HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, NETTLE AND GORDON JJ

MARK JAMES GRAHAM APPELLANT

AND

THE QUEEN RESPONDENT

Graham v The Queen
[2016] HCA 27
20 July 2016
B14/2016

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

P J Davis QC with J R Jones for the appellant (instructed by Grigor Lawyers)

P J Callaghan SC with V A Loury for the respondent (instructed by Director of Public Prosecution (Qld))

CATCHWORDS

Graham v The Queen

Criminal law – Appeal – Directions to jury – Where appellant convicted of attempted murder after firing shots during confrontation with man with knife – Where appellant relied on defence of self-defence under ss 271(1), 271(2) and 272(1) of *Criminal Code* (Q) – Where prosecutor suggested in closing address existence of "consensual confrontation" negated self-defence – Where trial judge did not direct jury that no evidence of consent – Where no redirection sought by defence counsel on this issue – Whether trial judge failed to properly direct jury as to self-defence – Whether trial judge erred in failing to direct jury as to defence of mistake under s 24 of *Criminal Code*.

Words and phrases – "assault", "consensual confrontation", "consent to assault", "mistaken belief", "self-defence".

Criminal Code (Q), ss 24, 245, 271, 272.

FRENCH CJ, KIEFEL AND BELL JJ.

Introduction

1 The appellant was convicted after trial before a judge and jury in the Supreme Court of Queensland of attempted murder and unlawful wounding with intent to maim. The indictment expressed the offences as contrary to ss 306(a) and 317(b) and (e) of the *Criminal Code* (Q) respectively[1]. The convictions arose out of an incident at the Robina Town Centre at the Gold Coast in Queensland on 28 April 2012.

2 The incident leading to the charges involved a confrontation between the appellant and one Jacques Teamo ("Teamo"). In the course of the confrontation, Teamo produced a knife and the appellant produced a hand gun and fired two shots. One of the bullets struck Teamo in the arm, albeit without inflicting a life threatening injury. The other struck and injured an innocent bystander, a shopper in the complex, Kathy Devitt.

3 The appellant was sentenced to 12 years and three months imprisonment for the offence of attempted murder, seven years for the offence of unlawful wounding with intent to maim and one year and six months for the offence of unlawful possession of a weapon, to which he had previously pleaded guilty. All sentences were to be served concurrently.

4 The appellant appealed to the Court of Appeal of the Supreme Court of Queensland against his convictions and applied to that Court for leave to appeal against the sentences. The application for leave to appeal against sentence was refused. His appeal against conviction was based upon allegedly inadequate directions by the trial judge as to his defence of self-defence. In particular, he complained of the trial judge's direction in relation to a suggestion by the prosecutor that Teamo's alleged production of the knife prior to the appellant shooting Teamo was part of a "consensual confrontation" and therefore not an assault. He also argued that the trial judge failed to leave to the jury the defence of honest and reasonable but mistaken belief as to fact under s 24 of the *Criminal Code* based upon a proposition that the appellant may have mistaken Teamo's conduct for an assault by threatened application of force and acted accordingly. The appellant was granted special leave to appeal in this Court on those questions on 11 March 2016. For the reasons that follow the appeal should be dismissed.

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1 The reference to s 317(b) would appear to be incorrect and should have been a reference to s 317(a).

Evidence as to relevant facts

5 The evidence relevant to the grounds of appeal was referred to in the judgment of Atkinson J in the Court of Appeal, with whom Morrison JA and Applegarth J agreed. It may be summarised briefly.

6 On 28 April 2012 the appellant went shopping at the Robina Town Centre with members of his family. Teamo was at the shopping centre at the same time with his two young sons. He and the appellant were members of rival motorcycle clubs. Both were armed. The appellant was carrying a loaded hand gun in a pouch bag on a belt around his waist. Teamo was carrying a flick knife in a shoulder bag.

7 Teamo entered a Sony store with his younger son. His older son was pushing a shopping trolley behind him. The appellant walked past, saw Teamo, stopped, paced up and down outside the store entrance, felt for something in his pouch, then entered the store. He walked around staring at Teamo. Teamo said "What are you looking at?" The appellant then left the store. Teamo said to his older son that he was going to "stab that guy". What he said was not heard by the appellant.

8 Teamo then walked out of the store. He appeared to touch something in his shoulder bag, then followed the direction taken by the appellant. He stopped and gestured towards the appellant and said "What are you looking at? You got a problem?" Both were described by witnesses as puffing their chests and shouting at each other. The appellant walked towards Teamo. As the appellant reached into his bag he dropped a ten dollar note, which a passer-by picked up and gave to him. There was an issue at trial as to who took his weapon out first. At some point Teamo took his knife out and extended the blade, stopped and started backing away. The appellant held his gun in his right hand moving towards Teamo. He pointed it at him and shot him once at close range but not seriously injuring him. Another shot missed Teamo and struck Ms Devitt. Bullet fragments lodged in her right hip. It is not clear which shot hit which person. After firing, the appellant walked away holding his gun in his hand. Teamo returned to the entrance of the Sony store where his sons were waiting and left the store.

The statutory provisions

9 The principal issue at trial turned on the defence of self-defence. The burden lay upon the prosecution to negate self-defence beyond reasonable doubt. Three different types of self-defence, referred to in ss 271(1), 271(2) and 272 of

the *Criminal Code*, were in issue. They were self-defence against an unprovoked assault[2], self-defence against an unprovoked assault where there is a reasonable apprehension of death or grievous bodily harm[3] and self-defence against a provoked assault[4]. Section 271(1) provides that:

> "When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm."

10 Section 271(2) applies where "... the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm ...". In those circumstances, "it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm."

11 As appears from the terms of s 271(1) and (2), a person who has provoked an assault cannot invoke the defence of self-defence under either of those provisions. Reliance must be placed upon s 272. Section 272(1) provides:

> "When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm."

12 It was common ground at the trial that the term "provoked" in each section attracted the application of the definition of "provocation" in s 268(1), which provides:

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2 *Criminal Code*, s 271(1).

3 *Criminal Code*, s 271(2).

4 *Criminal Code*, s 272(1).

> "The term ***provocation***, used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person ... to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered."

The application of that definition was not in issue in this appeal. In Queensland it has been held to be applicable to the term "provoked" in s 271[5]. As appears below, however, there was confusion about its application in the closing address of counsel for the prosecution, who linked it to a non-existent defence of provocation on the part of the appellant.

13 It is necessary to the defence of self-defence under each of ss 271 and 272 that the person claiming its benefit was "assaulted". That requirement engages the definition of the term "assault", which appears in s 245 of the *Criminal Code* and includes:

> "(1) A person ... who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an ***assault***."

That limb of the definition, which was applicable in this case, requires that the act constituting the assault be done without the consent of the person assaulted. Obvious examples of consensual application of force which is therefore not an assault include surgery, dental treatment and sporting matches involving deliberate physical contact. Relevantly to this appeal, a threat by one person to apply force to another can constitute an assault. The defence of self-defence is not available if the threatened application of force was done with the consent of the person threatened. In that event there would be no assault.

Counsels' closing addresses

14 Counsel for the prosecution commenced his closing address on the issue of self-defence with the observation that:

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5 *R v Prow* [1990] 1 Qd R 64 at 86 per Shepherdson J, 88 per Williams J; *R v Dean* [2009] QCA 309 at [25] per Fraser JA, Cullinane J agreeing at [50]; cf *Gray v Smith* [1997] 1 Qd R 485 at 489 per Pincus JA and Mackenzie J.

> "Now, there's three central propositions that I want to put to you as to why you'd accept, beyond reasonable doubt, that none of the self-defence provisions apply. The first is that both the defendant and Teamo really, at least, started behaving as badly as each other, that what was occurring was, at least until the gun was pulled out, a consensual fight or consensual confrontation — conflict. From the time the gun was pulled out the defendant became the aggressor. He was not acting in self-defence. He was the aggressor. And flowing from the proposition that it was a consensual fight or conflict is that the production by Teamo of the knife was simply either part of that consensual assault — part of that consensual fight or did not raise enough provocation to require actions in self-defence."

There were other references to a "consensual confrontation" in counsel's closing submission. At one point he described the incident as having started as a "consensual confrontation" and said:

> "That's not an unlawful assault. To be unlawful, there must be no consent."

Counsel then went on to say that:

> "The production of the knife if it was not part of that consensual confrontation did not, in the circumstances, provide provocation for a man to lose his self control."

15 The reference to consensual confrontation was at best puzzling given the state of the evidence. Its conflation with provocation of the appellant and loss of control on his part, when that was not an issue in the case, was inexplicable. Counsel turned specifically to the concept of assault and said:

> "In each case, there must be an unlawful — and I emphasise — unlawful assault which provokes the act said to be done in self-defence. As I say, the definition of assault is very important to understand: it doesn't only mean coming into contact; it can also mean — and I'm paraphrasing — a threatened application of force by one to another without the other's consent and in circumstances where the first person is in a position to carry out a threat. A threatened application of force; that's what was happening. They were both in puffing mode. But it must be without consent and they were both in it; they were both happy to be doing that."

Counsel continued:

> "So if the production of the knife itself was not part of that consensual fight, in the circumstances of what had happened, it certainly was not

> enough for that man to be losing self control when he knew, if not in his hand, sitting at the front of his waist is a loaded firearm. So issues of who pulled the weapon first and that sort of thing may well come into play, but in my submission to you, it was all consensual and it was all puffing. And any threatened application of force at that time was by consent. Once you're satisfied beyond that proposition beyond a reasonable doubt, any threatened application — that any threatened application of force was consensual, the assault is not unlawful and all forms of self-defence will be defeated; they would then no longer have any role to play in deliberations."

16 Counsel for the prosecution then submitted that if the production of the knife was not part of "that lawful assault" it did not in the circumstances amount to "the provocation required to justify the use of force itself." Again, this was a misuse of the concept of provocation which might have conveyed to a jury the proposition that the appellant's actions could not be justified unless he suffered a loss of control in reaction to Teamo's assault. This aspect of the address was not raised in the grounds of appeal in the Court of Appeal. That is perhaps understandable. The compendious direction given by the trial judge included a comprehensive list of questions which the jury had to answer in order to reach the various verdicts open to them. Neither the directions nor those questions disclosed error relevant to the use of the concept of "provocation".

17 Counsel for the appellant initially drew the attention of the jury to Teamo's state of mind as evidenced by his statement to his son that he was going to stab the appellant and his gestures and language when he came out of the Sony store. He observed that there were no words attributed to the appellant that suggested any intention, let alone an intention to kill.

18 Counsel for the appellant submitted to the jury that, quite apart from self-defence, the evidence would not allow them to be satisfied that the appellant intended to kill Teamo or that he intended to maim, disfigure, disable or cause grievous bodily harm to him. The incident involved a "split-second response to an exposed flick-knife leaving little or no time for anything other than an instinctive act of survival." The act of survival was the raising of a weapon and the pulling of the trigger twice in the direction of Teamo.

19 The case, as counsel put it to the jury, was about whether the appellant was acting in self-defence, his submission being that "at the very least, the Prosecution can't exclude self-defence beyond reasonable doubt." In any event, there were "all sorts of problems with identifying the precise state of mind in something that happened so quickly and so instinctively in the circumstances that unfolded."

20 Nothing in the closing address of counsel for the appellant was directed to negative the proposition that the confrontation between Teamo and the appellant was at any stage able to be characterised as "consensual". A fortiori, there was nothing in counsel's closing address to negative the proposition that the asserted unlawful assault by Teamo was consensual. That is not surprising. There was ample foundation for counsel for the appellant to form the judgment that the question whether the assault said to have been committed by Teamo was with the consent of the appellant would not detain the jury more than a moment and that the risk of an adverse finding on that basis was negligible. Although consent was raised by counsel for the prosecution and raised in a confusing way, it was plainly open to counsel for the appellant to form the judgment that it was simply not a real issue in the case.

21 Following his closing address, counsel for the appellant drew to the trial judge's attention an observation in the address of prosecuting counsel that might have left the impression that the failure of the appellant to give evidence could give rise to an adverse inference. The trial judge agreed that he would add an additional sentence to his summing up to deal with that concern. In the discussion of the draft summing up no issue about the character of the incident or any aspect of it as consensual was raised.

The trial judge's directions

22 A list of 10 questions setting out a sequence of matters to be found by the jury, and the consequences of such findings for their verdicts, was given to the jury by the trial judge. In that list three questions were posed relevant to the defence of self-defence. None addressed the issue whether any assault by Teamo, necessary to enliven the defence, was consensual. The jury, however, were provided with separate printouts of ss 271(1) and (2), 272(1), 245(1) and 268(1). As noted earlier, the use of the term "provocation" arose only in the context of whether the appellant could be said to have provoked Mr Teamo so as to negative the application of the self-defence provisions in s 271(1) and (2).

23 The trial judge asked the jury to consider whether the appellant was unlawfully assaulted by Teamo and if they were satisfied beyond reasonable doubt that whatever the appellant had done before the shooting constituted provocation of Teamo. His Honour then directed the jury on the question whether the force that the appellant used was not reasonably necessary to make an effectual defence against Teamo's assault. A further question with respect to self-defence under s 271(1) was whether the prosecution had established beyond reasonable doubt that the force used by the appellant was intended and was such as was likely to cause death or grievous bodily harm. The trial judge turned to s 271(2), where the "law recognises that in more extreme circumstances, people can on some occasions, be frightened for their lives and have to use whatever

force is necessary to save themselves." Specifically in relation to self-defence under s 271(2) the trial judge said:

> "The first matter that arises again is whether Mr Graham was unlawfully assaulted by Mr Teamo. Remember what I said to you about the meaning of assault. It doesn't have to involve actual physical assault and a movement or gesture may be enough, or a threat to apply force of any kind under circumstances where the person has actually or apparently an ability to affect a person's purpose can constitute an assault; and, in that context, you'll consider the evidence on the video of Mr Teamo and what is said to be a knife in his hand."

The trial judge continued to address s 272. In no part of his directions on the law did his Honour put to the jury that they could find that the defence of self-defence was defeated on the basis that Teamo's alleged assault was not an assault because it was consensual. His Honour did, however, refer to the prosecutor's closing address and his reference to the term "consensual confrontation" as "not an unlawful assault so a self-defence doesn't apply." That and other matters to which his Honour referred were described by him as "matters of interpretation, construction and argument put to you by the Crown prosecutor."

24 In re-directions, the trial judge gave the jury written directions on self-defence. Not surprisingly, there was no application by counsel for the appellant for a re-direction on the question whether the "consensual confrontation" referred to by counsel for the prosecution, and mentioned by the trial judge in the closing part of his address, required elaboration. Nor did he seek a direction that the disqualifying consent had to be related to Mr Teamo's alleged threatened use of the knife, which on the defence case constituted an unlawful assault and thereby engaged the self-defence provisions of the *Criminal Code*.

25 No reference was made in the summing up or in closing addresses to the defence of honest and reasonable but mistaken belief on a question of fact, provided for in s 24 of the *Criminal Code*.

The appeal to the Court of Appeal

26 The appellant's complaint in the Court of Appeal was that the prosecutor's submission referring to a "consensual confrontation" was "wrong and misleading" and that the trial judge had erred in failing to deal properly with that submission. The trial judge, it was said, should have identified the relevant assault as the production of the flick knife. He should also have directed the jury on the defence of honest and reasonable but mistaken belief about a fact pursuant to s 24 of the *Criminal Code*. He should have directed them that if the production of the flick knife was not a threatened application of force but the

appellant honestly and reasonably mistook it to be so, then the jury had to proceed on the basis that there was an assault. The trial judge, it was said, should then have directed the jury that there would be no assault for the purposes of self-defence only if the appellant consented to the particular assault. There was no evidence of any such consent.

The decision of the Court of Appeal

27 The Court of Appeal dealt shortly with the appellant's arguments. The steps in the Court of Appeal's reasoning were as follows:

1. The prosecutor's submissions directed the jury's attention to two alternative findings of fact on the question of whether there was an unlawful assault. The first was that Teamo's knife was drawn before the appellant drew his gun. The second was that the appellant's gun was drawn before Teamo produced his knife.

2. If the knife was found to have been drawn before the gun, the question that arose was whether the mutual threats were part of a consensual confrontation.

3. If the gun was drawn before the knife, the question was whether that was provocation for Teamo to pull out his knife.

4. The Crown prosecutor correctly pointed out that lack of consent was an essential element of the offence of assault. There was no further need for the issue to be addressed by the trial judge and neither counsel asked him to do so whether by way of emphasis or correction.

5. The trial judge directed the jury on the correct legal test as to the meaning of assault and directed them correctly on the relevance of whether it was the gun or the knife that was drawn first, inviting the jurors to make up their own minds about that.

6. No direction in relation to s 24 of the *Criminal Code* was sought at the trial. There was no evidentiary basis for suggesting that if the production of the knife were not a threatened application of force, the appellant might nevertheless have honestly and reasonably believed it to be so.

The contentions

28 The appellant canvassed before this Court essentially the same arguments as were put to the Court of Appeal. The effect of the submissions by counsel for the prosecution at trial had been that there was a consent by the appellant to a "confrontation" comprising a series of events which led up to the shooting.

However, the question of consent had to be related to the "assault", which was the threatened application of force constituted by the production of the flick knife. There was no evidence to suggest that the appellant had consented to being threatened with the flick knife or being cut or stabbed. There was no evidence to suggest that the appellant knew that Teamo had a flick knife before it was produced immediately before the shooting.

29 The appellant's submissions focussed upon the prosecutor's address and his characterisation of the conduct of the two men as a "consensual confrontation". He submitted that it was for the judge to properly fashion directions identifying the real issues for the jury and direct them on the necessary legal principles. The judge failed to do so because he did not identify the particular "assault" said to justify the appellant's action in self-defence. Moreover, he gave no direction to the jury as to the concept of consent. The trial judge's reiteration of the prosecutor's assertion that the series of events was a "consensual confrontation between the two actors" distracted the jury from the real issue in the case, namely whether the appellant had made proportionate self-defence to an assault constituted by the production of the flick knife.

30 The appellant complained that the Court of Appeal had misunderstood both the submissions of the prosecutor and the directions of the trial judge. Both had left open to the jury the possibility that the production of the flick knife by Teamo was part of the "consensual fight" or "consensual confrontation" with the result that there was no "assault" by Teamo upon the appellant and that therefore self-defence was not available.

31 On the question of mistake, the appellant argued that if the production of the flick knife was not a threatened application of force but just a brandishing with no threat to cut or stab the appellant, the appellant could honestly and reasonably have been of the mistaken belief that a physical assault was to ensue, such that s 24 of the *Criminal Code* was engaged.

32 The respondent's submissions relied substantially upon the absence of any relevant objection to the trial judge's direction by counsel for the appellant at trial. The trial judge had concluded his references to the prosecutor's closing address by emphasising that they were matters of "interpretation, construction and argument". It would have been open for counsel for the appellant at trial to conclude that this was sufficient to confine the effect of whatever the prosecutor had said. For the same reason, counsel might have taken the view that the jury should not have had their attention directed back to the issue of "consent".

33 The respondent said it was potentially relevant to ask whether the appellant was involved in a confrontation with Teamo in which there was an implied consent as between them to threaten each other. It was necessary to bear

in mind the circumstances. In a forensic situation where the appellant's state of mind was an element of the offences charged, counsel could reasonably take the view that it was better for the jury not to linger upon this aspect of the evidence — the appellant having walked into a shopping centre with a loaded hand gun.

Conclusion

34 The contentions can be dealt with in short compass. The Court of Appeal was correct to come to the conclusion that it did. It may be thought surprising that the prosecutor troubled to raise consent to an assault by Teamo as an issue negativing self-defence. It might have been open to treat the engagement between the appellant and Teamo as beginning with a kind of limited and largely blustering exchange involving aggressive statements and gestures. It is not clear, however, how the alleged production of the knife by Teamo could have been treated as consensual by any reasonable jury. Despite the reference to consent by counsel for the prosecution, it was, on the evidence, not a real issue in the case. Counsel for the appellant evidently perceived as much for he did not mention it in his own address nor ask the trial judge for a direction on that question. He, no doubt, had in mind to focus the attention of the jury on the question whether Teamo produced his flick knife before the appellant produced his gun and on the appellant's state of mind in the very short timeframe which, on his case, he had available to respond to the threat from Teamo. There was no misdirection by the trial judge. The relevant provisions of the *Criminal Code* were put before the jury, including the definition of assault in s 245 which incorporated the requirement of want of consent. In the circumstances of this case, no elaboration of that issue was required nor any elaborate discussion of what counsel for the prosecution had said beyond the rather dismissive observation that it was a matter of argument and interpretation.

35 So far as s 24 of the *Criminal Code* is concerned, it may be engaged in relation to s 271 although the scope of that engagement is likely to be limited[6]. It is not necessary for present purposes to consider the limits of its application to the defence of self-defence. On the case at trial there was no material upon which the possibility of that defence was engaged. It was not raised by counsel for the appellant and there was no requirement for the judge to direct on it.

36 For the preceding reasons, the appeal should be dismissed.

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6 *R v Allwood* [1997] QCA 257. See also *Marwey v The Queen* (1977) 138 CLR 630 at 637 per Barwick CJ, Aickin J agreeing at 644; [1977] HCA 68.

37 NETTLE J. I have had the advantage of reading in draft the reasons for judgment of the Chief Justice, Kiefel and Bell JJ. I gratefully adopt their Honours' statement of the facts of the matter. I agree with them that s 24 of the *Criminal Code* (Q) ("the Code") is not raised for consideration by this appeal. I have come, however, to a different conclusion as to the disposition of the appeal.

38 No doubt, if the jury were satisfied beyond reasonable doubt that the appellant drew his weapon before Teamo produced his flick-knife, there would be no room for self-defence. The difficulty is that, because of the way in which the jury were directed, they might wrongly have concluded that it was open to exclude the possibility of self-defence on the basis that Teamo's production of the flick-knife was part of a "consensual confrontation".

39 Counsel for the appellant submitted that the trial judge materially misdirected the jury by telling them that it was open to be satisfied beyond reasonable doubt that the appellant consented to Teamo's production of a flick-knife as part of a "consensual confrontation between the two actors" and, on that basis, that the possibility that the appellant shot Teamo in self-defence within the meaning of ss 271(1), 271(2) or 272(1) of the Code could be excluded beyond reasonable doubt.

40 That submission should be accepted. It was not open on the evidence to be satisfied beyond reasonable doubt that the appellant consented to Teamo's production of the flick-knife as part of a "consensual confrontation" and, consequently, it was a material misdirection to direct the jury that they could exclude the possibility of self-defence on that basis.

The Crown's closing address and the trial judge's summing up

41 The first point in the trial at which there was any suggestion of the appellant having consented to Teamo's production of the flick-knife as part of a "consensual confrontation" was in the course of the Crown prosecutor's final address, as follows:

> "Now, there's three central propositions that I want to put to you as to why you'd accept, beyond reasonable doubt, that none of the self-defence provisions apply. *The first is that both the defendant and Teamo really, at least, started behaving as badly as each other, that what was occurring was, at least until the gun was pulled out, a consensual fight or consensual confrontation – conflict.* From the time the gun was pulled out the defendant became the aggressor. He was not acting in self-defence. He was the aggressor. *And flowing from the proposition that it was a consensual fight or conflict is that the production by Teamo of the knife was simply ... part of that consensual assault – part of that consensual fight*". (emphasis added)

Later in the address, the prosecutor reiterated the point, thus:

> "His Honour will direct you as to the three different forms of self-defence that may be raised on the evidence depending on what view you take of the evidence ... but there are some limiting features to the various forms of self-defence that you will be instructed about. In each case, there must be an unlawful – and I emphasise – unlawful assault which provokes the act said to be done in self-defence. As I say, the definition of assault is very important to understand: it doesn't only mean coming into contact; it can also mean – and I'm paraphrasing – a threatened application of force by one to another without the other's consent and in circumstances where the first person is in a position to carry out a threat. A threatened application of force; that's what was happening. They were both in puffing mode. *But it must be without consent and they were both in it; they were both happy to be doing that*." (emphasis added)

Then the prosecutor dealt with the point for a third time, as follows:

> "So if the production of the knife itself was not part of that consensual fight, in the circumstances of what had happened, it certainly was not enough for that man to be losing self control when he knew, if not in his hand, sitting at the front of his waist is a loaded firearm. So issues of who pulled the weapon first and that sort of thing may well come into play, *but in my submission to you, it was all consensual and it was all puffing. And any threatened application of force at that time was by consent. Once you're satisfied beyond that proposition* [sic] *beyond a reasonable doubt, any threatened application – that any threatened application of force was consensual, the assault is not unlawful and all forms of self-defence will be defeated; they would then no longer have any role to play in deliberations*." (emphasis added)

42 In the course of summing up, the judge provided the jury with the definition of assault in s 245(1) of the Code and outlined the elements of each of the alleged offences. His Honour then turned to the issue of self-defence, as follows:

> "The burden remains on the prosecution at all times to prove that Mr Graham was not acting in self-defence, and the prosecution must do so beyond reasonable doubt before you could find him guilty. The first of those four elements is whether Mr Graham was unlawfully assaulted by Jacques Teamo. If you conclude that Mr Teamo did not assault the defendant, this defence is not open. ...
>
> And you will consider the evidence before you and find whether or not Mr Teamo actually assaulted Mr Graham, or did something by way of an

act or gesture from which you could reasonably infer that Mr Teamo was attempting or threatening to apply force to Mr Graham.

...

The first matter that arises again is whether Mr Graham was unlawfully assaulted by Mr Teamo. Remember what I said to you about the meaning of assault. ...

This morning you heard addresses from the Crown prosecutor and defence counsel. I don't intend going over them in great detail. I'm sure they're fresh in your minds and as it happened, each – I say this with great respect – spoke clearly and well in making the particular points that they wanted to bring home to you.

...

[The prosecutor] submitted to you that this was not a case in which any of the three, I'll call them again, arms of self-defence apply because this was not, in his view, a case in which there was anything other than a consensual confrontation between the two actors, not a case in which one provoked or one assaulted and the other provoked, any of those things that I was talking to you about at some length. Simply – and again he took you to evidence about this and showed you some film – in his submission, the evidence would lead you to conclude that you could forget about self-defence. Just look upon this as an occasion in which two men, for whatever reason and we don't need to know, became involved in a consensual confrontation which ended quite badly for one of them.

...

A consensual confrontation, [the prosecutor] submitted to you, is not an unlawful assault so a self-defence doesn't apply." (emphasis added)

43 By so directing the jury, the judge gave his authority to the Crown prosecutor's submission[7] that it was open to conclude, beyond reasonable doubt, that Teamo's production of the flick-knife was just another part of a "consensual confrontation" that began with the two men "eyeballing" each other in the Sony store and, for that reason alone, that the issue of self-defence could be excluded at the outset.

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7 See *Fingleton v The Queen* (2005) 227 CLR 166 at 205 [102] per McHugh J; [2005] HCA 34.

44 Contrary, however, to the prosecutor's submission, and the judge's direction, it was not open on the evidence to be satisfied beyond reasonable doubt that Teamo's production of the flick-knife was something to which the appellant consented, either as part of a "consensual confrontation" or at all.

45 As the video evidence shows, after the initial "eyeballing" in the Sony store, the appellant walked out of and away from the store in a manner which bespoke an intent to leave Teamo behind. It was only later, after Teamo had followed the appellant, gestured towards him and appeared to call out to him, that the appellant turned back towards Teamo and the latter produced his flick-knife. Contrary to the respondent's submission, there was nothing which suggested that the appellant knew before that point that Teamo was armed with the flick-knife, still less that the appellant consented to Teamo producing it with the apparent intention of using it against the appellant's person. To suppose as much would be to speculate. Logically, it cannot be inferred from the appellant's engagement in the "eyeballing" that took place in the Sony store that he consented to the production of a flick-knife or to being threatened with a flick-knife of which, *ex hypothesi*, he was unaware. It is, however, distinctly possible that the jury acted on the judge's endorsement of the prosecutor's submission that it was open to them to find that the production of the flick-knife was part of a "consensual confrontation" and, on that basis, open to them to be satisfied beyond reasonable doubt that the Crown had excluded the possibility of self-defence.

No forensic advantage

46 Much was made in argument by the respondent of the fact that counsel who represented the appellant at trial did not take exception to the prosecutor's final address, deal with the "consensual confrontation" point in his own final address, or seek a direction from the judge to correct the effect of it. It was submitted that there may well have been good forensic reason for defence counsel intentionally to adopt that course – lest, if the judge had emphasised the importance of the production of the flick-knife, and of the need to be satisfied beyond reasonable doubt that its production (as opposed to the general confrontational behaviour) was with the appellant's consent, it cause the jury to concentrate more closely on the evidence of the production of the flick-knife and, in view of that evidence, to come more readily to the conclusion that the appellant produced his weapon before Teamo produced his flick-knife.

47 Those submissions should be rejected. To start with, as has been observed, the first time during the trial that it was suggested that the production of the flick-knife was part of a "consensual confrontation" was in the course of the prosecutor's final address. That being so, it would hardly be surprising if defence counsel simply failed to perceive the significance of the point, and for that reason failed to take exception or deal with it in his own address. Notably, the prosecutor's address came after the judge had provided a copy of his proposed

final directions in draft to counsel and counsel had given them their approval. There was nothing in the draft directions about a "consensual confrontation".

48 It is also impossible to conceive of defence counsel's failure to take exception to, or seek appropriate redirections on, the prosecutor's "consensual confrontation" submission as an apparently rational tactical decision[8]. For, on any rational view of the matter, proper directions to that end could only have been of assistance to the appellant.

49 The respondent's suggestion that defence counsel may have refrained from seeking redirection on the issue for fear of the jury being led to concentrate more closely on Teamo's drawing of the flick-knife, and thereby being more likely to conclude that the appellant drew his weapon first, is untenable. It is conclusively contradicted by the fact that defence counsel spent the majority of his final address taking the jury frame by frame through the video evidence, and the oral evidence relating to each aspect of it, beseeching the jury to look closely at that evidence in order to see what had actually occurred. A direction from the judge to the same effect would have served only to support defence counsel's plea to the jury that they take the utmost care in studying the evidence of who drew his weapon first.

50 By contrast, the idea that it was possible to resolve the issue of self-defence by treating the drawing of the flick-knife as part of the "consensual confrontation" which began with the "eyeballing" in the Sony store was of potentially very significant benefit to the Crown's case – as the prosecutor evidently intended it should be – by taking the focus off the difficult-to-resolve evidence of the sequence of the production of weapons and back to earlier, less critical events about which there was relatively little doubt. So much is made clear by the precise words of the prosecutor's invitation to the jury in his closing: "it was all consensual and it was all puffing. ... Once you're satisfied beyond that proposition [sic] ... all forms of self-defence will be defeated".

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8 Cf *Suresh v The Queen* (1998) 72 ALJR 769 at 773 [22] per McHugh J; 153 ALR 145 at 151; [1998] HCA 23; *Doggett v The Queen* (2001) 208 CLR 343 at 346-348 [1]-[9] per Gleeson CJ; [2001] HCA 46; *TKWJ v The Queen* (2002) 212 CLR 124 at 130-131 [16] per Gleeson CJ, 135 [33] per Gaudron J, 155 [95] per McHugh J, 160-161 [115] per Hayne J; [2002] HCA 46; *Ali v The Queen* (2005) 79 ALJR 662 at 665 [11] per Gleeson CJ, 668 [38] per Hayne J (McHugh J agreeing at 665 [15]), 675 [85] per Callinan and Heydon JJ; 214 ALR 1 at 5, 10, 19; [2005] HCA 8; *Nudd v The Queen* (2006) 80 ALJR 614 at 618-619 [9] per Gleeson CJ, 624 [31] per Gummow and Hayne JJ, 636-637 [108] per Kirby J, 644 [158] per Callinan and Heydon JJ; 225 ALR 161 at 164-165, 172, 189, 199-200; [2006] HCA 9.

51 Moreover, regardless of the way in which defence counsel conducted the defence case, the trial judge was required to be astute to secure for the appellant a fair trial according to law and, therefore, adequately to direct the jury "both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part"[9]. It was not conducive to a fair trial according to law, and it was not an adequate direction as to the law and the possible use of facts, wrongly to direct the jury that it was open to make a finding of fact beyond reasonable doubt that was dispositive of the case. It was contrary to law and it is "reasonably possible" that it may have affected the verdict[10].

The proviso

52 Counsel for the respondent contended that, if that were so, this Court was in as good a position as the jury to determine the facts and that the Court should be prepared to apply the proviso[11]. Counsel submitted that, upon an examination of the whole of the record and giving such weight to the jury's verdict as was due, it was clear beyond reasonable doubt that the appellant drew his weapon before Teamo produced his flick-knife, or at least that he shot Teamo after Teamo had turned away and disengaged from any threat constituted of the introduction of the flick-knife; and therefore the appellant could not be found to have acted in self-defence. In counsel's submission, the most important evidence was the video evidence and, although there was also *viva voce* evidence, it was relatively inconsequential in light of the video evidence.

53 Those submissions should also be rejected. Much of the *viva voce* evidence was concerned with the states of mind of Teamo and the appellant. As defence counsel emphasised in his final address to the jury, it was favourable to the appellant in that, although it was to the effect that Teamo was acting aggressively, none of it suggested that the appellant had exhibited any physical display of aggression. There was also important *viva voce* evidence given by Teamo's son that Teamo had said "I'll stab that guy" (meaning the appellant) before Teamo produced the flick-knife. None of that can be seen on the videos.

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9 *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick CJ; [1971] HCA 20; see also *Fingleton* (2005) 227 CLR 166 at 198-199 [83] per McHugh J.

10 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38] per McHugh and Gummow JJ; [2003] HCA 40 citing *Simic v The Queen* (1980) 144 CLR 319 at 332; [1980] HCA 25.

11 *Criminal Code* (Q), s 668E(1A). See, eg, *Weiss v The Queen* (2005) 224 CLR 300 at 316-318 [41]-[47]; [2005] HCA 81.

54 Admittedly, one possible view of the video evidence was that Teamo turned and started to retreat before the appellant fired the shots. If the jury took that view, it would have been open to the jury to reason that, even if Teamo produced his flick-knife before the appellant drew his weapon, the appellant's response was more than was reasonably necessary to make effectual defence or went beyond such force as was necessary for defence[12]. But they were decisions for the jury to make on the basis of their assessment of the evidence and their perception of what was reasonable in the circumstances. They are not decisions which this Court should make in circumstances where there is a real possibility that the jury were deflected from the task by a misdirection that they were entitled to conclude that the drawing of the flick-knife was part of a consensual confrontation and, if so, that self-defence could be excluded *in limine*[13].

55 It was not contended that a verdict of not guilty was not open[14]. Nor should it be supposed that a verdict of guilty was inevitable[15]. Consequently, it cannot be concluded that the misdirection did not deprive the appellant of a chance of acquittal that was fairly open to him[16]. And, strong though the Crown case might appear to have been, in light of the limitations of the video evidence, the importance of hearing and seeing the witnesses who gave oral evidence, and the difficulty of assessing what was a reasonable reaction in the circumstances, this Court cannot and should not be satisfied beyond reasonable doubt on the record of the trial that the misdirection did not amount to a substantial miscarriage of justice[17].

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12 *Criminal Code*, s 271.

13 *Gillard v The Queen* (2003) 219 CLR 1 at 15 [29] per Gleeson CJ and Callinan J; [2003] HCA 64.

14 *Weiss* (2005) 224 CLR 300 at 313 [32].

15 *Baini v The Queen* (2012) 246 CLR 469 at 480 [30] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2012] HCA 59.

16 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; [1955] HCA 59; *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70]; [2010] HCA 35; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 105-107 [31]-[39] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14.

17 *AK v Western Australia* (2008) 232 CLR 438 at 457 [59] per Heydon J; [2008] HCA 8; *Baini* (2012) 246 CLR 469 at 481-482 [33] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; *Baiada Poultry* (2012) 246 CLR 92 at 104 [29] per French CJ, Gummow, Hayne and Crennan JJ.

Conclusion

56 In the result, I would allow the appeal, quash the convictions of attempted murder and unlawful wounding with intent to maim and order that a new trial be had on those counts.

57 GORDON J. I agree with French CJ, Kiefel and Bell JJ that the appeal should be dismissed. I would add the following.

58 The fundamental task of a trial judge is to ensure a fair trial of the accused[18]. In our system of criminal justice, the trial judge undertakes that task in a context where "a trial is conducted as a contest between the prosecutor (almost always a representative or agency of the executive government) and the accused (almost always an individual citizen)"[19]. It is the prosecution and the defence who "define the issues which are presented to the jury for consideration"[20].

59 Against that background, "the adequacy of a summing up ought not to be judged upon a subtle examination of its transcript record or by undue prominence being given to any of its parts"[21]. It is not appropriate to scrutinise a trial judge's directions to the jury to "consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced"[22]. Rather, the summing up should be considered as a whole, in light of the issues raised and the manner in which the trial was conducted[23], including "the addresses that have preceded it and the requests (if any) for redirection"[24]. As Gleeson CJ explained in *Doggett v The Queen*[25]:

> "The manner in which a trial is conducted, and in which the issues are shaped, especially where ... an accused is represented by experienced and competent counsel, has a major influence upon the way in which the case is ultimately left to the jury, and upon the directions, comments and

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18 *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]; [2000] HCA 3.

19 *Doggett v The Queen* (2001) 208 CLR 343 at 346 [1]; [2001] HCA 46.

20 *Doggett* (2001) 208 CLR 343 at 346 [1].

21 *La Fontaine v The Queen* (1976) 136 CLR 62 at 73; [1976] HCA 52.

22 *Stoddart* (1909) 2 Cr App R 217 at 246.

23 *La Fontaine* (1976) 136 CLR 62 at 73, 78, 91; *Barker v The Queen* (1983) 153 CLR 338 at 368-369; [1983] HCA 18; *Zoneff v The Queen* (2000) 200 CLR 234 at 256 [55]; [2000] HCA 28. See also *Stoddart* (1909) 2 Cr App R 217 at 246.

24 *Zoneff* (2000) 200 CLR 234 at 256 [55].

25 (2001) 208 CLR 343 at 346 [2].

> warnings, from the trial judge to the jury, that may be appropriate or necessary. Directions are not ritualistic formularies. Their purpose is to assist the jury in the practical task of resolving fairly the issues which have been presented to them by the parties."

60 Often, it will be open to contend that the directions could have been given differently. But that is not the question. No miscarriage of justice will arise unless the appellant demonstrates that the direction should have been given and it is "reasonably possible" that the failure to direct the jury "may have affected the verdict"[26].

61 The complaint made by the appellant was that the trial judge failed to properly direct the jury on the issue of consent to assault. The appellant submitted that the following directions should have been given by the trial judge to the jury:

(a) that the "assault" to which the appellant made self-defence was the threatened application of force constituted by the production of the flick knife by Teamo; and

(b) that there was no evidence upon which the jury could conclude that the appellant had consented to that assault; or that for consent to exclude self-defence, the appellant must have consented to the application of force with the knife.

62 Those contentions should be rejected.

63 In the present appeal, there was no contention that the verdicts were unreasonable, that any aspect of the law as explained by the trial judge to the jury was wrong, that the defences raised were not left to the jury or that the written directions provided to the jury were wrong.

64 Instead, the appellant contended that the directions that should have been given were necessary to meet certain things said by the prosecutor in his closing address about a "consensual confrontation", which the trial judge also referred to in his summing up while summarising that address. The appellant's complaint was that the prosecutor's remarks were "confusing and unhelpful". But that complaint must be considered in context. That context includes the matters identified in the preceding paragraph of these reasons; that at the conclusion of the trial judge's reference to the prosecutor's submissions concerning a "consensual confrontation", the trial judge told the jury that these were "matters of interpretation, construction and argument put to [them] by the Crown

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26 *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38]; [2003] HCA 40 citing *Simic v The Queen* (1980) 144 CLR 319 at 332; [1980] HCA 25.

prosecutor"; and that copies of the relevant provisions of the *Criminal Code* (Q) were given to the jury, including the definition of assault in s 245 which incorporated the need to consider "without the other person's consent".

65 No less significantly, experienced and competent senior counsel appearing for the appellant did not address the issue of consent in his final address and did not seek a direction about any of these matters, despite seeking an additional direction about another matter that arose from the prosecutor's address[27]. While it is ultimately the trial judge's role to ensure a fair trial, counsel for the appellant was well placed to determine whether the directions were adequate to ensure his client received a fair trial in light of what he, and others, considered to be the real issues in the trial. That experience of being at the trial cannot be replicated by consideration of the transcript in "the calm and inquisitive atmosphere" of an appellate court[28].

66 Finally, in any case, despite the references to a "consensual confrontation" in the summing up by the trial judge, the jury were told that a matter for them was whether there was an unlawful assault and, in that context, that they should try to reach a conclusion about whether the appellant produced the gun first or Teamo produced the flick knife first. The jury were told that was an issue which they should decide and, no less importantly, why that was such an important issue. That matter was raised in the context of self-defence under ss 271 and 272. After reminding the jury of the definition of assault, the trial judge identified the questions that the jury needed to answer under both limbs of s 271 of the *Criminal Code*. In both cases, that included whether the appellant was unlawfully assaulted by Teamo.

67 The trial judge's approach to s 272 was in similar terms. The trial judge explained to the jury that there were six possible bases for excluding self-defence to a provoked assault:

> "The first is if the prosecution can satisfy you beyond reasonable doubt that the assault by Mr Teamo was not of such violence as to cause reasonable apprehension of death or grievous bodily harm; or that the assault did not induce [the appellant] to believe on reasonable grounds that it was necessary for his own preservation in [sic] death or grievous bodily harm to use the force he used in self-defence, or that the force he used was more than was reasonably necessary to save him from death or grievous bodily harm; or that [the appellant] first began the initial assault with intent to kill or to do grievous bodily harm to Mr Teamo, or that [the appellant] endeavoured to kill or do grievous bodily harm to

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27 See *La Fontaine* (1976) 136 CLR 62 at 73.

28 *La Fontaine* (1976) 136 CLR 62 at 73.

> Mr Teamo before the necessity of so preserving himself arose; or, finally, in either case, unless when necessity for self-defence arose [the appellant] declined further conflict and quitted it or retreated as far as was practicable. If the prosecution satisfy you of any one of those six things or more, then the defence is excluded."

68 The various references to the assault by Teamo were to the production of the flick knife. Whether the appellant produced the gun first or Teamo produced the flick knife first and the question of the reaction of the appellant were questions for the jury.

69 The directions to the jury were complete. There was no risk of misunderstanding by the jury. The contention that the directions identified by the appellant should have been given should be rejected. Moreover, it cannot be said it is "reasonably possible" that the failure to direct the jury in those matters "may have affected" the verdicts[29].

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29 *Dhanhoa* (2003) 217 CLR 1 at 13 [38].