [AU] says that you and [DVH], um, were stopping the man from running away.

A. Yeah, we tried, but -

Q. Yeah.

A. But he jumped that wall. [J] was trying to stop him first coz he was in front of me.

Q. Who was that?

A. [J]

Q. [J]. Yeah. So [J] and [DVH] were trying to stop him from running away. Okay. If you could have stopped him from running away, what would you have done to him?

A. I don't know.

Q. If you had have caught him before he jumped over that all, what were you going to do?

A. I don't know.

Q. Okay. Why did you try and stop him from running away?

A. Because we seen just the wall - and it was quite a long way from the floor, the ground.

Q. To stop him from falling?

A. Yeah.

DETECTIVE SENIOR CONSTABLE HAMILTON: Are you sure that's why you tried to grab him?

A. Mm'hm.

Q. To make sure he didn't go over the wall?

A. Yeah.

Q. Or is it just more the fact you grabbed him to - so someone could punch him again?

A. Don't know.

Q. Don't know? Well, what were you thinking as you were trying to grab him?

A. Nothing. I was trying to grab him.

Q. Yeah. So you weren't thinking of any particular reason why you were grabbing him?

A. No.

212 I positively reject EW's explanation for trying to stop Mr Litchfield running. The explanation of trying to stop Mr Litchfield from falling when going over the wall is a complete fabrication and I reject it.

213 EW was also on my assessment, deliberately evasive on the questions on what he would have done to Mr Litchfield if he caught him. EW later accepted that he and the others probably did not catch Mr Litchfield because he was too fast for them.

214 EW was asked about Mr Litchfield's phone. He initially said that he picked it up off the road. He took the sim card out and then threw it away and put the phone in his pocket. Later EW was told that JR had told the Police that he picked it up. When told that, EW agreed that JR picked it up and 'he's like "that boy's phone" and I said "let me have a look" and he just gave it to me'.

215 On my assessment of EW and what he has said in his interview, he was grossly unreliable when seeking to deny or explain away him chasing Mr Litchfield and behaving aggressively towards him. Again, the State only seeks that that lie and others go to credit and I proceed on that basis.

216 In the end, EW has clearly and unequivocally admitted chasing Mr Litchfield down to and over the wall and I positively reject that he did so to save Mr Litchfield from falling.

217 The submission that EW chased Mr Litchfield in aid of the self defence of DVH is fanciful.

218 Further and in addition to EW's admissions, I also accept the evidence of JJW that EW chased Mr Litchfield. Further again, I am also satisfied beyond reasonable doubt that the combination of the evidence of JJW and the CCTV footage from Mercedes Benz and Jaycar, to which I have previously referred and analysed, also proves that EW chased Mr Litchfield.

DVH

219 There is no recorded interview between the Police and DVH in evidence. That of course cannot be weighed against DVH at all and so I promptly put that aside.

220 The State relies on various accounts of DVH given by him in starnet calls, i.e. intercepted telephone calls between DVH and various others since he has been in Banksia Hill Detention Centre on remand.

221 The conversation in a call made on 18 May 2013 included as follows:

D No, he, he snapped me in the head, dud, I got up. I said, hey, mother fucker. Whack boy.

TBIM3 [indistinct] you dumb [c---].

D Put him asleep, dud. When he was asleep I was sitting there stomping his head in.

TBIM3 No.

D But, yeah, that's when he jumped up and running of cliff. Oi.

222 The conversation in a call made 25 May 2013 included as follows:

TBIM2 Why, what happened that night?

D Fucking, no, he - he slapped me in the head and then - yeah.

TBIM2 Was that you bonding?

D No, I only hit him once and then he was out.

TBIM2 He was out.

D I don't know. But, then, yeah, he woke up brother starting shitting, took off running off a fucking cliff thing. Smashed his head then (indistinct).

223 The conversation in a call made on 9 July 2013 included as follows:

- TBIM5** Fuck, ay. Well, youse went down to Crab Fest, ay?
- D** Yeah.
- TBIM5** Yeah.
- D** And like, he come walkin' outta IGA, you know? Nah. I was tryina pickpocket him.
- TBIM5** At the skate park there?
- D** Nah. You know where IGA is?
- TBIM5** Aw, in Silbersands.
- D** Yeah. Along Pinjarra Road there.
- TBIM5** Yeah, yeah. I know what you mean.
- D** Yeah. Fuckin' - I was like walkin' along there [indistinct], and then my nigger - fuckin' - next thing I know [indistinct] he come walk' outta IGA an' all. And like, after that there like I was walkin' behind him tryina pickpocket him 'n shit.
- TBIM5** Yeah.
- D** He felt it boy, turned around, ahh, just like, slapped me in the head n' all.
- TBIM5** Yeah.
- D** I was all dazed you know. And then - - -
- TBIF 2** Hello, my darling.
- D** And then fucking - - -
- TBIF2** Hello?
- D** And then fuckin' - - -
- TBIF2** Hello?
- D** I just punched him in the jaw and all n' put him to sleep, you know?
- TBIF2** Who you talkin' to?
- D** I was talkin' to [R] there, man.
- TBIF2** [indistinct] say hello and I'll pass back to him.

D Yeah. [indistinct] knocked him out.

TBIM5 Yeah, yeah.

D And like - yeah - like, all I did was like - - -

TBIM5 What, you put him to sleep?

D Yeah. That's all. And then, like, because I was still dazed a bit, you know, I was angry - just like kicked him in the head, boy.

TBIM5 Yeah.

D And then he fell off the fuckin' - - -

TBIM5 Yeah. It woul-it woulda happened hell fast, ay?

D Yeah.

TBIM5 Yeah, man.

D Then I - when he got up, you know, he took off runnin' and fell off like, a ledge [c---] - - -

TBIM5 Aw, no.

D Car park ledge thing, boy - big wall.

TBIM5 Yeah.

D Like, split his head n' that shit.

TBIM5 Yeah. So that's what - that's what really made that happen, hey?

D Yeah.

TBIM5 Yeah.

D [indistinct] you know, he was still alive, you know? But all he had was a serious concussion and bleeding - internal bleeding of the brain.

224 There is no admission by DVH in any of the starnet calls that he chased Mr Litchfield.

225 I now turn to other evidence before the Court which I accept beyond reasonable doubt. EHW said that DVH was trying to pick pocket Mr Litchfield near some bushes near an Aussie Home Loans sign. He also said that DVH punched Mr Litchfield. Apart from the specific location where that occurred, DVH admitted that. EHW also said and I accept that

DVH went on to the road towards Mr Litchfield and shaped up to Mr Litchfield. Brodie Kerry's evidence supports that and I am satisfied beyond reasonable doubt on that fact. I have already explained why I find that EHW recalled more than what he limited himself to when he was cross-examined by counsel for DVH and that can be taken as repeated.

226 I also accept the evidence of JJW that, (1) Mr Litchfield's smack to DVH's head made DVH retaliate straight away, and (2) following on from that DVH was attacking Mr Litchfield, as he described it, with EW and TB, and (3) when Mr Litchfield returned to the northern side of the road he was swearing at them and telling them to stop and held his arms up with his palms forward and (4) then DVH swung at Mr Litchfield but JJW does not know if it connected, and (5) that DVH was one of the four boys who chased Mr Litchfield to the west, and (6) that DVH kicked Mr Litchfield to the head when Mr Litchfield was lying in the car park after he fell. I find that JJW had a clear view of this and that he was only a short distance away, about ten metres, when he observed it. He was cross examined on this factual issue and on my assessment he reliably maintained his position on it.

227 There is a particular factual issue on the evidence in relation to DVH which I need to address. There is oral evidence and CCTV footage that DVH broke away from the group and sat on a seat near Pronto's, well west of George Street. While sitting there, Mr Litchfield walked past. Shortly after DVH got up and continued walking and eventually caught up with Mr Litchfield and others in the group. Before he got up, JR, who had also broken away from the group, caught up with him at the seat. They then both walked off together to rejoin the rest of the group. The State has submitted that DVH had a sinister reason for waiting behind for Mr Litchfield to go past. On my assessment of the evidence, it would also be reasonably open to infer that DVH was simply waiting for JR. Accordingly, I do not draw any adverse inference against DVH that he had any sinister motive for waiting behind until Mr Litchfield went past.

228 The evidence of EHW and JJW, and particularly the evidence of JJW in combination with the CCTV footage from Mercedes Benz and Jaycar, supports the finding, which I make, that DVH was one of the first three boys seen chasing close behind Mr Litchfield when they all ran west past the entrance to Jaycar on the Jaycar car park and towards the wall. I should add that DVH was no doubt one of those four boys and that his clothing did not match the clothing of the fourth boy chasing Mr Litchfield, who I am satisfied was TB.

229 I should add to all of this, that on the whole of the evidence
admissible against DVH, which necessarily does not include any of the
interviews and starnet calls of the other accused, the evidence is
overwhelming that DVH chased Mr Litchfield and also, that in relation to
this incident, he was the instigator and main protagonist.

HCJ

230 HCJ participated in a recorded interview with the Police on 13 April
2013. He was 14 years 10 months of age at the time. His father was
present during the interview as his next friend.

231 It is clear from what HCJ said in his interview, that he saw and heard
a lot of what happened. He observed Mr Litchfield slap DVH and heard
what Mr Litchfield said to them at the time. He said that he was only
about 10 metres away from DVH when he hit Mr Litchfield to the jaw. He
was able to see everything ok.

232 HCJ said that after Mr Litchfield was hit, he jumped up and
staggered and fell over on the road, that he then ran, that JR told him to
stop, and that he didn't stop and he jumped (which was no doubt a
reference to jumping over the wall).

233 He told the Police that he saw one of the boys grab Mr Litchfield's
phone after it dropped out when Mr Litchfield fell over.

234 HCJ told the Police that while this was all happening that he was the
quietest there, and that he walked away and stayed up the front and
watched them.

235 HCJ described the incident in a way which overlooked a lot of what
happened when Mr Litchfield went over to the south side of Pinjarra Road
and then came back. On his description of the incident, it essentially
consisted of DVH hitting Mr Litchfield, Mr Litchfield going down and
then Mr Litchfield running towards the wall with the boys running behind
him and JR telling him to stop.

236 When it was put to HCJ by the Police that Mr Litchfield had ran
across the road and that DVH had followed him and adopted a fighting
stance, and that Mr Litchfield had put his hands up and said 'no more',
HCJ said that that jogged his memory. He went on to say that when Mr
Litchfield went on to the road, that he (HCJ) was standing up the top. I
think that the CCTV footage shows that that was not the case at that time.

237 It is clear from what HCJ told Police, that he was close enough to
hear what some of the boys said when they were in the car park around
Mr Litchfield after he had fallen.

238 After HCJ was told by the Police that they had spoken with other
boys, he started to give more detail than he had before.

239 HCJ told Police that he was there, but he stood back when the boys
started running. He agreed that Mr Litchfield was running to get away
from being punched. He said that he 'wasn't running with them'. He
agreed that he went down there, meaning the car park, but indicated that
when he got there they were already standing around Mr Litchfield. Not
long after saying all of that, HCJ agreed that he chased Mr Litchfield.

240 I refer to the Mercedes Benz footage and my analysis of it as set out
earlier for the purpose of considering the case of HCJ.

241 On that analysis, after Mr Litchfield had crossed the road and
returned back, and then moved to the west with DVH, EW and JR, with
TB following about five seconds later, the boy who I have identified as
HCJ, stayed back and was obviously watching what was going on to the
west or left of screen. He could actually be seen to retreat further to the
east while he was watching. It was not until about 20 seconds after TB
had disappeared from the screen to the west that HCJ and the other two
boys JJW and AU started to run to the west. HCJ started to run a short
distance in front of the other two. All three of them essentially started to
run in a line and spaced a short distance apart at about the same time.

242 On my consideration of all of this, I think that there is room for HCJ
to have been generally confused during his interview on this factual issue
of him running and whether or not he chased Mr Litchfield. I find that he
was a young person who was confused. He did run. The footage shows
that clearly. However the important point is that he was not involved in
what was going on with Mr Litchfield off screen and to the west, and that
he did not run, chase, Mr Litchfield with those other four boys.

243 In addition to all of this, I refer to and accept the evidence of JJW
when he was cross-examined by counsel for HCJ on where HCJ was at
particular points in time. It can be noted that JJW's evidence that he
passed HCJ on the footpath is consistent with my analysis of the
Mercedes Benz footage.

244 HCJ was not truthful when he gave his position in the early part of
the incident. Whether it was a lie, I am not sure. Anyway, even if it was,

the State would not seek to rely on it as evidence of a consciousness of guilt. I should add that even if the State's position was otherwise then the outcome in HCJ's case would be no different.

245 There is properly no suggestion that HCJ assaulted or attempted to assault Mr Litchfield at any time at all. HCJ said that he was the quietest in the group. On my assessment of HCJ, I think that that is likely his nature and that in this group he would likely have been a follower at worst. He has no criminal record, which I bear in mind, but there is always a first time. That HCJ would have hung back and kept out of it is consistent with my assessment of him.

246 On my overall assessment, I am not satisfied that HCJ was proximate enough to Mr Litchfield and influenced Mr Litchfield's decision to run away. HCJ did run, but from a distance, to see what was happening or what had happened. Mere presence is not enough. Further in my view, it cannot be properly concluded that HCJ aided or encouraged any of DVH, JR, EW or TB in what they did.

247 In summary, HCJ has not done anything to cause Mr Litchfield to run. As I have said, mere presence is not enough. Accordingly, I am not satisfied that HCJ has engaged in any threatening or intimidating behaviour against Mr Litchfield and so applying the law, he must be acquitted on the charge of murder and the two statutory alternatives.

Analysis of the evidence and applying s 272 of the Criminal Code

248 For ease of reference I again set out the provisions of s 272 of the *Criminal Code*. It provides:

272. Causing death by threat

A person who, by threats or intimidation of any kind, or by deceit, causes another person to do an act or make an omission which results in the death of that other person, is deemed to have killed him.

249 Section 272 of the *Criminal Code* does not create an offence. It is simply but importantly a deeming provision.

250 The questions arising from this section to be answered separately in the case of each defendant are:

1. Did the defendant threaten or intimidate Mr Litchfield?

and

2. If yes to question 1, then did it cause Mr Litchfield to do an act?
and
3. If yes to question 2, then did the act result in the death of Mr Litchfield?

251 In relation to the paragraph numbered 1, the threatening or intimidating behaviour alleged by the State is chasing or pursuing Mr Litchfield following the assault against Mr Litchfield before he ran on to the road. In closing submissions counsel for the defendants complained that this broadened the scope of the alleged threatening or intimidating behaviour compared to the State's position when it opened its case. Further, it was submitted that a chase as commonly understood, could not include Mr Litchfield going across the road and then going back towards boys from where he had initially come from.

252 I have two comments on this. First, the State's closing was the same in scope as the State's opening. In opening, the learned prosecutor referred to the act done as 'the chasing of the deceased, in the context of him already having been assaulted and/or detained by a member or members of the accused's group'. Secondly, in light of my assessment of and findings on the whole of the evidence admissible in the case of each defendant, whether a chase started before Mr Litchfield ran on to the road or after he returned would make no difference to the result.

253 I should add, that in my view s 272 does not require me to consider and decide in each case what the defendant intended. The section requires me to consider and determine what the defendant did and to then decide whether or not it amounts to threatening or intimidating behaviour.

254 Before I go to consider questions 1 and 2 for each of the defendants separately and in turn, I wish to make some general comments on when Mr Litchfield was walking with the group east on the northern side of Pinjarra Road before he reacted to DVH pick pocketing him. I wish to emphasise that these are general comments and are not used by me in the consideration of whether any particular defendant has behaved in a threatening or intimidating manner for the purpose of s 272 in the particular defendant's case. That consideration must be confined to circumstances which arose at a later point in time.

255 In my view, walking alone at night with no or few other members of the public about and being surrounded by nine strangers who were all together in the one group, with one or more of them moving around you,

asking you for something, arguing with you, touching you, and in particular touching your pocket(s), generally closing down your personal space, being persistent about it, would, objectively speaking, be very threatening and intimidating. Mr Litchfield was in that situation.

256 That said and put aside, I now turn to answer questions 1 and 2 for each of the remaining four defendants.

JR

1. Did JR threaten or intimidate Mr Litchfield?

257 I repeat my finding that JR chased Mr Litchfield. He did so against the background of knowing, (1) that DVH had tried to pick pocket Mr Litchfield, and (2) that DVH had punched Mr Litchfield, and (3) that DVH had kicked Mr Litchfield to the head and chest, and (4) that Mr Litchfield had run across the road to obviously escape being assaulted, and (5) he had no doubt observed DVH shaping up to Mr Litchfield and thereby continue to be threatening towards Mr Litchfield when he came back across the road, and (6) that Mr Litchfield was seriously outnumbered.

258 I find beyond reasonable doubt that JR chasing Mr Litchfield against that background of circumstances was clearly threatening and intimidating. Further, Mr Litchfield's level of fear would have been further escalated or at least maintained by JR knowingly trying to grab him when he had started to run away and then chasing him from close behind and at speed and in company.

2. Did JR's threatening or intimidating behaviour cause Mr Litchfield to run and go over the wall?

259 I repeat everything just mentioned in the answer to question 1.

260 I am satisfied beyond reasonable doubt that Mr Litchfield's level of fear for his own safety and wellbeing would have been extreme. Further, I am satisfied beyond reasonable doubt that it would have caused him to continue to run as fast as he could and to go over the wall to try and escape.

EW

1. Did EW threaten or intimidate Mr Litchfield?

261 I repeat my finding that EW chased Mr Litchfield.

262 He did so against a background of knowing, (1) that DVH had punched Mr Litchfield causing him to stagger into the trees, and (2) that Mr Litchfield had run away across the road obviously to escape being assaulted, and (3) that when Mr Litchfield returned to the north side of Pinjarra Road that DVH grabbed hold of him and dragged him back, and (4) that Mr Litchfield was seriously outnumbered.

263 I find beyond reasonable doubt that EW chasing Mr Litchfield against that background of circumstances was clearly threatening and intimidating. Further, Mr Litchfield's level of fear would have been further escalated or at least maintained by EW punching him in the neck when he had started to run away, and then chasing him from close behind and at speed and in company.

2. Did EW's threatening or intimidating behaviour cause Mr Litchfield to run and go over the wall?

264 I repeat everything just mentioned in the answer to question 1.

265 On a separate consideration of EW's case I make the same findings on question 2 for EW as I did in the case of JR.

TB

1. Did TB threaten or intimidate Mr Litchfield?

266 I repeat my finding that TB chased Mr Litchfield.

267 He did so against a background of knowing that, (1) and by reference to the evidence of JJW, that he, DVH and EW had attacked Mr Litchfield, in the way that JJW described attacking, and (2) that Mr Litchfield had run away across the road to obviously escape being attacked, and (3) that DVH was continuing to threaten Mr Litchfield by shaping up to him when he was crossing back over the road to north side of Pinjarra Road, and (4) that Mr Litchfield was seriously outnumbered.

268 I find beyond reasonable doubt that TB chasing Mr Litchfield against that background of circumstances was clearly threatening and intimidating. Further, Mr Litchfield's level of fear would have been further escalated or at least maintained by TB grabbing his shirt when he had started to run away and then chasing him from close behind and at speed and in company.

2. Did TB's threatening or intimidating behaviour cause Mr Litchfield to run and go over the wall?

269 I repeat everything just mentioned in the answer to question 1.

270 On a separate consideration of TB's case, I make the same findings on question 2 for TB as I did in the case of JR.

DVH

1. Did DVH threaten or intimidate Mr Litchfield?

271 I repeat my finding that DVH chased Mr Litchfield.

272 He did so against the background of knowing, (1) everything he did that forms part of the evidence against him in this case and which I have accepted beyond reasonable doubt, including his own admissions in the startnet calls on what he did to Mr Litchfield, and (2) that Mr Litchfield had run away across the road to obviously escape being assaulted, and (3) that Mr Litchfield was seriously outnumbered.

2. Did DVH's threatening or intimidating behaviour cause Mr Litchfield to run go over the wall?

273 I repeat everything just mentioned in the answer to question 1.

274 On a separate consideration of DVH's case, I make the same findings on question 2 for DVH as I did in the case of JR.

Causation

275 I now move on to determine the third question previously identified in the operation of s 272. This question concerns causation. I will refer to the medical evidence first.

Causation - Medical evidence

276 I have a great deal of medical evidence from undisputed experts. Dr Cooke, State Pathologist, Dr Fabian, a Neuropathologist and Mr Honeybul, a Consultant Neurosurgeon. All are very experienced in their field.

277 Dr Cooke conducted the post mortem. He determined that the cause of death was head injury. Mr Litchfield had numerous injuries to various parts of his body. They include bruises and abrasions. There were four abrasions on the top of four toes of the left foot, mostly up to six by five

millimetres. Dr Cooke agreed that this is an area prime to accidental contact. He said possibly if you trip over something.

278 Included in Dr Cooke's findings was a big bruise of the muscle on the right side of the jaw when viewed internally and also bruising beneath the skin on the left side below the shoulder blade when viewed internally.

279 Dr Cooke spoke about a laceration on the left back of Mr Litchfield's scalp about 1.5cm to the left of the mid line. It had a stippled punctate appearance which immediately suggested contact with a rough bitumen surface.

280 The evidence clearly links this injury to a severe skull fracture and in turn bleeding about the brain and particularly the right side. Bleeding was beneath the dural membrane. Dr Cooke referred to this as a contrecoup type bruising because it was not at the point of the abrasion.

281 Dr Cooke said that he always thought that Mr Litchfield's head injury was from him going over the wall. That scenario caused forceful contact to the back of Mr Litchfield's head. Dr Cooke was clearly of the view that running and some projection, involving acceleration, were also relevant factors. It was Dr Cooke's opinion from the stippled areas mostly on Mr Litchfield's left side, that he fell on to his back. A single application of force is responsible for the laceration, the skull fracture and the brain injury.

282 Dr Fabian gave evidence that the right side of Mr Litchfield's brain had damage to the underlying part of the brain and not just bleeding on the surface. There was extensive haemorrhage on the right side. Dr Fabian described Mr Litchfield's brain injury as a traumatic brain injury. On her evidence, it was clearly a contrecoup injury with the compatible scenario being that he hit his head on the left side.

283 Dr Fabian gave evidence that a strike to the face would not usually cause a subdural haematoma, although you can see subdural haemorrhaging from a blow to the head.

284 Dr Fabian also said that Mr Litchfield's brain injury was sufficient to cause the swelling that she saw.

285 Mr Honeybul described Mr Litchfield's brain injury as a non-survivable traumatic brain injury. He had bleeding on the lining of the brain, subarachnoid blood, and a very swollen brain with compression of his brain stem. When asked whether a punch could cause this injury he

said that it would need to be a severe force to cause, not just a subdural haemorrhage, but also the amount of brain swelling in Mr Litchfield's case. The subdural haemorrhage is just one aspect of Mr Litchfield's brain injury. Mr Honeybul also said that a punch to the face could cause a brain injury but it would have to be a very significant punch. He added that the facial area about the jaw is a very good crumple zone. The point was no doubt that that was protective of the brain. He said that a punch was unlikely to cause this skull fracture and that it was likely caused by contact with bitumen.

286 Mr Honeybul referred to a CT scan which showed a significant mid-line shift of Mr Litchfield's brain, blood on the right side, and a brain very swollen and being pushed down. No space related to swelling of the brain causes a person to stop breathing. Mr Honeybul said that Mr Litchfield's brain injury was consistent with a severe force fall.

287 On an overall consideration of all of the medical evidence, I am satisfied beyond reasonable doubt that Mr Litchfield's traumatic brain injury which caused his death was caused solely by him hitting the left side of his head on the bitumen surface of the car park when he fell after going over the wall. His death was not caused or contributed by any punching or kicking. I do not think that this finding will come as any surprise to any of the parties. There was really no issue taken by any party at the hearing on the cause of death in the medical sense. The issue for me to decide is whether the State has proved beyond reasonable doubt that there is causation in the legal sense such that a person should be criminally liable.

Causation - Legal principles and analysis

288 When juries are asked to decide the question of causation they are usually told that it is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, by appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter. See *Campbell v R [1981] WAR 286 per Burt CJ*. When dealing with causation, a distinction is often drawn between factual and legal causation. Legal causation involves enquiring whether the factual connection between the conduct in question and the event is sufficient to justify the attribution of moral culpability and hence, legal responsibility for the death. See *Krakouer v Western Australia [2006] WASCA 81*. An accused will not normally be held criminally responsible unless his or her act is a substantial or significant cause of death. The cause of death must be sufficiently

substantial to enable responsibility for the crime to be attributed to the accused. 'Substantial' means 'not de minimis'. See *Royall v The Queen (1991) 172 CLR 378*.

289 If conduct of a person for which the accused is responsible induces in the person a well-founded apprehension of physical harm, such as to make it a reasonable consequence that the person would seek to escape, then the fact that the death occurs in the course of that escape does not break the chain of causation so long as the response of the person is reasonable or proportionate having regard to the nature of the conduct of the accused or for which the accused is responsible, and the fear it is likely to have provoked. See *McAuliffe v R (1995) 183 CLR 108*.

290 Again, this question must be considered and determined separately in the case of each defendant.

291 I say that for two reasons. First, because it is the way that I must deal with each of these cases by reason of general principle, and secondly, because I need to have regard to each defendant's knowledge of the circumstances, including knowledge of what the other three have done, and what he in particular has done. That is particularly relevant in this case given the law as just mentioned on a person seeking to escape and the need to consider the conduct of the accused to decide whether there has been any break in causation. That is particularly relevant in this case because Mr Litchfield has gone over a wall with a drop of 1.19 metres to the low side.

292 Having said all of the above, there is a circumstance common to each and every one of the four of the remaining accused and that is that he chased Mr Litchfield in the company of three others. Outnumbering Mr Litchfield to that extent is in my view particularly significant.

293 Having said all of that, considering each defendant's case separately by taking into account my answers to questions 1 and 2 for each of them, but only in their own case, and then adding the factor that each of them was in the company of three others, I arrive at the same conclusion for each and every one of them. That is, that his threatening and intimidating behaviour was of such a high level of seriousness that it would have instilled in Mr Litchfield an extreme level of fear such that it caused him to run away as fast as he could and to decide that going over the wall was both necessary and reasonable.

294 Mr Litchfield had abrasions on four toes of one foot and there was a blood stain of Mr Litchfield on the top of the wall about where he went

over. He may have tripped on the top of the wall as he went over. In my view, whether he tripped or not when he went over the wall does not matter on causation at all.

295 For all these reasons, I am satisfied beyond reasonable doubt that the State has established causation in each of the cases of JR, EW, TB and DVH respectively.

Conclusion on the operation of s 272 of the *Criminal Code*

296 For all these reasons, I find that each of JR, EW, TB and DVH respectively, killed Mr Litchfield.

Whether the killing was unlawful

297 Section 279(1) of the *Criminal Code* which provides for the offence of murder is prefaced with the words 'if a person unlawfully kills another person'. Therefore the next step in this analysis is to decide in the case of each defendant whether the State has established beyond reasonable doubt that the killing was unlawful. A killing is unlawful if it is not authorised, justified or excused by law. In each case there is no authorisation or justification and so it is necessary to consider whether the State has proved that the killing was not excused.

298 Section 23B(2) of the *Criminal Code* provides that:

23B. Accident

(2) A person is not criminally responsible for an event which occurs by accident.

299 The State can disprove accident if it proves either that, subjectively, the accused intended or foresaw the event in question as a possible outcome or that, objectively, the event would reasonably have been foreseen by an ordinary person as a possible outcome (excluding, and each case, possibilities that are no more than remote and speculative). See *Raux v The State of Western Australia [2012] WASCA 1 par 84 Buss JA*. In each case, 'the event' in the context of accident, is the death of Mr Litchfield. The event is not the way or mechanism of Mr Litchfield's death. See *Hooper v R [2000] WASCA 394 per Malcolm CJ*.

300 In each case, the State does not assert that the particular defendant intended to kill Mr Litchfield. It is asserted that he foresaw death. Further and anyway, the State asserts that objectively, the death of Mr Litchfield would reasonably have been foreseen by an ordinary person as a possible

outcome excluding possibilities that are no more than remote and speculative. When considering subjectively what the particular accused foresaw and objectively whether Mr Litchfield's death would reasonably have been foreseen by an ordinary person as a possible outcome excluding possibilities that are no more than remote and speculative, it is necessary to take into account the age and knowledge of the particular accused.

301 I therefore again, move on to separately consider the case of each defendant.

302 Can I make some general comments on the issue of Mr Litchfield's intoxication. The hospital did a blood alcohol test which returned a reading of .134 percent. I do not know when the test was taken or whether it was contaminated or the result was distorted in any way. I just do not know what I can properly make of it and so I put it aside when considering the case of each defendant. Anyway, it is the particular defendant's knowledge of Mr Litchfield's condition which is relevant.

303 I also wish to mention that the knowledge of each defendant consists not just of what he has admitted he knew, but it also includes what the admissible evidence in his particular case shows that he knew. Every one of the defendant's knew that DVH punched Mr Litchfield to the face. That said, they were no doubt focused on Mr Litchfield thereafter and watched what was happening with him. Each of them was actually engaged in it.

JR - accident

304 JR was 15 years 5 months of age on the day of the incident.

305 JR was well aware that Mr Litchfield was extremely frightened. He saw DVH punch Mr Litchfield, its effect, and Mr Litchfield run on to the road.

306 When JR was asked if he thought that Mr Litchfield was dead, he replied that he thought he was 'like bleeding in his, like, in his head' and 'cracked his skull open'. The question is whether JR actually thought about that before or after Mr Litchfield went over the wall. The Police did not seek to cover this issue particularly in the interview.

307 I am not satisfied beyond reasonable doubt that subjectively, JR foresaw death.

308 I now turn to consider objectively, whether death would reasonably have been foreseen by an ordinary person applying the legal test to which

I have referred. An ordinary person is also one who is sober, as young as JR, and possessed with the knowledge that JR had at the time.

309 The following factors, in combination, are relevant to this consideration:

1. JR said that Mr Litchfield was a bit drunk because of his reactions. He said that Mr Litchfield had said that he had just come from the pub.
2. I accept JJW's evidence that Mr Litchfield was staggering. If that was evident to JJW then it would have been evident to JR.
3. JR knew that Mr Litchfield was dazed by DVH's punch. After he spoke about DVH kicking Mr Litchfield he said that Mr Litchfield was on the ground for 30 to 40 seconds before getting up.
4. Mr Dawson said, and I accept, that Mr Litchfield looked like he was stumbling when he saw him on the road and pavement on the south side of Pinjarra Road. Whatever the reason(s) for that, whether it be because of intoxication or the assault by DVH or both, that is the fact of the matter and I find that JR would have observed it.
5. JR knew that Mr Litchfield ran across Pinjarra Road. He would have known that it was a major road consisting of four lanes, two lanes each way. He would also have seen cars on the road, including one that had to brake because of Mr Litchfield and also those being driven by Mr Dawson and Ms Bell. He would have noted Mr Litchfield's proximity to them. The fact that Mr Litchfield ran on to Pinjarra Road shows how disorientated and/or afraid he was at that time.
6. JR was also aware that he was in the company of three other boys engaging in threatening and intimidating behaviour against Mr Litchfield. Being outnumbered to that extent and in those circumstances would have been extremely frightening. Further to that, being chased by four boys would cause a person to run as fast as possible. That creates risk of itself. The risk would significantly increase when that was combined with a person being dazed and affected by alcohol.
7. JR may not have specifically noted the particular wall in question when he walked past it with the rest of the group and Mr

Litchfield on their way up Pinjarra Road. However, he would have had an appreciation that the immediate environment included hard bitumen and paved surfaces, kerbing, a major four lane road, an uphill or downhill gradient, however you wish to express it, and different levels.

8. The sun had gone down and it was dark. While the visibility in the area at the time was improved by street lights and the headlights of motor vehicles, the lighting would have been uneven. Visibility was materially reduced.
9. I think that ordinary young people of JR's age know that if a person falls over and hits his or her head on a hard surface, then they could sustain a brain injury and that brain injury could result in death. It is a topic that has been given a lot of attention in our community over the last few years.

310 I find that objectively, considering all of these factors in combination, the death of Mr Litchfield would reasonably have been foreseen by an ordinary person of JR's age as a possible outcome, excluding possibilities that are no more than remote and speculative.

EW - accident

311 EW was 14 years five months of age on the day of the incident.

312 On my assessment, when considering subjectively whether EW foresaw death, it is not open for me to take into account when considering EW's state of mind, that EW said things such as, there was enough lighting to see the wall, that they were trying to stop Mr Litchfield because they had seen the wall, and that they did not want to let Mr Litchfield get hit by a car, because these were all fabricated explanations given by EW.

313 I am not satisfied beyond reasonable doubt that subjectively, EW foresaw death.

314 I now turn to consider the objective test for EW.

315 I repeat everything that I have said in the paragraphs numbered 2, 4, 5, 6, 7, 8 and 9 in JR's case on this issue. They all also apply in EW's case.

316 I find that objectively, considering all of these factors in combination, the death of Mr Litchfield would reasonably have been

foreseen by an ordinary person of EW's age as a possible outcome, excluding possibilities that a no more than remote and speculative.

TB - accident

317 TB was 14 years 2 months of age on the day of the incident.

318 On my assessment of the evidence, TB's answers in his interview that he and others tried to stop or trip Mr Litchfield to prevent him from going over the ledge, and also him having noticed the ledge/wall earlier in the night when they walked past it and also a year earlier, were all fabrications and I have rejected them. Therefore it is not open for me to take any of that into account when considering TB's state of mind.

319 In relation to the starnet call made on 30 April 2013 relevant to this issue, despite its contents showing that TB knew of the danger of falling and damaging the head, the question is whether he thought about that before or after Mr Litchfield went over the wall.

320 I am not satisfied beyond reasonable doubt that subjectively, TB foresaw death.

321 I now turn to consider the objective test in relation to the case of TB.

322 The following factors, in combination, are relevant:

1. TB said that he thought that Mr Litchfield was drunk.
2. I repeat everything that I have said in the paragraphs numbered 2,4,5,6, 7, 8 and 9 in JR's case on this issue. They all also apply in TB's case.

323 I find that objectively, considering all of these factors in combination, the death of Mr Litchfield would reasonably have been foreseen by an ordinary person of TB's age as a possible outcome, excluding possibilities that are no more than remote and speculative.

DVH - accident

324 DVH was 14 years 1 week of age on the day of the incident.

325 On my assessment of DVH, despite his young age, he is likely more mature than his age would suggest in the sense of him being street smart. He knew that Mr Litchfield was extremely frightened. He indicated that in the starnet call on 18 May 2013 when he said that Mr Litchfield woke up

and 'started shitting'. By reference to that same starnet call, he knew about 'concussion and bleeding - internal bleeding of the brain'.

326 Nevertheless, on an overall consideration and taking these things into account, I am not satisfied beyond reasonable doubt that subjectively, DVH foresaw death.

327 I now turn to consider the objective test in relation to the case of DVH.

328 I repeat everything that I said in the paragraphs numbered 2, 4, 5, 6, 7, 8 and 9 in JR's case on this issue. They all also apply in DVH's case.

329 I find that objectively, considering all of these factors in combination, the death of Mr Litchfield would reasonably have been foreseen by an ordinary person of DVH's age as a possible outcome, excluding possibilities that are no more than remote and speculative.

Conclusion on accident

330 For all these reasons I find that the State has negatived accident beyond reasonable doubt in the cases for each and every one of JR, EW, TB and DVH. Accordingly, I find beyond reasonable doubt that each of JR, EW, TB and DVH unlawfully killed Mr Litchfield.

331 I now move on to consider the next stage in this analysis, which is whether in the case of each defendant the unlawful killing is a murder.

Analysis of whether the unlawful killing is a murder

332 The relevant provision relied on by the State to prove murder in the case of each defendant is s 279(1)(c). For ease of reference, I will set it out again. It provides that:

279. Murder

(1) If a person unlawfully kills another person and —

(c) the death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life,

the person is guilty of murder.

333 Section 279(1)(c) is similar to the common law felony-murder rule. The rationale for that rule was that a person who unlawfully killed another in the prosecution of a felony should be subject to the same penalty

provisions as murder. I said similar and not the same because a felony and an unlawful purpose are not the same.

334 In *Johnston v The State of Western Australia [2012] WASCA 98 at par 95-98, Buss JA* said:

95 Section 279(1)(c) comprises three elements. First, there must be an unlawful killing. Secondly, the death must have been caused by means of an act done by the accused in the prosecution of an unlawful purpose. Thirdly, the act must be of such a nature as to be likely to endanger human life.

96 As to the first element, the unlawful killing must have been a willed or voluntary act of the accused. See s 23A of the Code; *Macartney v The Queen* [2006] WASCA 29; (2006) 31 WAR 416 [109] - [110] (Steytler P).

97 As to the second element, the act by means of which the death was caused must have been done 'in' the prosecution of an unlawful purpose. The unlawful purpose must be separate from the act which caused the death. See *Hughes v The Queen* [1951] HCA 34; (1951) 84 CLR 170, 174 - 175 (Dixon, McTiernan, Williams, Fullagar & Kitto JJ); *R v Gould & Barnes* [1960] Qd R 283, 292 (Philp J, Mansfield CJ agreeing); *Stuart v The Queen* [1974] HCA 54; (1974) 134 CLR 426, 438 - 440 (Gibbs J, Menzies & Mason JJ agreeing); *Macartney* [112] (Steytler P).

98 As to the third element, the act must be '*of such a nature as to be likely to endanger human life*' (emphasis added). The words I have emphasised connote an act which, regarded objectively, is of such a nature as to give rise to a substantial, real and not remote chance that the life of the victim would be endangered. That is, the act must 'in fact' have been of such a nature as to be likely to endanger human life. See *Gould & Barnes* (298); *Stuart* (438); *Macartney* [113] (Steytler P), [139] (Wheeler JA); *Wongawol v The State of Western Australia* [2011] WASCA 222 [22] (McLure P, Buss JA & Mazza J agreeing)

335 I am satisfied of the first element, that Buss JA identified. In the case of each defendant, his act of chasing, and also in respect of JR, EW, and TB, his attempt to grab, punch to the neck and grabbing of the shirt, respectively, was clearly willed.

336 It is the second element identified by Buss JA that I will now consider. It is necessary to consider this element carefully because the operation of s 279(1)(c) does not require a defendant to have intended to kill or to have intended to cause a serious injury (grievous bodily harm) to a person to be found guilty of a murder. Indeed, that is why there needs to

be a separation between the act and the unlawful purpose to get to a murder (subject of course to the other elements of s 279(1)(c) being satisfied).

337 In *Johnston's* case, the unlawful purpose was to steal money and drugs and the act was a vicious assault. In *Stuart's* case, the unlawful purpose was extortion and the act was the lighting of a fire.

338 Another example of the separation between an unlawful purpose and an act done would be where a defendant has committed a home burglary, and when running from the home and being pursued by the owner, he fires a shot in the direction of the owner and kills him.

339 In this case the State relies on the chasing in the context of what happened before, as the act done for the purpose of this second element of s 279(1)(c). When the State opened its case it relied on an unlawful purpose of assault or stealing. The State later abandoned stealing as an unlawful purpose. That was because on the evidence the only conclusion open was that Mr Litchfield's phone fell on to the road during or as a result of the first stage of the incident and before he crossed to the south side of Pinjarra Road.

340 Mr Litchfield's slap to the back of DVH's head was an assault. In my view it was provoked and not disproportionate to the provocation and so it was not unlawful. That said, it made DVH angry. DVH retaliated with a punch to Mr Litchfield's jaw. That is an assault. Thereafter, it is clear in my view that DVH remained angry and wanted to continue to assault Mr Litchfield. That would have been obvious to each and every one of JR, EW and TB. It was certainly obvious to Mr Litchfield because he ran away and across the road in risky circumstances.

341 The question may then be asked, then why did Mr Litchfield go back to the north side of the road. The answer to that question may be because he wanted to retrieve his hat or his thongs or more likely his phone or perhaps all of those things. The answer to that question does not matter in the context of each of these decisions. The fact is that he did go back. What is significant is that when Mr Litchfield went back he had both of his arms out with his palms facing forwards and was telling them in no uncertain terms to stop. Clearly what he wanted to stop, was him being assaulted.

342 After that point in time each and every one of JR, EW, TB and DVH continued to behave in a threatening and intimidating manner. It is clear from the evidence that DVH shaped up to Mr Litchfield by putting his

fists up, that when Mr Litchfield came back across the road, that DVH wanted to go on with it, i.e. assaulting Mr Litchfield. Each of JR, EW and TB would have known that and by them joining in, they were aiding DVH. Thereafter, when each of them tried to grab, punched in the neck, and grabbed the shirt of Mr Litchfield, respectively, and chased him, they each became principal offenders.

343 Each and every one of the four defendants chased Mr Litchfield for the purpose of further assaulting him. Indeed the chase in the context of what happened before is an assault by itself given the definition of assault in s 222 of the *Criminal Code*. It was a bodily act threatening to apply force under such circumstances that each defendant had the actual ability to effect.

344 That the chase of itself was not actual and that if each of the defendants had caught Mr Litchfield then he would have actually assaulted him, does not in my view create the necessary separation between the act done and the unlawful purpose so as to bring the conduct of each of the defendants within the operation of s 279(1)(c).

345 On my view of the evidence, what was happening after Mr Litchfield slapped DVH, was a continuous, ongoing assault with each of the defendants intending to go on with it if he caught Mr Litchfield. While there was pick pocketing earlier, on my view of the evidence, the phone falling out of Mr Litchfield's pocket and being picked up by JR was opportunistic against, by then, an ongoing unlawful purpose of assault.

346 For all these reasons, I am not satisfied that there is a separation between the act done, i.e. the chase, and the unlawful purpose, an assault, to satisfy the second element in s 279(1)(c) as identified by Buss JA in *Johnston's* case.

347 The third element identified by Buss JA does not come into play unless the second element is satisfied. Having reached this view on the second element, I do not propose to take the cases of each of the defendant's any further.

348 For all these reasons, in the case of each defendant, I am not satisfied beyond a reasonable doubt that the unlawful killing was a murder.

Verdicts

349 For all these reasons I find as follows:

<u>Defendant</u>	<u>Offence</u>	<u>Verdict</u>
JR	Murder	Not Guilty
	Manslaughter	Guilty
	Assault Causing Death	N/A
EW	Murder	Not Guilty
	Manslaughter	Guilty
	Assault Causing Death	N/A
TB	Murder	Not Guilty
	Manslaughter	Guilty
	Assault Causing Death	N/A
DVH	Murder	Not Guilty
	Manslaughter	Guilty
	Assault Causing Death	N/A
HCJ	Murder	Not Guilty
	Manslaughter	Not Guilty
	Assault Causing Death	Not Guilty