

CITATION: *Inquest into the death of Robert Jongmin* [2007] NTMC 080

TITLE OF COURT: Coroner's Court

JURISDICTION: Wadeye

FILE NO(s): D0200/2002

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HEARING DATE(s): 1 – 10 October 2007

FINDING OF: Mr Greg Cavanagh SM

CATCHWORDS:

Death by gunshot, police shooting,
crimes committed.

REPRESENTATION:

Counsel:

Assisting:	Phillip Strickland QC
Jongmin Family:	Michael Maurice QC
Commissioner of Police:	David Farquhar
Snr. Const. Whittington:	Ian Rowbottam

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

No. D0200/2002

In the matter of an Inquest into the death of

**ROBERT JONGMIN
ON 23 OCTOBER 2002
AT WADEYE COMMUNITY**

FINDINGS

(3 December 2007)

Mr Greg Cavanagh SM:

THE NATURE AND SCOPE OF THE INQUEST

1. On 23 October 2002, Robert Jongmin (“the deceased”) died at Wadeye. He was shot to death by Acting Sergeant Robert Whittington, a member of the Northern Territory Police. He was 18 years of age.
2. The death is a “reportable death” which is required to be investigated by the Coroner pursuant to section 14(2) of the Coroner’s Act (“the *Act*”). The deceased’s death was reportable because the deceased died as a result of an injury. I have exercised my discretion to hold an inquest pursuant to section 15(1A) of the *Act*. The scope of the inquest is governed by the provisions of sections 26, 27, 34 and 35 of the *Act*:

26. Report on additional matters by coroner

(1) Where a coroner holds an inquest into the death of a person held in custody or caused or contributed to by injuries sustained while being held in custody, the coroner -

- (a) shall investigate and report on the care, supervision and treatment of the person while being held in custody or caused or contributed to by injuries sustained while being held in custody; and

- (b) may investigate and report on a matter connected with public health or safety or the administration of justice that is relevant to the death.

(2) A coroner who holds an inquest into the death of a person held in custody or caused or contributed to by injuries sustained while being held in custody shall make such recommendations with respect to the prevention of future deaths in similar circumstances as the coroner considers to be relevant.

27. Coroner to send report etc. to Attorney-General

(1) The coroner shall cause a copy of each report and recommendation made in pursuance of section 26 to be sent without delay to the Attorney-General.

34. Coroners' findings and comments

(1) A coroner investigating -

(a) a death shall, if possible, find -

- (i) the identity of the deceased person;
- (ii) the time and place of death;
- (iii) the cause of death;
- (iv) the particulars needed to register the death under the *Births, Deaths and Marriages Registration Act* ; and
- (v) any relevant circumstances concerning the death; or

(b) a disaster shall, if possible, find -

- (i) the cause and origin of the disaster; and
- (ii) the circumstances in which the disaster occurred.

(2) A coroner may comment on a matter, including public health or safety or the administration of justice, connected with the death or disaster being investigated.

(3) A coroner shall not, in an investigation, include in a finding or comment a statement that a person is or may be guilty of an offence.

(4) A coroner shall ensure that the particulars referred to in subsection (1)(a)(iv) are provided to the Registrar, within the meaning of the *Births, Deaths and Marriages Registration Act* .

35. Coroners' reports

(1) A coroner may report to the Attorney-General on a death or disaster investigated by the coroner.

(2) A coroner may make recommendations to the Attorney-General on a matter, including public health or safety or the administration of justice connected with a death or disaster investigated by the coroner.

(3) A coroner shall report to the Commissioner of Police and the Director of Public Prosecutions appointed under the *Director of Public Prosecutions Act* if the coroner believes that a crime may have been committed in connection with a death or disaster investigated by the coroner.

3. The public inquest into the death commenced at Wadeye on 1 October 2007. Further evidence was heard in Darwin from 2 October to 10 October 2007 and final submissions were heard in Darwin on 10 October 2007. Mr Strickland SC and Dr Celia Kemp appeared as counsel assisting the Coroner. Mr Maurice QC and Mr Dominic McCormack appeared for the Jongmin family, Mr Farquhar and Ms Penny Christrup appeared for the Commissioner of Police, and Mr Rowbottam appeared for Acting Sergeant Robert Whittington. Ms Dwyer appeared for Mr Tobias Worumbu.
4. 13 witnesses were called to give evidence during the Inquest. Senior Constable Whittington was in attendance during the Inquest. The police took 68 statements from witnesses, which were admitted into evidence.

CORONER'S FORMAL FINDINGS

5. Pursuant to section 34 of the *Act*, I find as a result of evidence adduced at the Inquest as follows:

- (a) The identity of the deceased person was Robert Jongmin born 23 April 1984 in Darwin to Betty Walli Wundjarr and Ambrose Balang Jongmin.
- (b) The place of death was in the clinic at Wadeye. The date of death was 23 October 2002 and the time of death was 2.48pm.
- (c) The cause of death was a gun shot wound to the chest and neck.
- (d) Particulars required to register the death:
 - (i) The deceased was a male.
 - (ii) The deceased's name was Robert Jongmin.
 - (iii) The deceased was of Aboriginal Australian origin.
 - (iv) The cause of death was reported to the Coroner.
 - (v) The cause of death was confirmed by post mortem examination and was a gun shot wound to the chest and neck.
 - (vi) The pathologist was Dr Allan Cala.
 - (vii) The deceased's mother was Betty Walli Wundjarr and his father Ambrose Balang Jongmin.
 - (viii) The deceased lived at Wadeye.
 - (ix) The deceased was unemployed at the time of death.
 - (x) The deceased was born on 23 April 1984.

RELEVANT CIRCUMSTANCES CONCERNING DEATH INCLUDING REPORTS AND RECOMMENDATIONS

The deceased

6. The deceased was born in Darwin. He spent the first 13 to 14 years of his life in an outstation. When the deceased was about 13 or 14 years old he moved from the outstation to Wadeye. His father Ambrose Jongmin described him as ‘a strong, brave man who was kind to young kids’ (transcript p.81).

Acting Sergeant Robert Whittington.

7. Snr. Constable Whittington came to Wadeye on 17 October 2002 as acting officer in charge of the Wadeye police station. He was relieving the officer in charge, Dean McMaster, who was on leave for a month.
8. He had been a police auxiliary from October 1992. As a police auxiliary he had received mixed reports. He had received negative reports concerning his poor attitude towards authority, his failure to accept counselling; he was hampered by poor judgment and he was abrupt and overbearing towards prisoners. Whittington did not at that time, and still does not accept any of these criticisms.
9. In 1993, he applied for employment as a constable in the Northern Territory Police. That application was rejected on 30 November 1993. Whittington was persistent. He continued to act as a police auxiliary in 1993 and 1994. He did receive some favourable reports during that period. He went on to become a probationary constable, then a fully-fledged constable. He was promoted to the rank of senior constable in 1998. He received some favourable reports when he was a senior constable including some positive commendations during his tour of duty with the United Nations Transitional Administration in East Timor between May and December 2000.

10. Whittington attended a firearms instructor's course in August 2001. He failed that course in part because his marksmanship, in particular using a Glock pistol, was not of a sufficiently high standard required to be an instructor although it was of a standard suitable for an operational member of the police force. Whittington was not trained to shoot from his Glock pistol at a distance of 30 to 40 metres. His accuracy at shooting was not good at 12 metres because of his left eye dominance. (transcript p.294–295)
11. Sergeant Greg Hansen gave evidence that Whittington participated in a re-certification course in January 2002, which was supposed to be a full day's training where police officers are taught again about the use of the Glock, the rifle and the shotgun. The accuracy component of the training involved shooting at static targets at distances of 4 and 12 metres (transcript 288). The training did not include any accuracy testing or warnings or discussions about officers shooting their Glock pistols at distances greater than 12 metres. Hansen said such training was not considered relevant because most police shootings occurred with a handgun less than 7 metres because that is when the threat becomes really imminent. Furthermore, Hansen said that most people do not have a good ability to shoot at distance. Hansen's opinion was that the Glock pistol was not suitable for long range shooting and that it was more suitable for shooting at targets in the range of 25 metres or less (transcript p.281-283).
12. Whittington's firearm instructors also noted Whittington's apparent inability to accept constructive criticism.
13. Whittington came to Wadeye without any significant experience in policing in bush communities. He had not previously been the officer in charge of a police station. He arrived in Wadeye on 17 October 2002 for a four week relieving post. He had not had time to establish any close relationship with the Aboriginal community. He was the only person who applied for the position of the relieving officer in charge.

The Wadeye community and organised fistfights

14. In October 2002 Wadeye was undoubtedly a difficult community to police. There were three full time police officers at the station – Whittington, Carmen Butcher, who joined the Northern Territory police force in January 1998, and Leon Schultz, who took up active duty from July 2001.
15. It was a community where there had been pervasive violence between different groups or gangs. The two main gangs were the Evil Warriors and the Judas Priests. It appears that members of extended family groups belonged to both gangs.
16. One of the methods of resolving community tensions at Wadeye was for members of the gangs to engage in ‘one-on-one fist fights’ (“the fights”). One issue at this Inquest was whether police organised or sanctioned the fights. McMaster provided a statutory declaration to the Inquest, in which he said:

“Police in no way, shape or form condone or organised these fights. Police did at times stand by and observe meetings and at times ensured that one-on-one fist fights did not develop into anything more serious.”

17. I do not accept McMaster’s statement that police did not in any way, shape or form condone or organise the fights. The statement is inconsistent with the evidence from both other police officers and Aboriginal witnesses that police did have a role in condoning or organising the fights. The fights took place in public places, usually on the oval, but from time-to-time on the lawn outside the police station, at the school, or at the air strip. Carmen Butcher gave evidence that McMaster held lists of people who were set down to participate in the fights (transcript p.172).
18. Don Garner, who was the officer in charge at Wadeye from June 1989 to September 1991 and December 1995 to July 2002, said in his statement that the fights were run or supervised by police and the elders as a means of

dispute resolution. They took place on a regular basis. He said that the fights generally took place at the town oval and involved large numbers of people. He described police present at the fights identifying and removing weapons for the safety of the masses. He said:

“The fights were governed by a list of rules which were adopted by the elders and influenced by Police to make the fights fair and hopefully avoid serious injury to any individual participant” [my emphasis]

19. Leon Schultz gave evidence that he was present when the fights took place. He understood his role was to search people for weapons before they had the fight. He did not feel comfortable with this role. He was concerned that someone would become injured or die and he might be held accountable for it (transcript p.219).
20. Carmen Butcher gave evidence that when she arrived in Wadeye in November 2001, the fights were a regular occurrence. She said that the police sat back because they were extremely outnumbered. She said the police removed weapons if they could to ensure that the fights would be as fair as possible. She gave the following evidence (transcript p.172):

“The Coroner: Are you saying to me that it became more the practice after you arrived the police did not just attend and watch, but that they took some supervisory role in the fights?”

A: That’s correct.

Strickland: What was the supervisory role that they undertook?

A: Generally it was work that there were would be no weapons. The, people that had a beef so to speak with each other, a problem with each other, were identified and what their problem was, why they were angry with the other person, and – it was search for the weapons and it was the police basically stood there while they had a one-on-one fight to sort out their differences.”

21. David Norris, who was the Manager of the Murin Resource Centre at Wadeye in October 2002 gave evidence that he had previously seen fist

fighting down at the oval which were supervised and controlled by the police. (transcript p.242).

22. In my view, police should not have assisted and supervised public fighting as a means of dispute resolution; not only does it perpetuate a culture of violence but it is also illegal under the provisions of the *Summary Offences Act*.

Lead up to the Shooting

23. On 23 October 2002, Butcher, who had returned that day from leave, was approached by Ernest Perdjert, and Peter and George Cumaiyi. They told Butcher that two members of the Judas Priests – Albert Jongmin and Bede Lantjin - had been severely assaulted by the Kurungaiyi family who were members of the Evil Warriors. Butcher said that they wanted to have a fight to sort it out and that she said ‘no’ because she believed that the Jongmins were in town in breach of their bail conditions (transcript p.171). She spoke to Whittington about the matter because she did not know about the Jongmin’s current bail conditions, and if they should be arrested for breach of bail (transcript p.174).
24. On 23 October 2002 at 1.14pm Whittington called his superior David Pryce to ascertain, amongst other things, whether the policy of the Department (the police) would sanction a controlled fist fight at the oval. The short answer to his question was ‘yes’. Pryce told Whittington that the police could not arrest Ray Stevens, Sylvester Jongmin and then release them for the purposes of participating in a one-on-one fight. He told Whittington ‘that once you arrest them, they’re yours’. However, Pryce told Whittington that if two people were going to fight in the middle of the oval and be supported by their respective families, there was very little Whittington could do about it other than to make sure that the people involved were unarmed, and that it is as safe as you can make it.

25. Whittington asked Peter Cumaiyi and Ernest Perdjert for the names of those who wanted to participate in the one-on-one fair fight (transcript p.397). Whittington's intention was that he be given the names of the people from this group and that only those people would go down to the oval later that afternoon and participate in the fights. In fact, Whittington's proposal did not eventuate because the participants in the fight decided to go to the oval before they got back to Whittington with the names. Whittington was then informed that Norman Dumoo's Hilux vehicle had a group of people with weapons under the mattress.
26. About 2pm that day, Leon Schultz received a call from Anna Galas, a nurse at the clinic at Wadeye, who told Schultz that members of the Jongmin family were loading up various weapons into the back of a white Hilux. The weapons, she said, included clubs and sticks and perhaps a gun as well (transcript p.220).
27. Schultz and Whittington then drove down to the oval with the intention of intercepting the white Hilux and removing any weapons so that the fight could take place. Butcher entered the oval in a separate police vehicle. Whittington and Schultz were wearing their Glocks at the time. Butcher did not bring her Glock because she very rarely carried her weapon whilst in Wadeye. She said that carrying a gun was 'seen as a sign of aggression or distrust'. She did not consider it necessary (transcript 175).
28. When Whittington and Schultz arrived at the oval, there were a large number of people in the vicinity of Bottom Camp. People were on the oval, and on the streets running down beside the oval and beneath it. People were walking from the hill down towards the oval. Hundreds of people were gathered. Schultz said he had never seen such a large gathering of people before a fight (transcript 21). Whittington and Schultz drove across the oval to a vehicle belonging to the Jongmin family. They searched that vehicle for weapons.

29. Whittington, Schultz and Butcher proceeded to confiscate weapons from people gathered around the oval. They confiscated baseball bats, clubs, axes, branches, sticks, rocks and other improvised weapons (transcript p.222). They parked their vehicle between the oval and a ditch next to house 488 (transcript p.222).
30. There were several fights in progress around the police. Some people were cheering people on as they were fighting. The volume of people had pushed the combatants and their followers closer towards the houses at Bottom Camp. Whittington was shouting at people *'back on the oval, back on the oval'* and *'fist fight only, fist fight only'*.
31. Within a short period of time, the situation rapidly got out of control. One of the leaders of the Evil Warriors, Eugenio Kurungaiyi, ran off towards the creek being chased by a number of people (transcript p.224). Tobias Worumbu said that his brother Jude Cumaiyi was involved in one of the fights. Worumbu said that he saw his brother was surrounded and getting punched from every side by the Jongmins and the Dumoos. Worumbu said it was not a fair fight (transcript p.264).
32. Worumbu then ran and obtained a single shot shotgun from behind a house and ran back in front of house 488 (transcript p.265). Schultz saw Worumbu with the shotgun and yelled out "He's got a gun. He's got a gun" (transcript p.224).
33. Worumbu's decision to get the shotgun was the fateful prelude to the shooting of Robert Jongmin.

Whittington's version to the police about the shooting of Robert Jongmin

34. Whittington was interviewed by Superintendent Hofer at 8.20pm on 23 October 2002 at the Port Keats Police Station. It is highly probable that at the time of that interview, Whittington, at the very least, suspected that one of the bullets from his Glock pistol had killed Robert Jongmin.

35. Carmen Butcher had been instructed to go to the clinic at Wadeye by Commander Pope. She went to the clinic and saw Robert Jongmin's wounds had been caused by a Glock pistol (as opposed to a shot gun). When she returned to the station, she spoke to Whittington and said that the wounds looked like they came from a Glock, not a shotgun (transcript p.189). That conversation occurred before Whittington's Record of Interview with the police. Whittington did not deny having the conversation with Butcher. He said he simply could not recall it. Butcher's evidence is consistent with what she told police in her record of interview on 23 October 2002.
36. In Worumbu's interview with the police on 23 October 2002, he describes speaking to a short, male police officer at the cells (this description is consistent with Whittington). Worumbu said in that interview:

“And I ask him, the policemen, when he came here, who was shaking, and I ask him, you shot me, yeah. Where was the other bloke you shot him, nah, but he was guilty.”

In his interview on 24 October 2002, Worumbu was either told by the nurses, or he observed himself, that his wound and the deceased's wound were the same and was caused by the same gun. Worumbu's evidence is confirmed by Butcher who recalled Worumbu saying to a nurse in the presence of Whittington and herself (transcript p.188):

“They said I shot him in the neck. His – the gun went off, it hit the ground. You know I wouldn't do it, you know I wouldn't do it, Carmen. I didn't shoot him”.

37. Worumbu's version is also consistent with the nurse, Anna Galas, who reported that in the aftermath of the shooting, Whittington had a conversation with Worumbu in the cells in which Whittington told Worumbu “*It was me that shot you*”. Galas said that Worumbu told her that he didn't shoot “the other one, he hit the ground with his shot”. Galas also supports Butcher's version that she was present at the clinic making enquiries about Jongmin.

38. Whittington's version in his record of interview with the police was as follows. He said that when he saw Worumbu emerge with the shotgun in front of house 488 he was yelling at him '*Drop the weapon, drop the weapon*'. Whittington ran to a ditch some distance from his initial position and stopped at a ditch, continuing to call upon Worumbu to 'drop the weapon'. Whittington had drawn his Glock from his holster and was holding it with his arm out (transcript p.405).
39. Whittington says that he then saw another guy (Jongmin) running towards Worumbu. Whittington says that Jongmin was only two or three metres from Worumbu when he brought the barrel of the shotgun up towards Jongmin and fired. Whittington said he was still yelling '*Drop the weapon, drop the weapon.*'
40. Whittington then told the police that having discharged the shotgun, he believed that Worumbu was intending to fire the shotgun on a second occasion and that Worumbu was in effect tracking Jongmin. He told the police (page 36 of his Record of Interview):

“I made the conscious decision [to shoot at Worumbu] because of the people around me and the fact that this offender had raised the firearm further than what it was when he discharged it and he raised, he moved the firearm to my right following the person he'd shot. I had to take the decision to fire to stop that threat. And I fired four rounds at the offender.”

41. Whittington told the police that when he fired the four shots Jongmin (described as the 'other guy') was not in my line of sight. He said (at page 33):

“I was concentrating on, with the rifle and the offender and I could no longer see the bloke who'd been shot because I was, I was looking at this other chap, that's the rifle bloke (Worumbu). I have, I have to take the shot because of all these other people.”

42. Whittington was audibly upset when he made these comments during the Record of Interview.

43. One critical matter that Whittington did not and could not explain in his record of interview is why he did not see the deceased in his line of fire when he discharged his Glock at Worumbu. He told the police that the man who ran up to Worumbu (the deceased) was so close to Worumbu that he was “*almost touching the front of the muzzle*” of Worumbu’s gun. He drew a diagram, which was attached to his record of interview with the police which indicated that the deceased (represented by the letter Y) had moved directly into his line of fire immediately before he discharged his Glock.
44. In my view at the time he gave these answers, Whittington at least suspected that he was the person who shot Jongmin. He tailored his answers to the police to justify that shooting. I do not accept that the critical answers in Whittington’s record of interview justifying his shooting were reliable.

The fatal shooting of Robert Jongmin

45. After Worumbu ran in front of house 488, he stopped and swung the single barrel shotgun in an arc at the crowd of people who were either in front of him or coming towards him. Worumbu said he did this to frighten the ‘mob’ that was approaching him.
46. It was reasonable for Whittington at that point in time to regard Worumbu’s conduct as being a significant threat. Here was a person whom Whittington did not know, waving around a firearm, pointing it in his direction and in the direction of women and children and others who were behind him. Ambrose Jongmin, Concepta Narjic and others gave evidence that they were frightened of Worumbu’s action. Some were fearful that they might be shot. Ambrose Jongmin said that he thought that Worumbu might fire the shotgun in his direction (transcript p.107). Narjic said she was scared and shaking at that point. She said herself and maybe five children, some of whom were only three or four years old were standing directly behind Whittington (transcript p.107).

47. Whittington was entitled to believe, as was in fact the case, that the shotgun was loaded. He was also entitled to believe that there was a risk that Worumbu might fire the shotgun.
48. Very shortly after Worumbu was arcing his shotgun, Jongmin, who had come from the general direction of the oval, ran towards Worumbu.
49. As Jongmin approached Worumbu he threw a weapon, probably an axe, at Worumbu. Worumbu said that the axe came close to his head but missed him because he ducked down (transcript p.266 & 275). This is consistent with the statutory declaration of George Cumaiyi (page 6); and Rocky Cumaiyi (page 7).
50. Worumbu's description of what happened next is consistent with a considerable body of evidence tendered at the Inquest (transcript p.266):

“(Jongmin) threw that axe, and then I ducked. He missed me with that axe, and I turned round. When I turned around he got the gun, got the barrel – then he started wrestling that gun.

Coroner: You are indicating he is pushing the barrel down, is that what he's doing?

A: Yes.

Strickland: You were holding the gun?

A: Yep.

Q: Were you holding the trigger?

A: Yeah.

Q: Your finger was on the trigger?

A: Yeah it went off.

Q: And you said you were bending down?

A: Both of us, yeah. I was holding the gun like that facing down.

Coroner: Both bending down from the hips?

Strickland: And what happened then?

A: The gun went off.”

51. The evidence that the deceased and Worumbu were wrestling with the shotgun is overwhelming. Ambrose Jongmin describes the deceased wrestling Worumbu from behind and the shotgun pointing down at a 45 degree angle (transcript p.88).
52. The deceased was a large man. At the time he was shot, the deceased's body was silhouetted against the pale coloured end wall of house 488 in conditions of excellent visibility (transcript p.456).
53. Whittington fired his Glock pistol four times in quick succession after the shotgun was discharged. The evidence given by the great majority of witnesses at the Inquest was that between 1 to 4 seconds elapsed between when the shotgun was discharged and when the final of the four Glock shots were discharged.
54. Having discharged the single shot, there were no more cartridges in the breach of the shotgun. Very shortly after the shotgun was fired, it was dropped to the ground.
55. Whittington already had Worumbu in his sight picture when the shotgun was discharged. I find that Whittington's first shot went off immediately after the discharge of the shotgun. It is probable that after the first or the first two rounds of the Glock were discharged by Whittington, the shotgun was dropped and both Worumbu and Jongmin had begun to run away from the position where they were wrestling with the shotgun. In a panic, Whittington continued to fire his Glock as Jongmin and Worumbu were moving away from that position. I make these findings based upon both the forensic evidence and the evidence from the eyewitnesses.

Forensic evidence

56. Dr Cala, who prepared the autopsy report, observed that the trajectory path of the bullet which killed the deceased entered the right side of his back and travelled about 45 degrees upwards (that is, going from the feet up towards the head of the body), struck and fractured the fifth rib, continued to pass upwards and forwards through the right lung, struck the windpipe and then exited the left side of his neck (transcript 340-343). The bullet passed from the right side of his body over to the left side of his body. The deflection from striking the rib only accounted for several degrees of the 45 degrees of the trajectory of the bullet (transcript p.343).
57. The deceased was about 180cm tall. The exit wound on the left side of his neck was at a height of 162cm above his heel. The bullet which struck the louvre contained traces of blood, which was the same as the DNA profile of the deceased. The impact point of the bullet on the louvre was one meter from the ground at a distance of somewhere between 13.5 to 19 metres from where the deceased was struck. Based on these facts, Dr Cala was of the opinion that at the time the deceased was shot, he was crouched or bending over in some way such that the position of the left side of his neck where the exit wound was situated was just about a level of one metre above the ground (transcript p.344).
58. The Crime Scene Examiner, Gino Rob, found four cartridge cases from a Glock which were located close to a light pole near the oval. According to Senior Constable Butcher, she found the four cartridges the following morning after the shooting and they were at the location where she recalled Whittington was standing at the time of the shooting (transcript p.195). That was indicated as C1-4 on his layout diagram: Exhibit 2 Folder 3 tab 14 (“the layout diagram”). Rob conducted some standard tests in relation to the dispersal patterns of the cartridges in the Glock to ascertain the probable position where Whittington stood when he discharged his Glock pistol. The average ejection distance of the cartridges was about 2.3 meters from where

Whittington fired his Glock. This was the position “RW” on the layout diagram (transcript p.322-323).

59. At about 7.00am on 24 October 2002 Rob noticed a hole in the ground at a position marked on the layout diagram as “SG1” (shot ground 1). Ambrose Jongmin also noticed later on that the discharge of the shotgun had caused a big hole (transcript p.89). This hole was consistent with a shotgun having been discharged into that area. This was also the location where Butcher had said she had found two lead pellets (transcript p.320). Rob himself had found a further shotgun pellet in the soil. The three pellets contained 50-60% lead. On the basis of that information, Rob concluded that the position “SG1” was the point where the shotgun had discharged its projectile onto the ground. That opinion was not seriously contested at this Inquest.
60. The majority of witnesses who gave evidence at the inquest said that they saw a plume of dust rise from the point where the shotgun was discharged. Those witnesses said that Worumbu and Jongmin were close to the position where the shotgun was discharged – about 1 to 2 metres, and perhaps less than 1 metre. A fragment of the shotgun was located at position “B1” which was 6.55 metres from “SG1”. This fragment was the remains of the shotgun, which had been smashed on the ground by Ambrose Jongmin immediately after the shots had been discharged by the Glock. “SG1” was 41.8 metres from where the four cartridges were found at approximately 40 metres from where Whittington was standing at the time he discharged his Glock.
61. Gino Rob did tests on the Glock firearm and found that it was shooting accurately and that it had no faults (transcript p.327).
62. Based upon the trajectory lines depicted in the layout diagram, it is highly probable that at the time he was shot, the deceased had moved some distance (at least 5 metres) towards house 488 from the point where the shotgun had been discharged. I make that finding because if the deceased had remained in the position he was in when the shotgun was discharged, it is impossible

to conceive how the bullet, which killed the deceased, could have struck the louvre. The deceased must have moved towards the house at the time he was struck by the bullet. The entry and exit points of the bullet wounds indicate that the deceased had his back facing Whittington when he was shot.

63. I also accept Dr Cala's finding it was unlikely that the bullet which struck Worumbu had also struck the deceased (transcript p.346). In other words, the deceased was struck by the second, third or fourth bullet. Given his distance from the point of discharge from the shotgun and the period of time which had elapsed, it is more likely that the deceased was struck by the final of Whittington's shots. It is also likely that the deceased was running towards the house crouching or bending down in order to try to avoid being shot at. This is consistent with Worumbu's description on 23 October 2002 of seeing the deceased before he got shot. Worumbu says he was "running and looking back". He said:

"When he – when he was running, only – only I know when he got – when he – when he ducked down, and duck and running, yep, he trying to get some speed. That policeman, when he got me, and he trying to shoot him, when he shot him, he went like this (noise) and went this, and keep running"

Eyewitnesses

64. The forensic evidence which I have cited above is also consistent with the majority of eyewitnesses who gave evidence or who made statements for this Inquest.
65. The eyewitness accounts diverge on the issue as to whether Whittington **commenced** to fire his Glock pistol before or after the shotgun was dropped. However, the overwhelming number of eyewitness accounts support the view (which is consistent with the forensic evidence) that Whittington **continued** to fire his Glock whilst the deceased and Worumbu had commenced to run towards house 488.

66. Worumbu gave evidence at the inquest that the first bullet fired by Whittington struck him on his arm and that at the time the first of the Glock shots went off, he dropped his shotgun (transcript p.271). His evidence at the inquest was that by the time Whittington had fired the second and third shots from his Glock, he had already begun to move away from the place where he had dropped the shotgun (transcript p.271). Worumbu's statement to the police on 24 October 2002 was that the first Glock shot went off after he dropped his shotgun to the ground. I do not need to resolve the differences in these versions of events because he is consistent on the critical fact that Whittington continued to shoot when he was running away towards house 488.
67. Ambrose Jongmin's evidence was that he heard the shots from the Glock **after** Worumbu had dropped the shotgun (transcript p.94). Immediately after that, Worumbu ran towards the eastern side of house 488 followed by the deceased (transcript p.94).
68. Concepta Narjic supports Ambrose Jongmin's evidence on this point. She said (transcript p.112):
- “Tobias fired then there was silence. The two men started running away and then the policeman fired.”
- Narjic said they were running towards the house.
69. Marcellus Wundjarr, during his re-enactment with the police on 25 October 2002 said that Worumbu and the deceased were still fighting over control of the shotgun when he first heard Whittington fire his Glock. Wundjarr appears to state that Whittington was “still firing” his Glock when Worumbu began to run away.
70. Phillip Dumoo in his reconstruction of events on 25 October 2002 said that when he heard the shots from the Glock, he saw the two boys running – “they were chasing each other”.

71. Senior Constable Butcher’s evidence was that she was standing only 3 to 5 metres away from Whittington when she saw the shotgun hit the ground and she heard instantaneously or virtually instantaneously the first of the shots fired from the Glock. She turned to see Whittington holding his Glock. She then turned back to see Worumbu turning and running towards the houses. Worumbu (transcript p.180):

“had already started to turn and was completing his turn and started running as [the other three] shots went off.”

72. Senior Constable Leon Schultz saw events differently. He saw Worumbu throw the shotgun down and then turn and run away to the rear of the houses **after** the final shot was discharged from the Glock (transcript p.228). However, Schultz’s description of events was hampered because he had sensibly sought cover behind the police Hilux vehicle when he first heard the shotgun discharged. By the time he had turned around and was facing Worumbu, all the shooting had stopped (transcript p.227). When he came around the Hilux, he did not see Jongmin again (transcript p.227). He was also at least 40 to 50 metres from Whittington when he made his observations (transcript p.233).

73. David Norris also observed that at the time Whittington fired his final shot, the deceased and Worumbu were still wrestling, “but not to the same extent” (transcript p.247).

74. The majority of witnesses whose statements were tendered, but who did not give evidence at the inquest, supported the view that Whittington continued to fire his Glock after the deceased and Worumbu had commenced to run towards house 488.

Whittington’s evidence at the Inquest

75. In his evidence in chief, Whittington said that the shotgun was dropped to the ground after he fired the **final** round (transcript p.414). He said he stopped firing when “*the threat stopped. The rifle hit the ground*”.

76. He was asked the following questions by his counsel, Mr Rowbottam:

“Q: What made you stop firing? You had 15 shots obviously. What made you stop firing?”

A: The threats stopped. The rifle hit the ground.

Q: How did you know it had hit the ground?

A: I saw the rifle go to ground, so that there was no more threat from the weapon with that person at that time, so I stopped.

77. However, in cross-examination, Whittington conceded that the shotgun may have hit the ground before the final of his four shots had been discharged (transcript p.462).

78. I do not accept that Whittington stopped firing his Glock pistol as soon as the shotgun was dropped to the ground.

79. Whittington said in his evidence in chief (transcript p.408):

“I’ve taken a sight picture of Mr Worumbu because he wasn’t complying with my command, and I believe that this other fellow was in serious danger from the rifle, as I understood it to be”

80. Whittington maintained throughout his evidence that when he fired his Glock, he did not see the deceased, as he put it, “the deceased was not in his sight picture” (transcript p.440, 448, 456). This evidence is difficult to reconcile with his statements when he was interviewed by the police that the deceased came directly into his line of fire immediately prior to his discharge of his Glock pistol (transcript p.480).

81. Whittington was under considerable stress when he discharged his Glock and probably suffered from tunnel vision and possibly auditory exclusion, which prevented him from clearly seeing anything or anyone other than Worumbu and his shotgun. Hansen described the phenomenon of ‘tunnel vision’ as a common “physiological reaction to a psychological threat” (transcript p.306).

82. Whittington did not follow the procedure which he had been trained in, namely, to scan the area prior to discharging his pistol in order to overcome his tunnel vision (transcript p.306).
83. Whittington later gave evidence that after he had heard that shotgun discharged, he assumed that Jongmin had been shot by Worumbu because “I couldn’t see how you’d miss from that distance with a shotgun” (transcript p.449 & 440).
84. At the beginning of his cross-examination, Whittington remained of the opinion that:

“it was appropriate to fire upon Tobias Worumbu. If I had known that Robert Jongmin was going to be under my sights I would not have fired” (transcript p.424).

He stubbornly maintained that it was appropriate to fire his pistol with house 488 as a backstop even though the louvres were in a half open position and he had no idea whether anyone was inside that house (transcript p.426). However, by the end of his evidence, Whittington accepted that his original version of events was mistaken and he implicitly accepted that his conduct in discharging 4 shots from his Glock was a serious error of judgement.

85. During his evidence, Whittington was referred to the answers he gave in his record of interview, namely, that after Worumbu had fired the shotgun at the deceased, he had raised the muzzle of the shotgun for a second time at the deceased and was following him with that muzzle (transcript p.451).
86. He accepted that not one of the witnesses who gave evidence at the inquest or who gave statements to the police describe what Whittington said occurred, namely, that;
 - (a) Worumbu discharged his shotgun when he was pointing it in the direction of the deceased; and

- (b) That after firing the shotgun, Worumbu followed or tracked the deceased with that shotgun (transcript p.452).
87. Whittington was asked in cross-examination about these two crucial statements he made to the police during his record of interview whether:
- (a) He was right about these two matters and everyone else was wrong (option 1);
- (b) He was lying deliberately about these two matters (option 2); or
- (c) He was mistaken about these two matters (option 3).
88. Whittington chose the third option and conceded that he was mistaken about these two critical matters. In other words, the justification he gave to the police for discharging his Glock, could not be sustained. He was asked:
- “Coroner: Might it be it that the reason you made those mistakes is, when you really think about it, you panicked?”
- A: It may have been. It’s just not a concept people readily accept, is it, but you know an armed offender”
89. I find that Whittington did not intend to kill, wound or shoot at the deceased. I also find that Whittington probably did not see the deceased when he discharged his Glock pistol. Whittington discharged his pistol 4 times because he acted under considerable stress and was probably in a blind panic at that time. This was the first time in his entire career as a police officer that a person had ever pointed a firearm at him (transcript p.447).
90. However, Whittington’s decision to discharge his pistol four times in the circumstances he did demonstrated a serious error of judgement. **First**, Whittington knew or ought to have known that he was not a sufficiently good marksman to be able to hit his target at 40 metres distance (Whittington perceived he was 70 metres away) with all 4 shots. The spread of bullets on house 488 and the fact that the fourth bullet did not even hit house 488 is testimony to that fact. He had not trained with his Glock at

distances greater than 12 metres. During his training, he had not shot accurately at static targets at 12 metres. Worumbu was a moving target at a distance of some 40 metres and Whittington was shooting in a condition of considerable stress.

91. **Secondly**, Whittington clearly breached one of the four fundamental safety principles for discharging weapons: “*Be sure of your target. Know what it is, what is in line with. Never shoot at anything you have not positively identified*”. Critical to this rule is that the person discharging the firearm is sure that he fires his firearm in a safe direction, namely, that any fired shot would be safely stopped and contained with no human injury, and at most minimal property damage. The backdrop to this shooting was a house with 2 louvres half open. In fact, the bullets did enter that house through the window. It was pure good fortune that no-one else was injured. Whittington paid no regard to that danger.
92. **Thirdly**, Whittington clearly did not properly scan the area before he commenced to discharge his pistol. If he did, he could not have avoided seeing the deceased in very close proximity to his target.
93. **Fourthly**, his decision to discharge his pistol four times was a fatal error. I do not believe that Whittington would have had the time or the expertise to properly re-sight his pistol after each shot. Worumbu’s shotgun had been dropped by at least the second if not the first round of the shots fired. When the shotgun was dropped, the threat had disappeared. The deceased was shot as he was commencing to run away towards the house. There was simply no justification whatsoever for Whittington’s decision to continue firing his pistol.

Police investigation

94. Generally, the investigation into the death of the deceased was quick, thorough and competent. The investigation was carried out in accordance

with General Order D2 – *‘Deaths in Custody and Investigation of Serious and/or Fatal Incidents resulting from Police contact with the Public’*.

95. The police investigation into the death of the deceased commenced within a few hours of the fatal shooting. Commander Bertram Hofer and six other police officers arrived at Wadeye at about 6.50pm on 23 October 2002. They immediately commenced their investigation, which included taking swabs from Whittington, Butcher and Schultz and interviewing various witnesses by way of audio taped conversation. At 8.20pm on 23 October 2002 Detective Superintendent Hofer interviewed Whittington at the Port Keats Police Station.
96. With the benefit of hindsight, it would have been prudent to have interviewed Whittington after obtaining information from other witnesses because it then would have been made clear that the deceased died from being shot by Whittington, not by Worumbu. Indeed Hofer candidly admitted in evidence that by 24 October 2002 he viewed Whittington as a homicide suspect (transcript p.369). The consequence of this oversight was that Whittington was not cautioned before or during his interview. Different questions would most probably have been asked of him had it been known conclusively that it was Whittington who shot the deceased.
97. Some criticism was levelled at the police for failing to require Whittington to participate in a reconstruction at the scene of the shooting. I accept the explanation given by Hofer that such a reconstruction was impractical in the circumstances where there was considerable unrest in the community and Whittington’s safety was endangered if he remained in the community (transcript p.357 & 366). I also accept the explanation given by Hofer that it was very difficult to secure the crime scene for similar reasons (transcript p.354).
98. On 7 January 2003, Hofer wrote a memorandum to Assistant Commissioner Owen recommending that the investigation file be referred to the Office of

the Director of Public Prosecutions to review and if agreed, to prepare a charge that Whittington committed a dangerous act causing death.

99. On 24 March 2003 the police, acting on the recommendation of the Director of Public Prosecution laid two charges of dangerous act causing death against Mr Whittington. Committal proceedings in relation to these charges were heard and concluded on 21 October 2004.
100. On 28 January 2005, an indictment was presented to the Supreme Court. On 11 August 2005, Mildren J quashed the indictment because the charge had not been laid within two months of the act complained of as required by section 162(1) of the *Police Administration Act*. The Court of Criminal Appeal upheld Mildren J's decision on 26 February 2007.
101. I completely accept the evidence of Hofer that the investigation of the shooting was not in any way delayed to take advantage of section 162(2) (transcript p.359). I accept that the police, and indeed the legal community in the Northern Territory did not appreciate the full ambit of section 162(1) of the *Police Administration Act*. Hofer gave evidence that he was aware that over 37 members of the Northern Territory Police Force had been charged with criminal offences since 1996. Of those 37 cases, 17 cases fell within the ambit of section 162 namely, the acts complained of were related to their official duties. In almost all of those 17 cases charges were laid outside the two month period because the police did not appreciate that section 162 applied to criminal prosecution (transcript p.360 & 373).
102. I am satisfied that during this investigation, Whittington was not treated differently from any other suspect because he was a police officer. The police general orders specified that where the suspect or person of interest is a police officer certain procedures and protocols must be followed, which were in this case (transcript p.376).
103. There were some problems that arose from the police investigation. First, it would have been preferable for the police to have made greater efforts to

obtain the services of interpreters when interviewing Aboriginal witnesses (transcript p.365). Secondly, the PROMIS system (the police computer systems) was not available to the investigators mainly due to technical problems existing at Wadeye Police Station in 2002. Thirdly, the contemporaneous records of the investigation and the handwritten notes by the investigating police officers and other contemporaneous material were misplaced. Some of that material had been subpoenaed for the committal proceedings (transcript p.356). The Commissioner of Police would be well-served by having a more efficient system of retaining all documents, particularly contemporaneous documents such as running sheets and police notebooks which may be relevant in a future coronial inquest.

104. Four disciplinary charges were laid against Whittington. An internal memorandum from Acting Commander Kendrick to Deputy Commissioner Wernham (exhibit 20) recommended that disciplinary action against Whittington dated 26 May 2003 be formally withdrawn. That recommendation was acted upon and the disciplinary charges were withdrawn.
105. The decision to withdraw the disciplinary charges was unfortunate. In recommending the withdrawal of the charges, the internal memorandum did not expressly take into account that the principal purposes of disciplinary proceedings is to maintain appropriate professional standards; and to indicate to individual police officers and to the general public what those standards are and to make a determination as to whether an individual police officer has fallen below those standards. Bearing in mind the serious errors of judgement made by Whittington, it was inappropriate to withdraw the disciplinary charges before the outcome of the coronial inquest.

Training

106. There was considerable evidence adduced at the Inquest about the benefits of interactive training, which involved dynamic, moving targets and where police officers are trained to make quick and optimal judgment calls. The

evidence of the firearm instructors, Mr Greg Hansen and Mr Lloyd emphasised the utility of such training (transcript p.290-291 & 314). So too did Senior Constable Whittington.

107. I would recommend consideration be given to improving or enhancing training given to all recruits and operational members, who participate in weapons training for the purposes of re-certification.

Section 35 reporting

108. Pursuant to section 35(3) of the *Coroner's Act*, I report to the Commissioner of Police and Director of Public Prosecutions that on 22 October 2002 at Wadeye, a crime contrary to section 154 of the *Criminal Code* may have been committed which caused serious actual danger to the life, health and safety of Robert Jongmin and Tobias Worumbu in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done the act. The discharge of the firearm resulted in the death of Robert Jongmin and injury to Tobias Worumbu.

Dated this 3rd day of December 2007.

GREG CAVANAGH
TERRITORY CORONER