IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B14 of 2016

BETWEEN:

MARK JAMES GRAHAM
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

It is certified that this submission is in a form suitable for publication on the internet.

Part II: Issues raised by the appeal

1. The appellant was convicted on 30 September 2014.

2. On 16 April 2015, far removed from the atmosphere of the trial, it was argued to the Court of Appeal that the learned trial judge ought to have done certain things that he was not asked by trial counsel to do. The Court of Appeal held that his Honour had addressed the issues and that in the circumstances there was no need for further directions. Having so found, the Court was not required to consider the proviso. The Court also noted that neither counsel had asked for further directions "whether by way of emphasis or correction".[1]

[1] *R v Graham* [2015] QCA 137 per Atkinson J at [37].

Filed on 6/5/2016 on behalf of the respondent

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Per: Mr. Peter Negerevich

3. The position adopted by counsel was explicable in the context of the trial. When so viewed, the omission averred has not caused a miscarriage of justice.

4. Further, the case is well suited to the application of the proviso. There are no "natural limitations" that would preclude its application, since the relevant event is captured on video footage that facilitates scrutiny of any claim to self defence.[2] And on any viewing of that footage, there is no reasonable possibility that a substantial miscarriage of justice has occurred.

Part III: Notices under s 78B of the *Judiciary Act 1903*

5. The respondent has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903 and considers that no such notices need be given.

Part IV:

6. The appellant's narrative of facts is not contested, but the relevant facts are best appreciated by viewing Exhibit 3 and Exhibit 31.[3]

Part V: Applicable Statutes

7. Applicable provisions appear in the schedule to the appellant's submissions. The respondent adds s 668E of the *Criminal Code.*

668E Determination of appeal in ordinary cases

> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

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[2] *Weiss v The Queen* 224 [2005] CLR.300 at [41].
[3] And in particular, in ex 3 between 13:46:08 and 13:46:32; in ex 31 between 13:46:00 and 13:46:31.

(1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

Part VI:

THE RESPONDENT'S ARGUMENT

8. There is no contention that the verdict is unreasonable, nor that any aspect of the law, as explained to the jury by the learned trial judge, was wrong. Nor is it said that any relevant aspect of the law was omitted from the summing up. Rather, it is contended that there was a failure to engage with certain things said, in his closing address, by the Crown prosecutor, and a related failure to give certain directions which are now said to have been necessary[4], but which were not requested at trial.

9. In these circumstances the failure to give a direction will only amount to a miscarriage of justice if the direction *should* have been given.[5] The averred omission did not concern any part of the summing up conventionally thought to be mandatory (such as the onus of proof), nor to any element of the offences charged. And the defences raised were explained to the jury and provided to them in writing. Of themselves these circumstances make it difficult to contend that a further direction, only subsequently articulated, *should* have been given. And when regard is had to the context of the trial and, within that, the fact that

[4] Appellant's submissions 6.20.2

[5] *Dhanhoa v The Queen* 217 CLR 1 per McHugh and Gummow JJ at 13: [38], our emphasis.

trial counsel himself did not request it, any such contention becomes unsustainable.

10. It is not been suggested, either here or in the Court of Appeal, that trial Counsel was actually incompetent. He was entitled to exercise a wide discretion in the way he ran his case. If there was issue to be taken with the directions, the question of whether and if so how to deal with that issue was well within the ambit of that discretion.

11. It may, however, still be open to contend that the direction should have been given if there was no rational explanation for the decision not to request it. [6] But that cannot be the case here.

12. If, as suggested by the appellant,[7] the Crown prosecutor's remarks were "confusing and unhelpful," counsel may well have considered that by labouring these points, the prosecutor obscured other (obvious and better)[8] points that were there to be made.

13. It was also the case that, during the summing up, his Honour concluded his references to the Crown prosecutor's closing address with emphasis that these were matters of "interpretation construction and argument". It was open for counsel to conclude that this was sufficient to confine the effect of whatever the prosecutor had said.

14. There was in fact an even more compelling reason for counsel to take the view that the jury should not have their attention taken back to the issue of "consent".

15. Before addressing that, it is necessary to take issue with the proposition, advanced by the appellant, that if an assault is constituted by a threat then in

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[6] *Nudd v The Queen* (2006) 162 A Crim R 301 per Gleeson CJ at 306 [9].
[7] Appellant's submissions 6.12; 6.14.
[8] See paras 30 -33, below.

order to consent to that threat one must consent to the actualisation of that threat.[9] The "threat", and the "threatened result" are two different things. To remain involved in a verbal altercation may imply acquiescence to verbal threats[10], it does not axiomatically follow that it also involves consent to any actualisation of those threats.

16. In this case it was potentially relevant to ask whether the appellant was involved in a confrontation in which there was an implied consent, as between the parties, to threaten each other.

17. Since consent is a state of mind, and since there was no direct evidence on the point, any determination of this issue required that an inference be drawn, from all the circumstances, as to the appellant's state of mind.

18. One of those circumstances was the fact that this appellant, who was walking around in a busy shopping centre of the kind with which jurors would be familiar, was in possession of a concealed and loaded handgun.

19. It would be open for a jury to conclude that a person thus empowered might willingly get involved in a verbal altercation, and be more relaxed than usual about the prospect of receiving (or even provoking) threats from another. This may still be so even if the holder of the gun was fully aware of the fact that their interlocutor was aggressive and armed with a knife – so long as, in their choice of weaponry, the imbalance was maintained.

20. The appellant argues[11] that the trial judge should have directed the jury that there was "no evidence" upon which they could find consent or that "his Honour should have identified that evidence and directed the jury accordingly".[12] There was evidence, and its identification would have involved dwelling, at some

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[9] Appellant's submissions 6.22.
[10] Even those accompanied by menacing gestures
[11] 6.20.2
[12] 6.20.2

length, on this circumstance, and asking the jury what inferences they might draw from the fact that the appellant was walking around the shopping centre with a loaded gun.

21. In a forensic situation where the appellant's state of mind - and in particular his intent – was an element of the offences charged, counsel could reasonably adopt a preference for the jury not to linger upon this aspect of the evidence. It was rationally open for him to take the same view expressed by the Court of Appeal, namely that there was "no further need for the issue to be addressed by the trial judge".

22. Even if, in the face of an objectively explicable decision not to request further directions, it was still concluded that those directions *should* have been given, it cannot be thought that the failure to do so may have affected the verdict. The Crown address was followed by the Defence address that did not mention the concept of consent. That in turn was followed by a summing up in which the relevant law was fully explained. On the following day, during deliberations, the jury requested – and were given – copies of ss 271 and 272. It is not reasonably possible, after all that, to entertain the notion that the appellant's case, as put, was not given full and earnest consideration.

23. Trial counsel's position also points to the correctness of the reasoning in the Court of Appeal's decision about the need for directions on s 24 of the *Criminal Code*.

PROVISO

24. The recordings are not lengthy and the Court is as well placed as the jury to draw from them the conclusions necessary in order for the proviso to be applied. It can do so even after assuming, in the appellant's favour, a number of issues that were contentious at the trial.

25. For example, it may be assumed that:

25.1. At the outset of the confrontation, Teamo removed a knife from his bag, although the blade may not have been displayed at this time.

25.2. Even if already drawn by the appellant, the gun was not visible to Teamo at this point.

25.3. The blade became visible to the appellant after the return of the $10 note.

26. This still leaves intact the incontrovertible propositions that:

26.1. At no point after the approach of Mr Wadwell (with the $10 note) did Teamo make any movement towards the appellant.

26.2. At that point (the return of the $10 note) the appellant and Teamo were more than an arms length apart.

26.3. They were then both on the camera side of the long barricade.

26.4. The next movement was either backwards, by Teamo, or towards Teamo, by the appellant - it is almost simultaneous. In either case,Teamo's retreat was prompt.

26.5. Teamo's movement was not just backwards away from the appellant, but involved a right-angled turn around the corner, along the short side of the barricade.

26.6. The first shot was fired after Teamo had rounded that corner.

27. The assumptions made (in paragraph 24) in the appellant's favour would enliven the provisions of s 271 of the *Criminal Code*. That is, it could be assumed that by opening the knife, Teamo had assaulted the appellant. And for the purposes of the argument, it could follow from those assumptions that the assault was unlawful and it was unprovoked.

28. With all that in his favour, the appellant was still bound to be convicted. The provisions of s 271 (1) of the *Criminal Code* were always going to be negated by reference to the nature of the force involved. As might be expected in a case where a handgun has been fired at close range, the jury found an intention to kill. In any event, the firing of a handgun at close range will inevitably be found likely to cause grievous bodily harm.

29. Then one further assumption could be made in the appellant's favour, namely that the production of a flick knife was an assault of such a nature as to cause a reasonable apprehension of, at least, grievous bodily harm. This, in turn, would mean that it was necessary for the Crown to negate the operation of s 271(2).

30. That involves resolving the question of whether it was reasonably possible that the appellant believed, on reasonable grounds, he could not otherwise preserve himself from (at least) grievous bodily harm and whether, in those circumstances, the "force" he used was "necessary for defence", bearing in mind that the "force used" had two aspects - the presentation of the gun, followed by the firing of the gun.

31. And whatever the situation leading up to the production of the gun, once visible its effect was decisive. Teamo's retreat was predictably instantaneous. As soon as it began there was no reasonableness attaching to any grounds upon which the appellant might have been concerned about himself. It can be accepted that the appellant's conduct is not to be assessed as if he had the benefit of leisurely consideration.[13] But he did not need it. The production of the gun gave him immediate, total and unmistakable control over any threat posed by Teamo.

32. It follows that at the time he fired the first shot the appellant could not have held any belief – reasonable or otherwise – about the need to protect himself from anything, still less from grievous bodily harm.

33. It is equally apparent that a shot fired (with what was found to be murderous intention) at the rapidly retreating Teamo was not "necessary for defence". It was a gratuitous addition to the attack that started at the moment the appellant, who was armed with a gun, advanced towards a man who was not, and who at once took swift evasive action.

[13] Summing up P12 L10, redirections P10 L25

34. In these circumstances the Court can enjoy the requisite degree of confidence that no substantial miscarriage of justice has occurred

Part VII: Not Applicable

Part VIII: Oral argument

On the assumption that the relevant video footage has been viewed, the respondent estimates its submissions may take 20 minutes.

Dated this 6th day of May 2016.

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