Parker v The Queen [2007] NTCCA 11

PARTIES:	PARKER, Stephen v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 6 of 2007 (20621230)
DELIVERED:	24 OCTOBER 2007
HEARING DATES:	19 OCTOBER 2007
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & SOUTHWOOD JJ
APPEAL FROM:	RILEY J (SCC No 20621230)

CATCHWORDS:

APPEAL – CRIMINAL LAW
Appeal against conviction – whether the evidence was capable in law of supporting an inference beyond reasonable doubt – whether the verdict unreasonable and not supported by the evidence – appeal dismissed.

Appeal against sentence – whether the findings of fact upon the verdict were open on the evidence – appeal dismissed.

Criminal Code Act 1983 (NT), s 411

Doney v The Queen (1990) 171 CLR 207; *M v The Queen* (1994) 181 CLR 487; *MFA v The Queen* (2002) 213 CLR 606; *The Queen v Bilick and Starke* (1984) 36 SASR 321, *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1, applied

REPRESENTATION:

Counsel:

Appellant:	I Read
Respondent:	W J Karczewski QC

Solicitors:

Appellant:	Legal Aid
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Parker v The Queen [2007] NTCCA 11
No. CA 6 of 2007

BETWEEN:

STEPHEN PARKER
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, MILDREN AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 24 October 2007)

Martin (BR) CJ:

Introduction

[1] The appellant was convicted by a jury of attempted murder and sentenced to nine years imprisonment in respect of which a non-parole period of four years and six months was fixed.

[2] The appellant appealed against his conviction on the basis that the verdict was unreasonable and could not be supported by the evidence. The grounds of appeal also complained of errors by the learned trial Judge in his directions as to the evidence, but these grounds were not argued.

[3] Should the appeal against conviction be dismissed, the appellant appealed against the sentence on the basis that errors were made by the Judge in his findings of fact.

[4] At the conclusion of the submissions the appeals were dismissed. I now set out my reasons for reaching that conclusion.

Evidence

[5] In about 1985 the victim purchased a property at Marrakai with his partner, Ms Jackson. In August 2005, the appellant and his wife moved to a property nearby the property occupied by the victim and Ms Jackson. Initially the two couples were friends, but by mid 2006 the relationship had deteriorated.

[6] The victim and his partner separated in March 2005. Ms Jackson moved to premises in the same area and remained very good friends with the victim.

[7] The appellant and his wife separated in May 2006. They also remained friends. It was common ground that the appellant was a diabetic and suffered from chronic severe back problems causing significant pain.

[8] The events giving rise to the charge of attempted murder occurred on 21 August 2006. They occurred in the context of the breakdown of the relationship between the couples and an altercation a few weeks earlier between the victim and the appellant.

[9] The altercation on 2 July 2006 occurred after the victim attended at the appellant's premises. According to the victim, the altercation became

physical and, after the appellant applied a headlock to the victim, the victim fought back and "banged" the appellant's head into a pole.

[10] Following the altercation an ambulance and police attended. A police officer observed swelling above the appellant's left eye and around his left eye with redness. He described the appellant as "definitely unsteady on his feet" and distressed. Another police officer described the appellant as groggy and not completely coherent.

[11] It was an agreed fact that at 11.01pm on 2 July 2006 the appellant presented at the Royal Darwin Hospital with reduced left visual acuity, small subconjunctival haemorrhages and commotio in the left eye, consistent with the history of trauma. Conservative management was required and left visual acuity improved in the 12 hours following presentation and was expected to continue to improve. The appellant did not present for his follow up appointments.

[12] As a consequence of his actions on 2 July 2006 police served the victim with a notice under the Trespass Act warning him to stay off the appellant's property.

[13] On 21 August 2006 Ms Jackson visited the victim. On her return home she found the appellant standing next to her bore. She gave evidence that she pulled up next to him and asked why he was on her block. She said he was being "real smart" and saying he was not on her block. She drove into her driveway and the appellant left.

[14] According to Ms Jackson, after unsuccessfully attempting to call the victim she drove to the victim's premises where she told him that she had found the appellant on her block. Both the victim and Ms Jackson gave evidence that he responded by telling her to go home and call the police. She left immediately and on her return home was about to telephone the police when she became aware of events occurring across the road at the premises of the appellant.

[15] The victim said that after Ms Jackson left his premises he thought about the situation and, in his words:

> "I knew Stephen was up to something but I didn't know what, so I went there to confront Stephen over it."

[16] According to the victim, as he drove along the dirt road leading to the appellant's premises he could see the appellant sitting in front of a caravan waiting for him. He drove into the appellant's driveway and skidded to a halt. He said that as he got out of the car the appellant was watching him. The victim's evidence continued:

> "A. … Like I got out the car, walked towards the front of the car because the barbecue and everything was in the way and I was about to turn right to walk towards Stephen when he just got up and yelled at me and took off behind the caravan.
>
> Q. When you got out of the car did you say anything to Mr Parker?
>
> A. No.

Q. You said that he yelled out at you?

A. Yes.

Q. What did he say?

A. I believe it was, ‘I’ve had enough of this shit’, or something to that effect.

Q. Anything else?

A. No, that’s all he said.

Q. Now, when you got out of the car did you have anything in your hands?

A. No.

…

Q. Now, you were telling us earlier that Mr Parker said something to you and he got up?

A. Yes.

Q. And what did he then do?

A. He stood up and yelled at me, turned off and took off towards the back of the caravan into his humpy.

…

A. … he was sitting right next to the barbecue and when I got out the car and started approaching he got up off the car, yelled what he yelled at me and ran around to the back. …

…

Q. And how quickly did he move when he got up?

A. Like I when I explain he runs, he'd run like if someone were to have a quick pace, you know, very quick pace, like not actually physically ...

Q. Not actually physically running but moving quickly?

A. Yes."

[17] The victim said that "no sooner had [the appellant] gone behind the caravan than he'd come back out again", after which the critical events upon which the charge of attempted murder occurred. The victim described those events in the following evidence given during examination-in-chief:

"Q. And he re-emerged, there he was, what happened next?

A. All right, noticing that he re-emerged then I didn't actually see him holding a gun until it actually stopped and then I looked and I saw the gun in his hand and at that time I thought he's going to fire it in the air, he was going to – you know do something like – I assumed that's what he was going to do, he just [chambered] a round, pointed the gun at me and just fired it from the hip.

Q. The witness – so what sort of weapon was it?

A. It was a 22 calibre rifle.

Q. And you've just demonstrated that he chambered a round and you went through the motion of as if pushing a bolt forward?

A. Yes, closing the bolt.

Q. Closing the bolt. You saw that?

A. Yes, he ran out, I looked down to what he had in his hand and he had the 22 rifle and before I could do anything he'd already chambered – he'd already stopped with feet apart, chambered a round, pointed the gun like from the hip and just fired.

Q. In which direction he fire?

A. Directed at me.

Q. What happened?

A. Pardon?

Q. What happened?

A. Well he fired the shot and I was standing by a car, he hit me in the stomach.

Q. Now you're indicating the? -

A. The first shot was in the stomach.

Q. That's the lower left abdomen?

A. Yes.

Q. Right?

A. And from there I sort of – the pain – I just sort of started learning forward, the pain because when it hit it felt like you'd been hit with a hammer or something and then the pain just started really intensifying and I sort of doubled over because of the pain and just fallen to sort of down on my knees but I hadn't actually collapsed on the ground, I was just sort of half bent on my knees holding my stomach and leaning on the car to hold – support myself.

Q. Go on what happened next?

A. I looked up and he was watching me falling down as I described. He bent, re-chambered the next round, pointed the gun at me and fired again to shoot me in the chest.

Q. And once again the witness has indicated – gone through the motions of loading the firearm and indicating that the bullet struck him on [the] right upper chest. Is that correct, right upper chest?

A. Yes alongside the heart.

Q. Whilst this was happening the first shot and the second shot, was there any conversation between yourself and Mr - - ?

A. There was no further conversation at all.

Q. Had you in the meantime armed yourself with anything?

A. No."

[18] The victim said that he and the appellant were about six – seven metres apart when the shots were fired. Apart from bending over or crouching after the first projectile struck, he did not move between shots. After being struck by the second bullet, the victim turned his back and moved to his motor vehicle. Once in the vehicle he saw the appellant approaching the driver's side door with a gun in his hands.

[19] According to the victim, he started winding up the window. It was not half way up when the appellant "put the gun in through the window and started prodding on the head with the barrel of the gun". The victim reversed up the driveway and drove to Ms Jackson's premises. As to how the appellant

was holding the weapon when he put the muzzle to his head, the victim gave the following evidence:

> "Q. How was he holding the weapon at that stage please?
>
> A. He was holding his hand and just like – I can't remember clearly I just remember that he was putting it in through the window and prodding me in the temple with the gun.
>
> Q. You're indicating with one hand?
>
> A. Yes, not with both hands, just one hand like this with the rifle in – holding – he was holding it by the trigger mechanism, so like he was fire it and was just putting it in through the window and just prodding me with it.
>
> Q. So with one hand and that hand being the right hand?
>
> A. Yes.
>
> Q. And whereabouts on your head was he prodding you?
>
> A. He was actually – it was on the temple.
>
> Q. On the right temple?
>
> A. Yes.
>
> Q. Anything said at that point in time?
>
> A. No. I meant I'm not saying 'no', I don't recall."

[20] As mentioned, Ms Jackson was about to telephone the police when she heard events occurring at the appellant's premises. She said she could not remember if she heard the victim pull up at the appellant's premises, but she

heard an argument and yelling and ran to her sliding glass door. She did not hear the words that were said. When she got to the window she saw that the victim and the appellant were yelling.

[21] Ms Jackson said the victim did not move from beside the car. She saw the appellant "with a gun on his hip" and then heard two shots. Ms Jackson described one shot and then a second shot "more or less straight after". She said that after the first shot the victim was bending over slightly from the waist and then she heard the second shot "more or less straight away".

[22] According to Ms Jackson, as the events were occurring she was yelling out to the victim to come back to her place.

[23] During examination-in-chief, when asked what happened after the second shot, Ms Jackson said the victim got into his car and reversed back up the driveway. No mention was made of the appellant putting the gun through the window until cross-examination:

> "Q. Did you see [the appellant] walking from further from within the camp?
>
> A. Who, Stephen?
>
> Q. Yes?
>
> A. I did after he had fired the shots, I did.
>
> Q. What did you see him do then?

A. Well after he had done the shooting Danny was trying to get in the car. I know it's not in my statement, but I seen Stephen saying to him – I heard yelling, 'get in the car, you mongrel,' and he was shoving the gun in the window, that's what I seen.

Q. You saw him shoving the gun in the window did you?

A. Yes.

Q. Yes?

A. And poking the gun. This is, sorry. I seen him gabb (sic) him. He had the gun and he was pushing him like that.

Q. What, before he got in the car?

A. As he was getting in the car.

Q. So he's pushing him with the gun, pushing in the car?

A. Cause Danny was trying to close the door, the car door.

Q. Right, so was he pushing him with the gun before Danny got in the car, before he closed the door or as he was closing the door?

A. As he was closing the door.

Q. And then when he closed the door did you see him do anything then, Stephen?

A. Yes he was poking the gun in the window.

Q. You're quite sure about that?

A. Yes I'm quite sure.

Q. It's not something you've discussed with Danny is it?

A. No."

[24] As to why she did not mention to the police that she had seen the appellant put the gun in the window, Ms Jackson said she was in "such of a hurry" as she wanted to get to the hospital and did not include everything in the statement. Later Ms Jackson explained she was eager to get to the hospital and she "just didn't want to be there" as she "wanted to go". In response to cross-examination about the absence in the statement to the police of mention about the gun being on the appellant's hip, Ms Jackson said:

> "Yes I, I know that because I just wanted to make it, I just wanted to. I don't know why. But I was, because I was really confused when I was talking to the police officer. When it happened."

[25] A police officer who attended soon after the shooting observed the victim in a bedroom at Ms Jackson's home. The victim appeared to be in a lot of pain and told the officer he had been shot, but bullets had bounced off. Ms Jackson informed the officer that she heard two shots from her house, but had not seen anything. Ms Jackson was not cross-examined about that statement.

[26] The Crown also called the appellant's wife. She did not witness the events, but gave evidence of a telephone conversation with the appellant in which the appellant spoke of the shooting:

> "Q. Can you tell the court please what you recall happening on that day?

A. I got a text from Steve first in the morning stating that the dog and pig had been missing. And after that text I spoke to him on the phone and he said that the dog and pig had been missing, he went across the road on the firebreak area or just before the firebreak and he was calling for the dog and the pig. And Trish yelled out to him to – I don't want to swear – get off the F-ing property, basically and that they were already baited. And then after that he said he was going to have a cuppa and everything like that and sit down. I continued with my housework and then I got a phone call from Steve saying that he'd shot him and I said – kept saying to him who did you shoot or what did you shoot. In the end he told me it was [the victim] and I kept saying oh my God, because I was in a bit of shock. In between the silences and things like that, I got out of him what happened. He said he flew down the driveway at him and he was flying at him and it – he shot him. And then after that he said that he'd rung the police, he'd rung the ambulance and he had to go, he was just about out of credit. And I didn't hear anything else from him – from the police until the next day.

Q. Was there any discussion about where he'd shot him?

A. In the stomach, sorry about that.

Q. Was there any discussion about how many times he'd shot him?

A. I can't remember if it was once or twice now, it's been so long."

[27] Telstra records establish that Ms Jackson made a 000 emergency call at 1.07pm. The appellant also made a 000 call at the same time. A tape of the appellant's call was tendered and the trial Judge directed the jury that they were entitled to take into account the tone of the appellant's voice "and the matter of fact manner, if you find it to be so, which was used by [the appellant] on that occasion".

[28] During the 000 call, the appellant gave his name and address and said he had just shot someone with a 22. After the appellant gave the name of the victim, the following conversation was recorded:

> "Q. And does he require an ambulance Stephen?
>
> A. Oh I'd say so I just put two bullets in him.
>
> Q. You put two bullets in him?
>
> A. Yep.
>
> Q. Whereabouts?
>
> A. Moving off my property again to his wife's property across the road.
>
> Q. So he's got … he's … he went off into your property?
>
> A. He come in screaming into my property. I got a restrain … you know a … a trespass order out on him.
>
> Q. Yep.
>
> A. Right, he come in to attack me again, screaming and carrying on. I told him to get off me property …
>
> Q. Yep.
>
> A. … and he lunged at me so I shot him.
>
> Q. Okay.
>
> A. I've already been in hospital once because of this guy.

Q. Okay, is he breathing?

A. Well he was. He drove his ute out of here across the road to his wife's place."

[29] The appellant gave his telephone number and said he would be staying at his property and not moving.

[30] Soon after the shooting police attended at the area and stopped the police vehicle about 50 to 100 metres short of the appellant's residence. Using a loud speaker an officer called out to the appellant to come to the road. The appellant complied and a brief conversation occurred:

"A. … I spoke to Stephen Parker on the roadside and I just asked him, 'Stephen, what happened', and he told me, 'Daniel came around again and I shot him.' I then said to Stephen, 'Okay, well you're under arrest for that one.'"

[31] Following the appellant's arrest he was placed in the rear caged section of a police vehicle. One of the officers spoke with him briefly, but not about matters related to the incident. During that conversation the appellant said to the officer:

"I wasn't going to let him bash me up again, Bill."

[32] On 22 August 2006 the appellant participated in a record of interview. The interview was not led in evidence. Instead, the following facts were agreed from the interview:

"1) Stephen Parker participated in a record of interview on 22 August 2006 with the police. He stated that:

a) He is the registered owner of a .22 calibre rifle and .22 Magnum. He holds a shooter's licence. The guns are normally kept in a digital gun safe welded to his 6 ton container. He has been shooting for 30 years and that he shoots targets and pigs.

b) On 21 August 2006 he had been cleaning his guns. That he acted 'for self-protection, self-defence, simple as that'. That he had been attacked by [the victim] before and put in hospital and was having problems with his eye. That he was afraid of [the victim] and was afraid of him when he entered his property at the time of incident."

[33] The weapon used by the appellant was a .22 bolt action rifle which required a box magazine. The magazine is loaded individually with .22 long rifle ammunition and then placed in a port on the underside of the firearm. In order to move a cartridge from the magazine into the chamber of the weapon, a bolt is lifted and moved to the rear thereby allowing the magazine to sit flush with the magazine port. By moving the bolt forward, a cartridge is moved from the magazine into the chamber of the firearm. The bolt lever is then moved downward in order to lock it into position and that movement also cocks the firearm. After firing, the bolt action is moved upward and backward in order to eject the spent cartridge and when moved forward a live cartridge is moved into the chamber. On testing the weapon was found to be in safe working condition.

[34] The appellant did not give evidence. The defence was conducted on the basis that the evidence was incapable of establishing an intention to kill or of negativing self defence. As to self defence, counsel described the

defence case as "circumstantial" and pointed to the prior altercation and the trespass notice, together with the statements by the appellant to his wife and the police and in the 000 call.

Ground 2 – attempted murder – case to answer

[35] At the conclusion of the Crown case, counsel for the appellant submitted that the evidence was incapable of supporting a charge of attempted murder because it was incapable of excluding as a reasonable possibility that the intention of the appellant was to cause grievous harm and not to kill the victim. The essence of the submission is summarised in the written outline of submissions in the following terms:

> "The only evidence on the issue of intent was [the victim's] evidence that when the applicant got up from sitting he said, 'I've had enough of this shit'. This of itself does not evince an intent to kill and in any event the witness's credit was in issue directly on this point, as it was in general. To the contrary there was evidence that the applicant used a low velocity projectile and did not use high velocity .22 rounds or the high powered .22 Magnum rifle which was at his disposal."

[36] The question to be answered by the trial Judge was whether the evidence was capable in law of supporting an inference beyond reasonable doubt that at the time he fired the shots, the appellant intended to kill the victim. In *Doney v The Queen* (1990) 171 CLR 207 at 214 – 215, the High Court said:

> "It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be

directed only if there is a defect in the evidence such that, *taken at its highest,* it will not sustain a verdict of guilty" (my emphasis).

[37] The principle and application of the principle were explained by King CJ with his Honour's usual clarity in *The Queen v Bilick and Starke* (1984) 36 SASR 321 at 335 and 337:

> "… The question of law is whether on the evidence as it stands the defendant *could* lawfully be convicted. He *could* lawfully be convicted on that evidence only if it is capable of producing in the minds of a reasonable jury satisfaction beyond reasonable doubt.
>
> …
>
> The same test is to be applied to deciding a submission of no case to answer in a case depending upon circumstantial evidence as in a case depending upon direct evidence, although the manner of its application will be different. The question to be answered by the trial judge is whether there is evidence with respect to every element of the offence charged which, if accepted, could prove that element beyond reasonable doubt. Where there is direct evidence of the *actus reus* and that evidence is capable of supporting an inference of *mens rea*, there is a case to answer except in the extreme case, as perhaps of testimony which is manifestly self-contradictory or the product of a disorderly mind, envisaged by the Privy Council, in which the direct 'evidence' is so incredible as to amount to no evidence. Where the case is a circumstantial or partly circumstantial case and therefore depends on inferences, the question may be expanded so that it becomes: On the assumption that all the evidence of primary fact considered at its strongest from the point of view of the case for the prosecution, is accurate, and on the further assumption that all inferences most favourable to the prosecution which are reasonably open, are drawn, is the evidence capable of producing in the mind of a reasonable person satisfaction, beyond reasonable doubt, of the guilt of the accused? That, as it seems to me, was the question which the learned trial Judge was required to answer in deciding on the submission of no case to answer."

[38] Direct evidence of the act of shooting was provided by the victim and Ms Jackson. Taking that evidence at its highest, it established that when the

victim got out of the car he was unarmed. He walked to the front of the car, but before he could move further the appellant yelled "I've had enough of this shit" and moved quickly behind the caravan where he took possession of the .22 rifle. After a short time the appellant re-emerged holding the weapon which he loaded and fired from the hip. The projectile struck the victim in the abdomen. Notwithstanding that the victim had obviously been wounded and had not made a move forward after the first shot, the appellant ejected the spent cartridge, reloaded and fired again. The second projectile struck the victim in the chest. Both shots were fired from a distance of approximately six to seven metres.

[39] These facts alone were capable in law of supporting a conclusion beyond reasonable doubt that at the time he fired either or both of the shots, the appellant intended to kill the victim. As King CJ observed in the passage cited, the evidence is to be taken at its strongest from the point of view of the case for the prosecution including the drawing of inferences most favourable to the prosecution which are reasonably open.

[40] In *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1 at 5, King CJ identified the role of the trial Judge faced with a submission of no case to answer in a case involving circumstantial evidence in the following terms:

> "It follows from the principles as formulated in *Bilick* … in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences were are reasonably open to the jury. He must decide

> upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence … . He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence." (citations omitted)

[41] These observations are applicable to the drawing of inferences from the conduct of the appellant as described by the victim and Ms Jackson. Plainly it was open to the jury to conclude that the appellant intended to kill the deceased. For these reasons, in my opinion this ground of appeal was without substance.

Ground 1 – unreasonable verdict

[42] Ground 1 asserts that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence: s 411 Criminal Code. This ground of appeal requires the court to examine all the evidence and determine whether, "upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty": *M v The Queen* (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at 493. The joint judgment in *M* also observed (493):

> "… But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and

heard the witnesses. On the contrary, the court must pay full regard to those considerations" (footnote omitted).

[43] The test stated in *M* was confirmed by the High Court in *MFA v The Queen* (2002) 213 CLR 606. In addition, the following observations in the joint judgment of McHugh, Gummow and Kirby JJ are of relevance [56]:

> "The majority in *M* pointed out that "[i]n most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced" [*M* at 494]. In such a case of doubt, it is only where the jury's advantage of seeing and hearing the evidence can explain the difference in conclusion about the accused's guilt that the appellate court may decide that no miscarriage of justice has occurred [*M* at 494 – emphasis added]:
>
> > 'If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a *significant possibility* that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.'"

[44] The appellant's contention was founded on the proposition that the evidence of the victim and Ms Jackson was so unreliable that it was incapable of rebutting the defence of self defence. The written submissions identified numerous areas of internal inconsistencies within the evidence of each of those witnesses and inconsistencies between their respective versions of the events of 2 July and 21 August 2006. In oral submissions counsel emphasised contradictory statements by the victim as to what the appellant said immediately before taking up the weapon, the appellant's movements immediately after the victim arrived and the victim's physical movements

immediately following the first shot. In these areas, counsel also emphasised evidence from Ms Jackson which contradicted the appellant.

[45] The matters to which counsel drew attention obviously provided fertile ground for submissions to the jury that the jury should entertain a reasonable doubt as to the honesty and reliability of both the victim and Ms Jackson. However, in the absence of evidence from the appellant or other evidence in the case contradicting the victim and Ms Jackson, it was open to the jury to find that notwithstanding that the victim may well have endeavoured to minimise his role, the essence of his evidence and that of Ms Jackson concerning the firing of the shots and the absence of any movement by the victim toward the appellant was true.

[46] The trial Judge gave full and accurate directions as to the burden of proof and the responsibility of the jury to acquit the accused if the jury could not work out what happened and was not sure which evidence to accept or reject. His Honour reminded the jury of the need to bear in mind the relationship between the victim and Ms Jackson and the possibility of a conscious or subconscious colouring of their evidence. Full directions were given concerning inconsistent statements and the approach to be taken should the jury be of the view that a witness told a deliberate untruth.

[47] The Judge drew attention to a number of the inconsistencies now relied upon by the appellant. He reminded the jury of the primary submissions of counsel. The jury cannot have been under any misapprehension as to the

nature of the challenge to the reliability of the evidence of these witnesses nor of their importance to the critical issues argued before the jury, namely, intent and self defence. This was a case in which the advantage of the jury in seeing and hearing the witnesses should not be underestimated.

[48] In my opinion this ground of appeal is not made out. Having considered the whole of the evidence, I do not experience a doubt about the guilt of the accused and I am far from persuaded that there is a significant possibility that an innocent person has been convicted. There was no evidence to contradict the evidence of the victim that he did not behave in a threatening manner toward the appellant. The evidence as to the essential features of the conduct of the appellant in obtaining the weapon and loading and firing it on two occasions was uncontradicted. There was no evidence to suggest that at the time of the first shot the victim was making any move toward the appellant. The assertions of the appellant to police and others, including the assertions that the victim lunged at him and he was acting in self defence, were untested and self-serving. The jury was entitled to reject the assertions of self defence and to rely upon those essential parts of the evidence which described the critical facts of the shooting.

[49] Of particular significance was the second shot. Whatever inconsistencies and inadequacies existed with respect to the evidence of the victim, it was not in dispute that the first shot struck the victim in the abdomen. In the absence of any evidence from the appellant, an inference that the appellant was well aware that the first bullet had struck the victim was unavoidable.

In addition there is no evidence or statement by the appellant to suggest that the victim behaved in a threatening manner or made any move toward the appellant after being struck by the first bullet. It was almost inevitable, therefore, that at least with respect to the second shot the jury would reject the suggestion that the firing of the second shot was a reasonable response in self defence to the circumstances in which the appellant found himself.

[50] For these reasons, in my view ground 1 was not made out.

Sentence

[51] The appeal against sentence was based upon the proposition that the Judge erred in finding that the appellant did not warn the victim before shooting and that the appellant formed an intention to kill "prior to the first shot".

[52] The Judge made a number of findings beyond reasonable doubt. The essential findings for present purposes are found in the following passages from his Honour's sentencing remarks:

> "… [The victim] took it upon himself to go to your block to sort the matter out. He drove onto your block and down to your caravan where you were seated, watching his arrival. It was not suggested that you anticipated his arrival, or that you had anything planned for that eventuality. After he arrived you got out of your chair saying, 'I have had enough of this shit', or words to that effect. You went into a building behind your caravan. You came out with a gun and you shot [the victim] twice.
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> It follows from the verdict of the jury that you intended to kill him when you fired at him, at least on the second occasion. In light of all of the surrounding circumstances, including the words uttered by you and your actions in getting the gun and firing it, I am satisfied

beyond reasonable doubt that you held the intention to kill at the time both shots were fired.

I find that at the time he was shot [the victim] was near his car. He had emerged from the vehicle but had not sought to pursue you into the premises. He did not chase after you.

There was some suggestion from you, in statements made at the time, that [the victim] 'flew' at you. What you meant by that expression was never explained. It may describe the manner of his arrival on your block. When he gave evidence it was not shown that he chased after you or pursued you at all. Given the respective physical condition of each of you, had he chased after you confrontation would have occurred within the premises, rather than outside.

Both bullets fired by you hit [the victim] in the torso. Having been shot he got back into his motor vehicle to escape from your block. You came to the window of the car and held the gun through the window pointing it at his head. Effectively, you taunted him with the weapon. Fortunately, for all concerned, you did not fire again. [The victim] then reversed his vehicle and went across the street to the house occupied by his wife."

[53] In arriving at his findings, the Judge specifically had regard to the challenge to the reliability of the evidence of the victim and the submissions of counsel for the appellant that the evidence of the victim was so unreliable that his Honour should be reluctant to make a finding adverse to the appellant on the basis of that evidence. The following passages are demonstrative of the care that his Honour took in this regard:

"During submissions on sentence Mr Read took me in detail to the evidence of [the victim] at the trial and submitted that the evidence was so unreliable in some areas that wherever it might lead to a finding adverse to you, I should be hesitant to make such a finding. It was submitted that I would not be able to make any adverse finding beyond reasonable doubt.

> I accept that there are elements of the evidence of [the victim] which reflect doubt upon his reliability in some areas. There were differences in his evidence as to whether he was crouched down at the time of the second shot and, if so, to what extent; whether at the time of [the victim's] arrival at the premises there was more said by you than words to the effect of, 'I've had enough of this shit'; whether you were still standing or whether you were moving when the second shot was fired; over what distance the skid marks of [the victim's] vehicle stretched, and other matters of that kind.
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> In my view, these are matters in relation to which it is not surprising that differences should occur over a period of time and in the context of the traumatic events of the time. However, in relation to the main thrust of his evidence, I accept [the victim] to be reliable.
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> During the trial there was no dispute that you fired the gun twice into [the victim]. The live issues were whether you did so in self-defence, and if not, what your intention was at the time. The jury rejected the suggestion that you acted in self-defence. There was a compelling case to the contrary, reflected in the fact that upon [the victim's] arrival you moved quickly away from him into the building, obtained the rifle and came out and without more, shot him. There is no evidence that you warned him to leave or warned him that you would shoot him if he approached you. The evidence of [the victim], which I accept in this regard, was to the contrary. You simply shot him.
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> I accept the submission of Mr Read that your actions were not pre-meditated in the sense that you did not anticipate [the victim's] arrival and you did not plan to shoot him upon his arrival. However, upon his arrival you got the gun and it was at about that time that the intention to kill must have been formed. You were possessed of that intention for only a short period of time. By the time you threatened [the victim] with the gun through the window of the car, you had backed away from your original intention to kill him, although you were still acting in a menacing manner."

[54] In the attack upon the findings of the Judge, counsel advanced a broad proposition that "where the evidence is in such a unsatisfactory state as to make plain findings of fact beyond reasonable doubt difficult, it is incumbent upon the Judge to give the accused the benefit of that doubt and

sentence in accordance with a factual scenario which is more favourable to the accused yet consistent with the jury verdict." That proposition is not supported in principle or by authority. The mere fact that the state of the evidence might make findings of fact beyond reasonable doubt "difficult" does not preclude such findings being made. If there is a doubt, the offender is entitled to the benefit of the doubt. However, notwithstanding that the state of the evidence makes finding facts proven beyond reasonable doubt difficult, if the evidence is capable in law of supporting an adverse finding beyond reasonable doubt, and the Judge makes that finding, the Judge has not erred in law.

[55] In connection with the complaint that the Judge erred in finding that there was no evidence that the appellant warned the victim prior to the shooting, counsel submitted that the Judge failed to have regard to the statement of the appellant in the 000 call that "I told him to get off me property". The Judge was entitled to disregard that statement and to accept, as he did, the evidence of the victim to the contrary. In these circumstances, it matters not whether his Honour was strictly correct in his finding that there was no "evidence" that the appellant warned the victim to leave. If it was part of the res gestae, the statement in the 000 call was "evidence" that the appellant told the victim to get off the property. Significantly, however, his Honour was correct that there was no evidence that the appellant warned the victim that he would shoot the victim if he approached.

[56] In these circumstances it is unnecessary to determine whether the 000 call was part of the res gestae. Whether the Judge was strictly correct in finding there was no "evidence" of a warning to leave is immaterial. As I have said, the Judge accepted the evidence of the victim to the contrary.

[57] It was also open to the Judge to make the finding that upon the arrival of the victim, the appellant got out of his chair saying "I've had enough of this shit" or words to that effect. Counsel submitted the finding was not open on the evidence because the victim told the police that the appellant "mumbled something". As mentioned, his Honour was well aware of the inconsistencies and the mere fact that the victim had made an inconsistent statement to the police at a time when he was in hospital does not, of itself, necessarily create a reasonable doubt as to whether his evidence was accurate when he said that the appellant spoke words to the effect of "I've had enough of this shit".

[58] There was ample evidence to support the findings made by the Judge. His Honour had the distinct advantage of having seen and heard the witnesses, particularly the victim. There is no basis upon which this Court can reasonably interfere with those findings.

[59] Further, even if the submissions of the appellant are made out, in my opinion this Court should not interfere with the sentence. Bearing in mind the finding of the Judge that the appellant has not accepted responsibility for his actions and has not expressed any "remorse or even concern for the

situation in which [the victim] has found himself", in my view the sentence of nine years imprisonment is toward the lower end of the appropriate range of sentences for the crime committed by the appellant. Even if the appellant was to be sentenced on the basis that he formed the intention to kill after the first shot, in my view such a finding would not result in a lesser sentence. It would mean that having shot the victim in the abdomen effectively removing any threat, the appellant then formed an intention to finish the victim off. Similarly, even it was found that the appellant told the victim to get off the appellant's property before firing the first shot, a reconsideration of sentence would not result in a sentence less than nine years imprisonment.

[60] For these reasons I was of the view that the appeal against sentence should be dismissed.

Mildren J:

[61] I have had the advantage of reading a draft of the reasons prepared by the Chief Justice. I agreed that the appeal should have been dismissed for the reasons there stated, having read and considered the whole of the evidence, and not having entertained a reasonable doubt as to the guilt of the appellant.

Southwood J:

[62] I agree with the Reasons for Decision of Martin CJ. Having considered the whole of the evidence I entertained no doubt as to the guilt of the appellant. The sentence imposed on the appellant was a just and appropriate sentence.