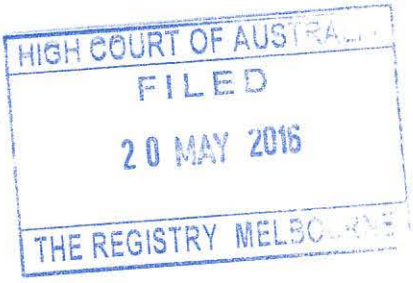
IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B14 of 2016

BETWEEN:



MARK JAMES GRAHAM
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

PART I:

1. Certification

    1.1. This submission is in a form suitable for publication on the internet.

PART II:

2. Reply to the argument of the respondent.

    2.1. A miscarriage of justice has resulted in this case notwithstanding the failure of defence counsel to request a redirection[1] as:

        2.1.1. It was conceded by the respondent at the trial that self-defence ought to be left to the jury under each of ss 271(1), 271(2) and 272 of the *Code*[2].

        2.1.2. The prosecutor's concession was clearly properly made and in any event the trial judge was obliged to leave all three bases of self-defence to the jury regardless of the position adopted by either counsel[3];

        2.1.3. The respondent has submitted that *". . . the defences raised were explained to the jury and provided to them in writing"*[4]. This is strictly true, but the invitation by his Honour to the jury to consider the Crown Prosecutor's submission that they could find that the appellant had consented to the threatened application of force with the

---

1 *Dharhoa v The Queen* (2007) 217 CLR 1; *Code* s 668E

2 Appeal Book ("AB") 166-171

3 *Fingleton v The Queen* (2005) 227 CLR 166 at [83] and for an example of a successful appeal where one of the bases of self-defence was not left and was not requested to be left by trial counsel see *R v Beetham* [2014] QCA 131

4 Paragraph 9 of the respondent's submissions

Grigor Lawyers
Level 1, 271 William Street
MELBOURNE VIC 3000

Telephone: 03 9642 3517
Facsimile: 03 9670 8850
Email: alastair.grigor@grigorlawyers.com.au

knife, led the jury down a path whereby they may have excluded the defence on a basis not justified by law. The potential removal from the jury's consideration of the proper elements of the defence has caused a miscarriage of justice.

2.2. The respondent submits that trial counsel made a forensic decision not to seek a redirection[5]. The real question is whether a miscarriage of justice has occurred[6]. Here a miscarriage of justice has occurred by the trial judge's failure to properly direct the jury as to the appellant's defence.

2.3. In any event, there is no reasonable basis to conclude that a forensic decision was made not to seek a redirection. The appellant undoubtedly fired two shots at Teamo and shots had hit both Teamo and Ms Devitt. The appellant's only real defence was self-defence, and the trial judge had determined that self-defence should be left to the jury. The respondent's submission[7] that a reasonable forensic decision could have been made to avoid scrutiny of evidence that the appellant had consented to the assault[8] ought to be rejected because:

2.3.1. The issue was not whether the appellant had consented generally to being threatened;

2.3.2. The issue was whether the appellant had consented to being assaulted by Teamo with a knife;

2.3.3. The respondent's distinction between a *"threat"* and *"threatened result"* is a distinction with no meaning[9]. Self-defence is made against a threatened application of force. The force threatened is here obviously stabbing or cutting with a knife. That is the force (the stabbing or cutting) to which self-defence is made;

2.3.4. There was no evidence that the appellant knew that Teamo had a knife until he produced it immediately before the shooting;

2.3.5. The proper direction which ought to have been sought and given was that the jury could not find that the appellant had consented to the assault[10];

2.3.6. There could be no reasonable forensic decision made not to exclude consent from the jury's consideration.

2.4. The better inference is that defence counsel was taken by surprise by the Crown Prosecutor's submission that the appellant had consented to being

---

5 Respondent's submissions paragraph 21

6 *Nudd v The Queen* (2006) 80 ALJR 614 at [7]-[8] and see *TKWJ v The Queen* (2002) 212 CLR 124 at [16]

7 Respondent's submissions paragraphs 14-20

8 Constituted by threatened application of force

9 Respondent's submissions paragraph 15

10 Constituted by the production of the knife being a threatened application of force

threatened by Teamo with the knife. On Friday 26 September 2014, the Crown case closed, and the defence elected to lead no evidence[11]. The trial judge excused the jury until Monday 29 September[12] and invited submissions from counsel as to available defences and other directions[13]. The Crown Prosecutor fairly conceded that self-defence under each of ss 271(1), 271(2) and 272 was available[14]. The Crown Prosecutor identified the relevant *"assault"* to which defence was made as including a threatened application of force with the knife[15]. Any threats prior to the production of the knife may (so the prosecutor said) have been consensual[16]. There was no suggestion by the Crown Prosecutor at that time that the Crown's case was that the appellant had consented to the assault constituted by the threatened application of force with the knife. In his address, the prosecutor took a different approach[17]. Defence counsel has seemingly failed to respond to this change of position.

2.5. The respondent has submitted that the appeal ought be dismissed upon application of the proviso[18]. No notice of contention has been filed by the respondent raising, as an issue before this court, the application of the proviso[19]. The appellant therefore submits that the court ought not consider the respondent's submission on the application of the proviso. The appellant though makes submissions in answer to the respondent's submissions on the application of the proviso in recognition of the court's discretion to give leave (which, if requested, is opposed) to the respondent to file a notice of contention out of time[20].

2.6. The respondent has submitted that the appeal ought to be allowed in reliance upon the proviso because the court can be satisfied beyond reasonable doubt that the appellant is guilty[21] because:

2.6.1. The CCTV footage shows Teamo retreating at the time the two shots are fired;

2.6.2. That shows that the force used in self-defence by the appellant was excessive;

---

11 AB 163

12 AB 164

13 AB 165

14 He at least didn't argue with the judge's view that all three should be left: AB 171

15 AB 167 line 34; AB 169 lines 10-15 and AB 170 lines 22-27

16 AB 169 lines 15-20

17 AB 316 lines 10-12; and see the other references in paragraphs 6.7-6.15 of the appellant's submissions

18 *Code* s 668E(1A)

19 *High Court Rules* r 42 .08.5

20 *Campbell v Bank Office Investments* (2009) 238 CLR 304 at [152] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [43] and *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992

21 *Weiss v The Queen* (2005) 224 CLR 300 at [4] and see [38]-[45]

2.6.3. This court is in as good a position as a jury to assess the evidence because (it seems to be submitted) the only relevant evidence is the CCTV footage.

2.7. The respondent's submissions ought to be rejected on two bases:

2.7.1. Even if the CCTV footage was the only evidence, it should not be concluded by this court that the accused is guilty beyond reasonable doubt;

2.7.2. There is other relevant evidence for jury assessment.

2.8. The defences created by ss 271(1), 271(2) and 272, all contain both subjective and objective elements. For example, under s 271(2) the question is whether *"the force in fact used was no more than the accused honestly and reasonably believed to be necessary for defence"*[22].

2.9. In determining the belief of the accused *"detached reflection cannot be demanded in the presence of an uplifted knife"*[23].

2.10. While it might be that on one view, the appellant, to a point, advanced towards Teamo, his actions were clearly a reaction to the production of the knife. He was entitled to react to the threatened application of force. He was entitled to make a pre-emptive strike. His reaction was spontaneous and both shots were fired quickly. It cannot be concluded beyond reasonable doubt that he did not hold the requisite belief or that he acted disproportionately.

2.11. As well as the CCTV footage, there is other evidence which the jury heard, relevant to the issue of self-defence. In particular:

2.11.1. The appellant and Teamo clearly knew each other and were adversaries. This is the only rational explanation of the two men's behaviour in the Sony shop[24];

2.11.2. Further evidence of the fact that there must have been an acrimonious history between the two men is the evidence of Teamo's son Zakkaria Teamo, that Teamo said he would stab the appellant[25];

2.11.3. The CCTV footage shows that the appellant left the area outside the Game shop but Teamo pursued him and was yelling at him;

---

22 Section 271(2); as explained in *Marwey v The Queen* (1977) 138 CLR 630 at 636 citing *R v Muratovic* [1967] Qd R 15 at 18-19

23 *Brown v United States of America* 256 US 335 (1920) at 343 cited with approval by Dixon CJ in *The Queen v Howe* (1958) 100 CLR 448 and *R v Portelli* (2004) 10 VR 259 at 271

24 AB lines 25-45, (witness Paul)

25 AB 265

2.11.4. The evidence of various witnesses was to the effect that Teamo was acting aggressively towards the appellant[26].

2.12. The issue of self-defence was a live issue before the jury. It was for the jury to assess all the evidence in accordance with proper directions. The Crown Prosecutor's submissions, and the trial judge's directions diverted the jury from consideration of the real issue. The court should not conclude that no substantial miscarriage of justice has occurred.

10

Name:	Peter John Davis QC	Name:	Joshua R Jones
Telephone:	(07) 3175 4601	Telephone:	(07) 3175 4688
Facsimile:	(07) 3175 4666	Facsimile:	(07) 3175 4666
Email:	pdavis@qldbar.asn.au	Email:	jrjones@qldbar.asn.au

Dated 13 May 2016.

[26] AB 22 lines 40 – AB 23 (witness Tan); AB 91 lines 35-45 (witness Braybrook); AB 101-102 (witness Taylor) and AB 124 (witness Reid)