PARTIES:	MAXWELL PATRICK MAHER
	v
	ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA86/97 (9701159)
DELIVERED:	19 December 1997
HEARING DATES:	21 November 1997
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Appellant:	P. Loftus
Respondent:	J. Watson

Solicitors:

Appellant:	Waters James McCormack
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	
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kea97041

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

No. JA 86/97
(9701159)

IN THE MATTER OF the Justices Act

AND IN THE MATTER OF an appeal against a conviction by the Court of Summary Jurisdiction at Darwin
BETWEEN:

MAXWELL PATRICK MAHER
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: Kearney J

REASONS FOR JUDGMENT

(Delivered 19 December 1997)

The appeal

This is an appeal under s163(1) of the *Justices Act* against a decision by the Court of Summary Jurisdiction at Darwin on 16 June 1997, convicting the appellant of unlawfully assaulting Stephen Keen on 6 January 1997; there was a circumstance of aggravation in that the victim had thereby suffered bodily harm. Nine grounds of appeal were ultimately relied on.

The case before the Court of Summary Jurisdiction

(a) The evidence for the prosecution

The prosecutor's case was that on 6 January at Herbies' Bar Mr Keen was assaulted by the appellant, who kneed him in the groin and punched his head. They had been discussing whether a dividing fence should be erected between their properties. The bodily harm alleged was the victim's resulting incapacity for about 3 weeks; he had difficulty in walking, was bruised and swollen in the groin area, and had sustained a broken nose and a swelling around his eye.

The victim testified as follows. Accompanied by 2 employees he was drinking in the bar after work. He had had 2 light beers and was shortly to leave when he saw his neighbour, the appellant, walk in. At one time they had worked together. He walked across to the appellant, to speak to him about erecting a dividing fence along their common boundary "in the next week or so". This subject had been broached before, and the appellant had then agreed to the erection of the fence. He did not approach the appellant in an aggressive manner. The appellant had responded that he did not want to erect the fence, because he was selling out; he told the victim he should see the new owners. The victim argued for the construction of the fence, and then said that he would recover half the cost from "whoever owns the block when I put the fence up". He was then about to rejoin his own group when the appellant yelled at the top of his voice: "I'm sick of your f-----g s--t", and 'all of a sudden kicked me or kneed me in the balls'. He then felt that he was "getting punched in the head"; his next memory was of "being on me knees" with the

appellant hitting him, until some people pulled the appellant away. He said that the pain he suffered was “excruciating”.

The appellant sought to show that in January the victim had been hostile to him for a number of reasons, including a dispute between them over compensation for a work injury which the appellant had suffered. In cross-examination the victim agreed that his opening remark on approaching the appellant had been: “Max, about this bloody boundary fence.” He denied that he had ever raised his hands to the appellant, or had lunged forward at him, or had tried to grab him by his upper body or shoulders. He said that when he was on his knees he had grabbed the appellant’s legs, and the appellant then “toppled over”, as other people sought “to pull him away”.

The victim’s account was generally supported by his employees, Messrs Snowden and Thorne, who had been drinking with him at the bar, and later pulled the combatants apart. Mr Snowden said that he saw the victim throw a couple of punches in self-defence, “but they missed badly”. He said that the appellant and the victim ended up on the floor, with the victim “pretty much” on top. Mr Thorne said that both the appellant and the victim eventually had “raised [their] voices,” and that the victim was standing with “his arms folded” prior to being kneed in the groin by the appellant. He did not see the victim on top of the appellant; the appellant was always on his feet, while the victim was “down on his knees on the ground and Maxy over the top, was thumping the crap out of him.”

Medical reports sufficiently established the victim's bodily harm. A taped record of a Police interview of the appellant on 14 January 1997 was also in evidence. In it he said he "had walked into a set-up", he had "tried to walk away", the victim had "stepped forward and I came up with the knee and he grabbed me and I started punching"; he explained his fear of a "heavy blow in the stomach area" due to surgery he had undergone, his terror of "another aneurism or a tumour", that the victim "wouldn't let go" so he "kept punching him", they "fell on the floor" with the victim "tyring to get up on top of me"; two more punches by the appellant, and it ended with the victim being pulled away. He said that the victim had been "really aggro," had "wanted to fight", and had "stepped into me", "put his hands up, not clenched", "he was going to grab me," "I was just defending myself all the way through", "I kept punching until I knew I was safe."

(b) The evidence for the defence

The appellant testified as follows. He had had major abdominal surgery some 2 years before, as a result of which he believed that a punch to his abdomen "would probably kill me"; "one belt in the belly and it could be very serious for me." It may be noted that this belief was vital to the justification of self-defence on which his then counsel, Mr Priestley, relied (p6). The victim had approached the appellant "in an irate manner" saying; "Now, about this fence". The victim had refused to take "no" for an answer on the subject, "was trying to push me into an argument," and "was looking for a fight." The appellant had been "frightened from the start", since the victim had "been cold-shouldering me for some weeks", and he had heard that the victim "was

looking for an excuse to give me a hiding." Eventually the appellant, who had "tried to walk away", stopped and said loudly "leave me alone, I'm f-----g sick of this"; the victim had responded "I'm sick of you", and lunged at him, unfolding and raising his arms so that "I thought he was going to hit me or grab me round the head in a headlock". It was then that the appellant dropped the beer he was holding and "as a natural reaction" and believing that the victim "was going to hit me" lifted his knee, making "a lucky connection" with the victim's groin, and raising his own hands "for protection."

I note that this was the crucial point in the appellant's case; in terms of s32 of the Criminal Code he was alleging he had an honest and reasonable belief at the time, that he was about to be assaulted by the victim, and accordingly he had "lifted his knee" in self-defence (s27(g)); literally, a knee-jerk or reflex reaction on his part to a perceived threat.

The appellant said that when the two went to the floor, the victim "was definitely on top of me"; the appellant then "had him by the hair" to keep him back "as he was trying to come up" his body, and this explained how some of the victim's hair was pulled out. The appellant explained why he always wore several rings on his fingers. He said that the victim was "holding me, wrestling me", and accordingly he "couldn't stop [fighting] until [the fight] was stopped." By his account he was defending himself throughout. He would not have punched the victim as the latter doubled over after being kneed in the groin, if the victim had not then "immediately grabbed me." He did not think that the victim had punched him at any time.

Luke Jeffries, a friend of the appellant, was with him in the bar at the time and testified as follows. The victim "seemed to move forward towards Max, I think he was upset, and I'd say he had gritted teeth --- [he] looked as though he lunged at Max, whereas Max has stepped away." The victim had "raised his hands" in a grabbing action, as he moved "a step closer" to the appellant. The victim and the appellant then "both moved into each other," the appellant "raised his knee" into the victim's groin "pretty hard", then "toppled backwards" and fell on the ground, with the victim "on top." He had "never seen any punches thrown", except for 2 by the appellant to the victim's face when "they were both on the floor."

(c) The submissions

Relying expressly on Code s27(g), and tacitly on s32 as well, Mr Priestley submitted that "the essential matter in this case" was "whether [the Court could] be satisfied beyond reasonable doubt that [the appellant] did *not* have a reasonable apprehension that he was going to suffer harm." I think that put the real question in issue very clearly, though it later became somewhat obscured.

As part of its case, the prosecution had to prove that the appellant's assault on the victim was "unlawful", a term defined in Code s1 as meaning "without authorisation, justification or excuse." I note that Code s27 sets out generally the "circumstances" in which the use of force of the type used here is justified, and hence not 'unlawful'. Section 27(g) provides that the use of

force in self-defence is one of those "circumstances": the appellant's assault on the victim was justified if carried out in self-defence, provided the force he used in that assault was "not unnecessary force". The term "unnecessary force" is defined in Code s1, viz:

> "'unnecessary force' means force that the user of such force knows is unnecessary for and disproportionate to the occasion *or* that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion." (emphasis added)

See *Marwey v The* Queen (1977) 138 CLR 630 for this concept. Mr Priestley submitted that the "justification of self-defence has been squarely raised" on the evidence and the prosecution had to "negative that upon reasonable doubt." This appears to have been common ground.

His Worship rightly accepted that the prosecution had "to negative beyond reasonable doubt any justification" as part of its task of proving "beyond a reasonable doubt that this was an unlawful assault." However, he observed that despite variations in the evidence of the prosecution witnesses "they were all solid --- that there was nothing done by [the victim] of an aggressive nature by way of movement just before the knee." This was of course contrary to the defence account; see pp4-6. Mr Priestley accepted that, but submitted that to convict his Worship had "to be convinced beyond a reasonable doubt [that the appellant] is not telling the truth," and as to that "there must be a reasonable doubt." On appeal, Mr Loftus of counsel for the appellant noted that this appeared to misstate the issue in terms of the burden of proof, which was that the prosecution witnesses' version be established

beyond reasonable doubt to be the truthful version; however, in this case, to arrive at that conclusion would I consider require rejection beyond reasonable doubt of the appellant's version. Mr Priestley's submission gave rise to the following exchange:

> "HIS WORSHIP: *Why must it be a doubt, it's a matter of who I believe, isn't it?*
>
> MR PRIESTLEY: I don't think it is just a matter of who you believe, Your Worship. If you prefer - even if you prefer the evidence of the 3 [prosecution witnesses], there still must be a doubt in your mind as to exactly what occurred there, and that doubt would be sufficient in my submission, to prevent you from convicting Mr Maher.
>
> HIS WORSHIP: That may be so, but *tell me why I must have a doubt*? I don't know who I believe at the moment, I've got to go away and think about it, but just say I believed, on the crucial element of what happened just before the knee, the prosecution witnesses - and when I say I believe them, then I have the other side of the coin and I don't believe Maher or Jeffries.
>
> *You're right, that may not be enough, I still then have to look at it from* the perspective - *the mental perspective of your client*.
>
> MR PRIESTLEY: That's right.
>
> HIS WORSHIP: *And it may be that even if it happened the way of the defence [quaere, prosecution] witnesses, I've still got to be satisfied beyond reasonable doubt that there was the perception in Maher's mind that - - -*
>
> MR PRIESTLEY: That's entirely correct, Your Worship.
>
> HIS WORSHIP: Is that what you want to put to me?
>
> MR PRIESTLEY: Yes, that's what I'm trying to put to you." (emphasis added)

I note that the passage last emphasized is important, and difficult to follow. In any event, I note that his Worship did not have to be satisfied beyond reasonable doubt as to any "perception in [the appellant's] mind" that he was under assault by the victim, in terms of threat of immediate attack; rather, in terms of Code s32, the prosecution had to satisfy his Worship beyond reasonable doubt that the appellant did not honestly and reasonably (though mistakenly) perceive he was under such a threat. His Worship had already accepted that that was the position; see p7.

Mr Priestley submitted as follows. The evidence of the prosecution witnesses showed that it was a situation "of some aggression" from the outset, a situation instituted by the victim. The two men had been face to face, about a foot apart. In that situation the appellant was justified in believing that he was at risk of sustaining serious bodily harm. That belief was based on his fear of imminent attack, his knowledge of his own medical condition, and his consequent appreciation of the dire consequences, as he believed, of receiving a blow to his body. I note that this belief that he was at such risk was crucial, because if he did *not* hold that belief, his immediate behaviour - his kneeing and punching - would be clearly seen as excessive; in terms of s27(g), it would have been the use of 'unnecessary force'. His reaction however fell to be measured against his honest and reasonable belief that he was then under threat of serious injury, if it was reasonably possible that he held such a belief. I note as important that his Worship accepted Mr Priestley's final submission that he had to acquit the appellant, if he was not satisfied beyond reasonable

doubt by the prosecution that the appellant did not have a reasonable belief that "he was in danger of suffering serious harm."

In the course of the prosecutor's submissions, he had the following exchange with his Worship:

> "THE PROSECUTOR: The question of self defence, your Worship, is always one of degree, and in my submission against this. If as is alleged by the defence that Mr Maher was afraid of some sort of injury occurring to him, why didn't he stop?
>
> HIS WORSHIP: It's a bar room, a bar room brawl's not an antiseptic court room.
>
> Mr Prosecutor, if I accept his version then I'd acquit him. *If I don't accept his version, even with the help of Jeffries, and I don't accept that even if that didn't happen but it was operating in his mind, then I won't*. Isn't that the situation?" (emphasis added)

The meaning of the sentence emphasised, if correctly transcribed, is somewhat obscure. The appellant bore no onus of proving his version of events, or of proving that he had an honest and reasonable, though mistaken, belief that he was under threat at the time; the burden lay on the prosecution to negative these matters, so as to exclude any reasonable doubt as to their existence, a position which his Worship had accepted (p9).

(d) The decision

His Worship retired briefly before delivering an oral judgment. He stated that:

"--- The Crown set out to prove that this unlawful assault was constituted by a knee to the groin with, then, punches to the head region by Maher on Keen.

--- it's common ground that there was an incident with those assaults occurring, at Herbie's Bar, --- it's also common ground that that particular incident of assault arose in the context of a discussion regarding a boundary fence between two neighbours.

It must also be common ground that --- if I find that that assault was unlawful, --- the aggravation of bodily harm is made out. The defence admitted such by allowing the tender of medical reports which prove the alleged injury and the injuries to the testicles."

His Worship then referred to the evidence by the various witnesses, noting that the victim may have been "gilding the lily a little bit" when he said he did not speak to the appellant in an aggressive tone. His Worship noted that the appellant:

"--- gave evidence that, so far as his own mind was concerned, that because of [the victim's 'irate' manner of speaking, his own medical condition, the victim's refusal to 'take no for an answer' and the 'stepping forward, lunging of [the appellant], [moving] forward, hands out to grab him'], he thought he was going to be hit. He added to his record of interview in that regard, and that he was frightened and scared, and that he firmly believed that [the victim] was looking for an excuse 'to give me a hiding'.

He denies the victim's version of events in relation to those crucial moments before the hit or the knee."

His Worship then stated his assessment of the credibility of the various witnesses, and his conclusions based on that assessment, viz:

"--- Jeffries, in contradistinction to everyone else, and when he said he was looking because --- the dramatic event of the knee to the groin had happened - so he wasn't just glancing, he was looking directly at the fight

- to use his words, “never saw any punches thrown”. He only saw 2 [punches] thrown, when they were on the floor. He remembers the incident well.

Well, *Jeffries was a very unimpressive witness in terms of his recollection of the event*, because there were plenty of punches thrown, even from [the appellant’s evidence] after the knee and before the --- last two [punches] were thrown [by the appellant] when they were on the ground.

Jeffries was partisan in my opinion, stuck to a script. *I found him unreliable, unimpressive*, and I’ve studied his demeanour closely, and not just because of his evidence as to no punches being thrown, *his whole demeanour was unimpressive*; and [he] seemed to me, as I’ve said, to be *partisan*.

The prosecution witnesses were not word perfect in relation to what they say occurred, *but they were all very strong in their evidence that [the victim] did not lunge forward or make a movement at --- the [appellant], and certainly didn’t raise his hands or arms to the [appellant]*.

It was subtly and sometimes unsubtly suggested [the prosecution witness, Messrs Snowden and Thorne] got together or were partisan because they were employed by the victim, but *I don’t accept that. I found all of them to be credible, to be reliable, and to be believable.*

[The appellant] --- says in his record of interview that Keen stepped forward and lunged at him - I believe he used the same word ‘lunge’ as Jeffries did. *I don’t believe him, it’s as simple as that*. I don’t believe him. And *I don’t believe, that whatever the situation was, whether there was a ‘lunge’ or not, that he thought he was going to get hit in Herbie’s Bar on that Monday afternoon, by [the victim]*. I believe [the victim] when he says he wasn’t going to hit him. His evidence was to the effect that he wasn’t going to hit him. He certainly knew of [the appellant’s] stomach troubles.

I’m sure that [the appellant] was frightened *after* he kneed [the victim] in the testicles, frightened of a return of the violence by [the victim] in terms of punches to his stomach, and that’s one of the reasons he’s continued on with the punches. But *I don’t believe it was the reason he kneed him and punched him, at least the first once or twice.*

He was irritated by [the victim]. [The victim] had confronted him in a bar, perhaps not the most sensible things of all to do, and indeed I accept that [the appellant] was walking away. But I do believe the

evidence that suggests that [the appellant] got angry, irritated - more than irritated, he got angry or to use the prosecutor's word 'cross' - and used words to the effect of 'I'm f-----g sick of you', followed immediately by the knee to the testicles, *and that was not done with the perception by [the appellant] that he was defending himself.*

I don't accept him on that. I don't believe him on that. I studied him in the witness box and that is the result of hearing him in the witness box. *I don't accept his evidence in terms of self defence at all.*

I accept that he's an asthmatic, he has migraines, he has stomach problems. He's terrified of another aneurism and tumour, but I don't accept he's an aged gentleman, or was an aged gentleman, albeit sick gentleman, that afternoon, in terms of being a gentleman.

He unlawfully assaulted Keen deliberately, and was not provoked in terms of that being a defence, and he didn't do it for reasons of self defence at all.

The evidence that suggests self defence by the defence, when that is compared to the prosecution evidence, *I accept the prosecution evidence and witnesses in that regard, and I don't accept the defence witnesses at all.*

Accordingly, when looking at the elements, I find proved beyond reasonable doubt that there was an assault, and that it was unlawful, that is to say it wasn't justified, excused or authorised as defined under the Criminal Code." (emphasis added)

The submissions on appeal

Mr Loftus' main submission was that his Worship had erred in the way he had come to his decision, as regard the onus of proof and the issue of self-defence; the argument is best seen in the discussion of Grounds 2, 3 and 4 (pp14-19). Mr Loftus treated his Worship's reference to not "accepting" the appellant's evidence on salient points, as indicating an erroneous approach that if his Worship did not believe the defence witnesses, he would convict the appellant. I turn to the grounds of appeal.

Ground 1

In all the circumstances the finding of guilt was unsafe and unsatisfactory.

I note that this ground may be raised under s163(1) of the *Justices Act*; see *JK v Waldron* (1988) 43 FLR 451 at 455-7.

Mr Watson of counsel for the respondent submitted that his Worship's findings on the evidence - that the prosecution witnesses were credible, reliable and believable, while the account of the defence witnesses (including the account by the appellant that he was acting in self-defence) was not believed - constituted a safe and satisfactory basis for his conclusion beyond reasonable doubt that the prosecution version should be accepted, self-defence negatived, and the appellant convicted. See p23, for discussion.

Grounds 2 and 3

The learned Magistrate misdirected himself in approaching his decision on the basis that the question for determination was whether he believed the version of events advanced by the prosecution or that advanced by the appellant.

The learned Magistrate misdirected himself in not approaching his decision on the basis that the question for determination was whether the prosecution had proved its case beyond a reasonable doubt.

These differently-worded grounds involve the same legal proposition; they are directed at separate remarks by his Worship in the course of his discussions with Mr Priestley and the prosecutor.

Ground 2 is directed at the remark:

"Why must it be a doubt; it's a matter of who I believe, isn't it?" (p8).

See my comment at p9. The question for ultimate decision by his Worship was whether the prosecution had proved its case beyond a reasonable doubt. In coming to a conclusion on that question it is quite right, as Mr Loftus submitted, that his Worship could totally disbelieve the appellant yet still acquit him, because he was not satisfied that the prosecution evidence proved the charge beyond a reasonable doubt. In that sense, the question to be answered is not "a matter of who I believe". Mr Loftus submitted that his Worship had erred in framing the question in those terms, and this erroneous approach had persisted and infected his ultimate conclusion of guilt.

Ground 3 is directed at his Worship's remarks in his discussion with the prosecutor, emphasised at p10; see my comment on that page. The meaning is not clear, but I consider that the fair construction is that his Worship considered that in the event that he did not "accept" the appellant's version of events, and did not "accept" that the appellant mistakenly believed in that version and so felt under threat, the appellant should not be acquitted. This appears to mis-state the burden of proof.

However, his Worship's remark was made in the course of discussion with the prosecutor. It is his Worship's reasons for decision (pp10-13) which are relevant. In those reasons it is clear that his Worship believed the prosecution witnesses' version of events, and disbelieved the appellant's version; further, his Worship disbelieved the appellant's account that he had kneed the victim for the purpose of defending himself. In the light of those findings I consider that there was no room for a reasonable possibility that the appellant's version was correct, or for a reasonable possibility that he nevertheless honestly and reasonably (though mistakenly) believed that he was acting in self-defence. On these findings of fact, it was inevitable that his Worship would conclude (as he did) that there was a deliberate and unprovoked assault on the victim by the appellant.

Ground 4

> ***The learned Magistrate misdirected himself in not approaching the issue of self-defence on the basis that the question for determination was whether the prosecution had proved that the appellant was not acting in self-defence.***

It can be seen that the contention was that his Worship did not place the burden on the prosecution of excluding self-defence. Although it was not expressly referred to before his Worship, it was necessary that Code s32 be taken into account, viz:

> "A person who does --- an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally

> responsible for it to any greater extent than if the real state of things had been such as he believed to exist."

Mr Priestley had, however, in effect rightly put the combined operation of s27(g) and 32 as "the essential matter in this case"; see pp6-7.

In general, Mr Loftus referred to the evidence in support of the appellant's contention that he was acting in self-defence, and to his Worship's conclusion (p11) that the victim may "have been 'gilding the lily' a little bit" in asserting that in his discussion with the appellant he did not speak aggressively. Mr Watson rightly conceded that the evidence before his Worship had raised for consideration the question of self-defence, and accordingly the prosecution had to exclude self-defence beyond a reasonable doubt. His Worship therefore had to deal with it, and the question of the appellant's belief: see *Waterside Workers' Federation of Australia v Birt & Co Ltd* [1918] St R Qd 10.

No onus to establish self-defence lay on the appellant; once the evidence disclosed the possibility of self-defence, the prosecution had to disprove it beyond reasonable doubt, as an essential part of its case, before a verdict of guilty was justified - see *Zecevic v DPP (Vic)* (1987) 162 CLR 645 at 657. Further the onus was on the prosecutor to satisfy the Court beyond reasonable doubt of the non-existence of the operative mistaken belief relied on by the appellant, there being some evidence of it; *Loveday v Ayre and Ayre* [1955] St. R. Qd 264; *Brimblecome v Duncan; ex parte Duncan* [1958] Qd R 8. In the circumstances, the appellant had to be acquitted if his Worship thought that

his account of holding a (mistaken) belief that he faced an imminent attack might reasonably be true, and if it was not proved beyond reasonable doubt that he had used unnecessary force; see *McPherson v Cairn* [1977] WAR 28. As to "unnecessary force" the nature and degree of force he used in his defence was to be assessed in the light of his belief as to the threat he faced; he was entitled to use such force in his defence as was reasonable in the circumstances as he honestly and reasonably believed them to be. In that connection, if the appellant showed that he had only done what he honestly and instinctively thought was necessary to avert imminent danger, that would be very strong evidence that his actions were reasonable; see *R v Whyte* (1987) 85 Cr App R 283. In sum, to exclude self-defence, the burden lay on the prosecution to prove beyond reasonable doubt that in kneeing the victim, the appellant was not then acting under an honest and reasonable (though mistaken) belief that he was about to be attacked by the victim; if the prosecution failed on that, it would nevertheless exclude self-defence by proving, beyond reasonable doubt that the appellant had used force which was "unnecessary force" in the circumstances as he honestly and reasonably believed them to be. See *Lean* (1989) 42 A Crim R 149.

I note that it was not *essential* for the appellant to have demonstrated that he did not want to fight; that is only a factor to be taken into account in assessing the reasonableness of his conduct. See *R v Howe* (1958) 100 CLR 448, not over-ruled on this point; *R v Bird* (1985) 81 Cr App R 110. It is permissible to use force to ward off an attack honestly and reasonably believed to be imminent; that is, an honest and reasonable belief that a blow is about to

be struck may justify a pre-emptive blow - *R v Lewis* [1986] 3 Qd R 502 at 505 per Connolly J, *R v Secretary* (1996) 107 NTR1 at 3, and *Beckford v The Queen* [1988] AC 130.

Mr Loftus relied on the following passage in the cross-examination of Mr Thorne, viz:

> "So the raised voices [was those of] Mr Keen and Mr Maher?---Hmmm.
>
> Later on, is that right?---Hmmm.
>
> And that's later on, before Mr Maher raised his knee?---Yes.
>
> Isn't that right?---Yes, that's right.
>
> And that was when they were chest to chest, isn't it?---Yeah, they come in closer then yeah.
>
> And was it Mr Keen who moved closer in - it was Mr Keen who moved towards Mr Maher, wasn't it?---Not that I know of, they were both - - -
>
> HIS WORSHIP: *Denies that Keen moved toward Maher*." (emphasis added)

As to the sentence emphasized, Mr Loftus rightly submitted that Mr Thorne's cut-off response "Not that I know of, they were both - - -" was not a denial that the victim had moved towards the appellant; one possibility is that the witness was saying, when interrupted, that both men were moving towards each other as Mr Jeffries testified (p6). It will be recalled that in his reasoned judgment (p12) his Worship had referred to the prosecution witnesses being "all very strong" on the vital point that the victim had not lunged or moved

towards the appellant; Mr Loftus submitted that that conclusion might not be correct, on a proper understanding of Mr Thorne's testimony above.

Mr Loftus also referred to Mr Snowden's evidence (p3) that the two men had ended up on the floor, with the victim "pretty much" on top of the appellant. He noted that this supported the appellant's evidence, which had been "totally denied" in that respect by Mr Thorne (p3). I note, however, that his Worship at p12 took account of inconsistencies in the evidence of the prosecution witnesses.

On the whole it is clear, I think, that his Worship's conclusions on the credibility of witnesses were such that his findings as to what in fact happened - no lunge by the victim towards the appellant, and an assault on the victim by the appellant in anger - and as to what the appellant claimed - he was not believed in his assertion "that he thought he was going to get hit" - were established against the appellant beyond reasonable doubt. His Worship did not believe (pp12, 13) that there was a 'lunge' by the victim, or that he raised his hands or arms to the appellant, before the appellant commenced to assault him; nor did his Worship believe (p13) that the appellant perceived that in kneeing the victim he was defending himself. His Worship considered that the appellant neither acted in self-defence, nor believed that he was so acting. He held in effect that self-defence was disproved; as their Lordships said in *Palmer v The Queen* [1971] AC 814 at 832, in those circumstances "self-defence --- is eliminated from the case --- as a defence it is rejected."

Grounds 5 and 7

In finding against the appellant's version of events the learned Magistrate overlooked or ignored evidence in the prosecution case which tended to support the appellant's version.

In determining whether to convict the appellant, the learned Magistrate failed to consider, or to consider properly, the discrepancies between the evidence of the prosecution witnesses.

Some of the matters raised here are dealt with in the discussion of Ground 4 (p19). I consider that his Worship took into account the discrepancies between the evidence of the prosecution witnesses, and did not overlook or ignore such of that evidence as tended to support the appellant's version, in coming to his conclusions.

Ground 6

The learned Magistrate misdirected himself in failing to consider, or to consider properly, whether the prosecution had discharged its onus of proving that, on the version of events most favourable to the appellant suggested by the material in evidence, the acts of the appellant were unprovoked.

An assault committed because of provocation is excused, provided the conditions set out in Code s34(1) are met. No submission as to provocation was put to his Worship; however, if the excuse of provocation might possibly be inferred from the evidence, it was his Worship's duty to consider it. His

Worship tersely rejected it at p13. Mr Loftus referred to the evidence of raised voices and argument (p19), as raising the issue of provocation. He submitted that the prosecution had to negative provocation. Ultimately, however, he did not press this ground of appeal. I consider that his Worship's findings of fact (p12) indicate that there was no provocation by the victim, as defined in s1 of the Code, and the assault by the appellant was because he "got angry"; his Worship's conclusion at p13 on provocation was warranted.

Grounds 8 and 9

> ***The conduct of the learned Magistrate towards the solicitor for the appellant during the course of submissions was such as to cause the solicitor to lose his train of thought, and to amount to excessive interference by his Worship in the course of the trial.***
>
> ***In his attitude towards the appellant and his case, the conduct of the learned Magistrate throughout the hearing was such that a fair-minded person might reasonably apprehend or suspect that he had prejudged or might prejudge the case.***

Mr Loftus submitted that his Worship had interrupted Mr Priestley's submissions twenty-nine times, over 5 pages of the transcript. I have read the transcript. I consider that there was at time a dialogue between his Worship and Mr Priestley, with his Worship responding to Mr Priestley's various submissions. Such a process can be very useful to counsel. The dialogue falls nowhere near "excessive interference" by his Worship; nor could it possibly give rise to a reasonable suspicion by fair minded people that his Worship had

pre-judged the case. See generally, *Galea v Galea* (1990) NSWLR 273 at 277-8, and 283.

Conclusions

I have already expressed my views on Grounds 2 and 3 (pp15-16), Ground 4 (p20), Grounds 5 and 7 (p21), Ground 6 (p21) and Grounds 8 and 9 (p22). As to Ground 1, I reject Mr Watson's submission that to succeed in challenging his Worship's findings of fact, the appellant must show that there was no evidence to support the particular finding, or that the evidence was all one way. What must be shown to establish that the conviction was "unsafe and unsatisfactory" is that on the appellate court's own independent examination of both the quality and sufficiency of the relevant evidence, it was such that it would be dangerous to convict even if the evidence was sufficient to do so; see *JK v Waldron* (supra) at 457 and *Morris v The Queen* (1987) CLR 454. Applying that test, I am not satisfied that the finding of guilt was unsafe or unsatisfactory. His Worship was in a privileged position to evaluate the evidence and credibility of the witnesses. The inconsistencies in the evidence are not of such a nature as to persuade me that there is a significant possibility that an innocent person has been convicted. See *M* (1994) 181 CLR 487.

This was a case of two opposing bodies of evidence; it is natural to begin the approach to decision-making - in such a case - by asking: "who should I believe?" However, that approach has been criticized, for the reasons stated by Wells J in *R v Calides* (1983) 34 SASR 355 at 358, and in the cases there

cited. In this case, his Worship was well aware of and applied the correct principles of onus and standard of proof; see pp7 and 9-10.

For the reasons set out above, none of the grounds of appeal have been established, the appeal is dismissed, and the conviction of 16 June 1997 is affirmed.