DISTRICT COURT OF QUEENSLAND

CITATION:	*McDonald v Commissioner of Police* [2020] QDC 193
PARTIES:	**MATHEW JOHN MCDONALD** (appellant) **v** **THE COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	4490/19
DIVISION:	Criminal
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Richlands
DELIVERED ON:	17 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2020
JUDGES:	Reid DCJ
ORDER:	**Appeal dismissed.**
CATCHWORDS:	MAGISTRATES – APPEAL AND REVIEW- appeal brought pursuant to s 222 of the *Justice Act 1886* (Qld) – where appellant was convicted on two counts of serious assault of a corrective services officers - where appellant appeals against his conviction on two grounds– where the first ground is that the verdict was unreasonable or unsupportable having regard to the evidence – where the second ground is the learned Magistrate erred in not excluding ‘Accident’ in respect of count 2 – where appellant was serving a period of imprisonment at the time of alleged offences – where the alleged offences occurred at Princess Alexandra Hospital where he was receiving treatment for laceration to his left arm – where video evidence tendered did not show the alleged offences – where each officer gave the same mistaken time as to when offences occurred – where Magistrates entitled to accept evidence of two officers as to the circumstances of offending- whether the appeal should be allowed *Criminal Code 1899* (Qld) s 23 *Justices Act 1886* (Qld) s 222 *Fox v Percy* (2003) 214 CLR 118

Fennell v The Queen [2019] HCA 37
Tierney v Commissioner of Police [2011] QCA 327
Lee v Lee [2019] HCA 28
M v The Queen (1994) 181 CLR 487
Nationwide News Pty Ltd v Rush [2020] FCAFC 115

COUNSEL: Axel Beard for the appellant
Samuel Sherrie for the respondent

SOLICITORS: Legal Aid for the appellant
The Office of the Director of Public Prosecutions for the respondent

Introduction

[1] The appellant appeals against his conviction on 15 November 2019 in the Richland's Magistrate's Court on two charges of serious assault of two corrective services officers. He was sentenced to 15 months imprisonment on each charge, to be served concurrently with one another but cumulatively under a term of imprisonment he was already serving. A parole eligibility date of 17 January 2021 was fixed.

[2] He did not appeal against the sentence imposed, only against his conviction.

[3] The only stated ground of appeal was that the verdict was unsafe and unsatisfactory but, in addition, the appellant submits that the learned Magistrate failed to consider the defence of accident in relation to charge two. The appeal was conducted on that basis.

Circumstances

[4] The appellant was at the time of the alleged offending serving a period of imprisonment. He had suffered a significant laceration to his left hand and so had been admitted to hospital for treatment, under the supervision of four corrective services officers.

[5] Whilst he was in hospital he was, based on my observations of the appellant on CCTV footage tendered at the trial, often agitated and misbehaving. The two

charges of which he was convicted relate to allegations that he spat on corrective services officer Paul Cullen and that he deliberately flicked blood on corrective services officer Peter Holman.

[6] The first offence was particularised as having occurred at 8.20 am, and the second at 11.20 am.

[7] The learned Magistrate identified that the critical issue was whether the two incidents in fact happened. He noted that "much of the trial focused on the timing of the alleged assaults" and identified that this was because footage from CCTV cameras in the appellant's room at the hospital from 8.16 am to 8.36 am, and from 11.18 am to 11.28 am was downloaded by the investigating officer, and played to the Court.

[8] The reason the officer obtained that footage was that all four corrective service officers, in their statements, identified the first incident as occurring at 8.20 am, and the second at 11.20 am. If that were correct, the footage that was downloaded ought to have shown both incidents.

[9] All four officers, having seen the footage at or shortly before the trial, said however, that it did not show either of the alleged events. All four gave explanations of how they were all in error. More particularly, they all gave explanations of how they were identically wrong, that is, having each nominated the events as occurring at 8.20 am and at 11.20 am, when they clearly did not occur at that time as is shown on the CCTV footage.

[10] The submissions of the appellant's solicitor – that they did not show the alleged incidents because the offences had not occurred – was rejected by the learned Magistrate who found the appellant had both spat and deliberately flicked blood as alleged.

[11] The Magistrate accepted:

(i) That the offences alleged were not shown on the CCTV footage;

(ii) That the evidence of all four witnesses who gave evidence in the police case was mistaken as to the time the offences occurred;

(iii) The explanation for the four witnesses giving the same incorrect time was to be found in the evidence of one of the corrective services officers, Mr Delvinios.

The trial

[12] The learned Magistrate described Mr Delvinios' evidence as "reasonable, logical and honest". The Magistrate, whilst accepting that the time was in fact incorrect, accepted his evidence that "following these events there was a debriefing with Mr Holman the supervisor. Mr Holman provided the time estimate. Most people, including Mr Delvinios, simply copied it down as the time things happened. They must have assumed it was the right time and relied on it thereafter".

[13] The Magistrate accepted that this explained why all four officers gave the same time, for both incidents, and why the time, they gave did not accord with the time shown on the CCTV footage. The Magistrate described it as "a simple error repeated" and said it did not cause him to doubt the prosecution's case.

[14] The learned Magistrate referred to the lack of corroborative evidence, such as photos or medical reports, and said that whilst it might have been prudent to obtain such evidence, the lack of it did not cause him to doubt the prosecution case. I interpose that while photographs may have been of assistance, it is difficult to see how a medical report would have been relevant.

[15] Mr Cullen was the complainant to the spitting charge and was found by the Magistrate to be "a witness of truth and general reliability". Mr Cullen described the appellant as spitting at him as he was trying to reapply constraints to the appellant's left arm. He described the spittle as landing on his left arm, torso and neck and that the appellant continued to try to spit. He said he saw the appellant spit. He said that a self-harm helmet was applied. Mr Cullen described seeing spittle on his shirt and arm when, after the helmet was obtained and applied and the appellant restrained, he went to the break room to clean himself up.

[16] I interpose that in the earlier CCTV footage a fifth officer can be seen leaving the room, and returning with a self-harm helmet that was applied to the appellant, but this evidence must be considered alongside other evidence, to which I will shortly

refer, that the self-harm helmet was applied, and then taken off, a number of times during the day.

[17] The learned Magistrate found Mr Holman "was not an impressive witness because he locked himself into timings that were plainly wrong and he became confused and unreliable during cross-examination." He said he did not rely on Mr Holman's evidence. So too he found the evidence of a fourth officer, Mr Pal, "too broad and general without a clear recollection".

[18] I have said already he found Mr Delvinios' evidence "reasonable, logical and honest". He found Mr Delvinios gave a reliable account of the second incident. He gave evidence in relation to the second offence that as officers were adjusting the restraints, the appellant "had his left arm out of the restraint" and this moved his left arm in a flicking motion towards Mr Holman, causing blood to land on him. The learned Magistrate said it "was not an accidental move, rather a deliberate move of the arm", directed at Mr Holman.

[19] On that basis he found the appellant guilty on both offences.

[20] It is therefore clear that the learned Magistrate did not make any analysis of the CCTV footage, other than to observe that if recorded events in the room but not events at the time of the two assaults.

[21] The question arises whether it, and other evidence, was such that the learned Magistrate should have had a doubt about the prosecution case.

[22] In order to consider that question it is necessary to consider the evidence of the four prosecution witnesses who were present at the hospital on 31 December 2018.

The Evidence

[23] Before doing so, it is I think, helpful to observe a number of things about the CCTV footage itself. The footage obtained of the first incident, or what the investigating officer mistakenly thought was the first incident runs from 8.16.00 am to 8.35.50 am.

[24] Based on my observations, it relevantly shows:

(i) The appellant going to the bathroom accompanied by Mr Holman with Mr Cullen, Mr Pal and Mr Delivinios standing nearby. The officers seemed unconcerned by the appellant's presence who appears himself at that time to be calm. He is handcuffed but not wearing any helmet or other device to stop him from spitting. The nature of the CCTV at that time suggests quite strongly that the officers did not then think they were at risk of him spitting at them, itself suggesting that if he did so it was not shortly before that CCTV footage. That scene starts at the commencement of the CCTV, at 8.16.00am.

(ii) My impression that the officers did not then consider the appellant a risk of spitting at them is strengthened by footage, at 8.17.01ff, which shows both Mr Holman and Mr Delvinios, when handcuffing or shackling the appellant to the bed to prevent him from moving, placing their heads very close to the appellant's face. I would estimate both officers moved their heads to within 250 to 300 cm of his face, something they were very unlikely to have done if he had, in the recent past, spat at one of the officers. I therefore think it strongly suggests that at that time no spitting incident had occurred.

(iii) At the commencement of this first CCTV footage a fifth officer is present. He leaves the room at 8.18.07am. Immediately before he leaves – only a matter of about three seconds – the appellant can clearly be seen biting at a bandage on his left hand. The officers in their evidence all speak of the appellant doing that repeatedly. I assume he wished to do this because the bandage on his hand was large, requiring a large cuff to be applied to his hand and he hoped to pull the bandage off so as to pull his hand free of the cuff, or as an attempt to cause further harm to his hand.

The reason he was in hospital was for surgery to a deep cut on his hand. Having left the room the unidentified officer returns at 8.19.22am with a hood or helmet which was immediately put on the appellant's head.

In my view the fact that the hood was then utilized to stop the appellant biting his bandage is made clear by the immediate correlation in time

between the biting, at 8.18.04am, the officer leaving and at that time Mr Holman clearly signalling to that officer, by patting his own head. I have no doubt that this signal was an indication to the officer to get some sort of head cover to prevent the appellant biting at his bandage.

(iv) This unidentified officer is present throughout the CCTV footage except when he leaves to get the helmet covering (i.e. from 8.18.10am to 8.19.22am) and for a further brief period (from 8.24.09am to 8.25.47am) when both he and Mr Holman leave together returning with some further item which seems to be handcuffs.

(v) At 8.20.21am a sixth officer enters the room and at 8.20.42am a seventh officer. Both assist thereafter in the appellant's management. Mr Cullen also leaves briefly for about 10 seconds from 8.21.55am, bringing back a restraint strap. At the end of the CCTV Mr Holman and the sixth officer both leave.

This sequence of movement, including the fact that seven officers were at times present is important only because of the evidence of the four witnesses, who did not refer to their presence.

(vi) Throughout much of the footage the officers appear to be trying to move or add restraints, presumably so the appellant could not bite at his bandage.

(vii) In the 10 minutes of the second CCTV footage at all times the appellant's left hand was shackled to the bed. It would have clearly been impossible for him to have extended his arm in the way described by this officer when he was so shackled. A towel is placed on the floor under his hand and blood appears to be dripping on the area.

[25] With those matters in mind, it is necessary to consider the evidence of the prosecution witnesses, in particular that of Mr Cullen and Mr Delvinios, since the Magistrate found, as I have said, that Mr Holman was "an unimpressive witness" on whom he did not rely and Mr Pal "broad and general and without a clear recollection".

[26] Mr Cullen gave evidence that the appellant, when in hospital, was continually trying to remove the bandage from his left hand (see T1-39, ll 13-17). He had said he had become non-compliant pretty early in the morning. He said this would have been "before 8 o'clock" (T1-38, ll 43 – T1-39, l 2). He said he, Mr Holman, Mr Pal and Mr Delvinios, went to the appellant's room. He said the appellant became aggressive whilst they were adjusting his restraints.

[27] At this point at the hearing the appellant interjected saying that a Mr Tony Carroll also came in. It is interesting that he was aware of the presence of a fifth officer, when CCTV footage clearly shows a fifth officer present, indeed a sixth and seventh officer, and neither Mr Cullen nor any of the prosecution witnesses refers to that fact. Nor, of course, were Mr Carroll or the other officers present on the CCTV footage called to give evidence.

[28] Mr Cullen says, "we wanted to move the restraints" so that he was "unable to continue biting at the dressings". This off course, is what is shown in the footage shown to the court as I have indicated.

[29] Mr Cullen said that as they were trying to re-apply the restraints to the appellant's left arm, the appellant spat at him. He says, "we then moved to secure his head to prevent him spitting further". He said, "we didn't have any spit hoods or anything of that nature available so we asked for a self-harm helmet to be brought into the cell".

[30] This is curiously similar to what happened in the captured events on the CCTV footage when the fifth officer left as I earlier described to get that helmet at 8.18.07am. Mr Cullen described the helmet as "a soft padded helmet with a full-face cover". This is, of course, what appears to be shown on the CCTV footage.

[31] Moreover, Mr Cullen said Mr Holman asked for it, consistent with the actions of Mr Holman who is shown patting his head as I earlier referred to.

[32] Mr Cullen said that there were interactions between officers and the appellant, "back and forth quite frequently" and described them as "ongoing". He said there were "moments of non-compliance and aggressive offensive behaviour throughout the majority of the day". (T1-47, l5).

[33] When asked about the CCTV footage he said this did not show the incident in which he was spat on (T1-47, l 34) and said he could not say if the CCTV footage was prior to or after the incident on which he was spat upon (T1-47, l 36, again at T1-50, l 29 and during cross-examination at T1-51, l 43).

[34] He said the helmet shown in the CCTV footage was the self-harm helmet he had earlier referred to. He identified the four officers who gave evidence as staff from the Brisbane Correctional Centre and said that the other officers shown on the CCTV footage are Correctional staff from PAH Secure Unit (T1-51, l 33). Importantly, he said in relation to the self-harm helmet that the helmet could have been applied, then re-applied at least twice on that day but there could have been more such occasions. He said it was applied, left on for a short period and then removed again, depending on the appellant's behaviour (T1-52, l 34 – 38). He also said that the appellant was able to get it off himself. This is a matter consistent with the CCTV footage, showing him doing so that day (at 11.24.35am). Later in cross-examination he said it would normally stay on for 10 to 15 minutes, not an extended time (T1-6, l 26 – 30).

[35] He was cross-examined about his statement prepared in relation to this matter. He said that in preparing that statement he had access to what was described as "my officers' report".

[36] Exhibit 2 was a document entitled "Officers' Report". It is said to be "through A/CS P Holman" and was directed to "GM B Kruse – Brisbane Correctional Centre". The copy that became an exhibit was unsigned but appears to have been written by Mr Pal, for use by Mr Holman, the supervisor, and was to be submitted to the general manager of the correctional centre, a Mr Kruse.

[37] It records the time of the occurrence as 8.20hrs. Exhibit 3 is the similar document, again prepared by Mr Pal, and records the time of the second incident, the flicking of blood, as having occurred at 11.20am.

[38] Asked to explain the fact that he had not referred to the fifth unidentified officer, whom the appellant clearly thought was Mr Tony Carroll, he said that at the time of the spitting incident, that officer was not present. He did say that officer was "in

and of the room at different times of the day… but at other stages when we were in dealing with (the appellant)… he was not present." (T1-63, l 30/34).

[39] Mr Cullen, in response to questions from the bench concerning how he had "come up with the time 8.20", said he didn't specifically check the time when the incident itself occurred but recalls afterwards when he was outside "checking the time and kind of trying to count back and thinking… if it was roughly 8 o'clock when I last checked before then and thought it must be at some stage after that so I figured approximately 20 min after." (T1-64, l 15/25)

[40] The other witness the learned Magistrate accepted was Mr Delvinios.

[41] He was asked what time the incident with Mr Cullen had occurred. He said, at (T2-80, l 37ff) that after the incident – indeed after every important incident – they had a debriefing and during it "somebody said the time and I just noted it in my notebook… that way I remember it was that time, 8.20". He said he noted it in his book during the debrief, and he thought most people had done that. He said he thought the debrief was only a short time, five to 15 minutes, after the incident itself but added "it was a full on day' and that "we lost track of time".

[42] Mr Delvinios described the day as full on because he said the appellant was continually trying to self-harm, trying to remove the bandages on his left arm in any way possible and they were trying to stop him from doing so.

[43] He said when the incident with Mr Cullen occurred he, Mr Holman, Mr Pal and Mr Cullen were all present in the room, trying to stop him self-harming. Mr Delvinios said the appellant was swearing and demanding his medication and then started spitting towards Mr Cullen. He described the helmet being applied.

[44] He said he had seen the spit land on Mr Cullen's chest and arms but also said he could not recall if it had landed on his skin or only on his uniform. He described the appellant as swearing and not easy to control. Mr Delvinios said they withdrew from the room, Mr Cullen going first. He said that prior to the incident no "spit hood measures" were being used.

[45] Mr Delvinios said after they were outside the appellant managed to remove the helmet and "we start talk to him again".

[46] In relation to the second incident, Mr Delvinios said he recalled the same four officers being present and said he was not sure if there was another officer present as well. He said he recalled another officer helping but didn't remember if he was present at the time of the particular offence.

[47] He described the appellant as bleeding profusely and a blanket being on the floor below the dripping hand. This is consistent with CCTV footage taken at about 11.20am to which I have already referred. He said the appellant was pulling at the bandage with his teeth and getting his hand free of the handcuff. At that stage he says they went back into the room and the appellant flicked his bleeding hand towards Mr Holman, spraying blood onto his "middle and upper" body. He denied it could have been accidental saying:

> "I saw him look at (Mr Holman)… talking to (him) and put his arm towards (him)… showing that he was waiting … to go to (Mr Holman)."

[48] In cross-examination when asked about the time of the first incident he said "somebody said 8.20, I think, and everyone I think wrote it down". He said he wrote it on a piece of paper. He later said it may have been staff outside who told him the time.

Appellant's submission

[49] The appellant's solicitor referred to the approach of appellate courts in reviewing findings of fact by a trial court, referring in particular to *Tierney v Commissioner of Police*,[1] which itself relied on the High Court decision of *Fox v Percy*.[2] In relation to cases involving an alleged "unreasonable verdict" the solicitor referred to observations of the High Court in *M v The Queen*,[3] at 492/3 that:

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury

---

1 [2011] QCA 327.
2 (2003) 214 CLR 118.
3 (1994) 181 CLR 487.

ought to have experienced. 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."

[50] So too he referred to *Fennell v The Queen*[4] that:

> "Where a court of criminal appeal is called upon to decide whether it considers that, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the offence charged, the court must not disregard or discount either that the jury is the body entrusted with primary responsibility of determining whether the prosecution has established the accused's guilt or that the jury has had the benefit of having seen and heard the witnesses. At the same time, however, the court may take into account the realities of human experience, including the fallibility and plasticity of memory especially as time passes, the possibility of contamination of recollection, and the influence of internal biases on memory. The court can also take into account the well-known scientific research that has revealed the difficulties and inaccuracies involved in assessing credibility and reliability."

[51] He submitted that although it was not necessary that the crown prove the offence occurred at the time particularised, the timing of the incidents was of critical importance because:

(i) The CCTV footage of the incident was of very significant importance, but that obtained showed no offence, and no other footage was now available; and

(ii) It was "compounding improbability" to conclude four officers, on two separate occasions, all nominated the wrong, and the same time.

[52] In addition to that ground the appellant submitted that the learned Magistrate erred in failing to exclude the defence of accident pursuant to s 23 of the *Criminal Code* in relation to Count 2. He referred to a statement by the learned Magistrate in his decision that:

> "The real and only question for me is whether the Prosecution has satisfied me of any assault or assaults occurring at all. No defences

---

4 [2019] HCA 37 at [81].

> were raised on the evidence to any alleged assault. It is simply did the assaults occurred?"

[53] The appellant's case was that in circumstances where the appellant's hand was bleeding, a large amount of blood had been spilt on the floor and the appellant was clearly distressed, waving his arm about, that the circumstances were such that the defence of accident ought have been considered, and the appellant acquitted, on the basis that the defence had not been excluded beyond reasonable doubt.

Crown submission

[54] The crown's legal officer submitted that the Magistrate's verdict was not unreasonable and that the appeal ought be dismissed. He submitted that the findings of the Magistrate were not inconsistent with incontrovertible facts, were not glaringly improbable and could not be said to be contrary to compelling inferences, relying on the observations of Gleeson CJ, and Gummow and Kirby JJ in *Fox v Percy*[5] (supra) about such matters, in particular their Honours comments at para [29] of their judgment, which I will set out shortly.

[55] The legal officer referred to the Magistrate's observation that the Magistrate found two of the corrective services officers, unimpressive witnesses but that he found Mr Cullen was a witness of "truth and general reliability", and Mr Delvinios provided a "clear logical reliable and honest" account of the incident. He submitted that shortfalls in the prosecution case arising from the investigation did not detract from the strength of these witnesses' evidence.

[56] In relation to the defence of accident, he referred to the Magistrate's acknowledgement, during addresses, that he needed to consider that issue and his finding that at the time of the second incident the appellant's arm was "directed" and Mr Holman was "not an accidental move, rather (a) deliberate move of the arm". This was, he submitted, consistent with the evidence of in particular Mr Delvinios and this was inconsistent with the defence of accident.

The judgment

[57] I'll confine my comments about the learned Magistrate's judgment to the issues relevant to the determination of the appeal.

---

[5] (2003) 214 CLR 118.

[58] His Honour said that although the video "captured events in the place where everything … occurred", police had secured that footage based on the consistent time given by witnesses in their statements as to when the events had occurred and "no one properly checked to see if, indeed, it captured what allegedly occurred".

[59] His Honour observed that, as each of the witnesses said, the footage plainly did not capture the alleged incidents, but showed other events in the appellant's room on the day in question. The learned Magistrate rejected the view that it did not do so because "there was no alleged incidents to show" as the allegations were "made up".

[60] His Honour concluded that whilst the witnesses' evidence about the time of each incident was not accurate, evidence about the timing was not "concocted to, falsely accuse the appellant".

[61] The explanation for the consistently wrong evidence about time was, the Magistrate determined, in the "reasonable, logical and honest evidence" of Mr Delvinios. He had said Mr Holman, during a debrief subsequent to the events, provided a time when he said the events occurred and he accepted it. I interpose that the officers did not themselves charge the appellant, and the debrief was part of their routine practice after incidents with prisoners at the hospital. It was not preclude to the appellant.

[62] The evidence about timing was, in his Honour's words, "a simple error repeated" and did not cause him to doubt the prosecution evidence. In the absence of CCTV footage, the learned Magistrate determined the matter on the oral evidence. In so doing, he observed that Mr Cullen was a witness of truth and general liability and provided a "logical and truthful account of events".

[63] He referred to that officer's evidence that the appellant:

(i) was trying to remove dressings and bandages from his left hand;

(ii) had his left hand restrained; and

(iii) was becoming increasingly aggressive, saying words to the effect of "fuck you", "get fucked", "get out of my cell" and "leave me alone".

[64] These observations, I interpose, are entirely consistent with the observations of the appellant on the CCTV footage. Although there is no audio, it also shows the appellant regularly struggling and thrashing about on his bed and biting on his bandage and shows blood dripping from his arm, particularly in the footage from about 11.20am.

[65] The learned Magistrate then noted, and ultimately accepted, the evidence of Mr Cullen that he "saw the appellant spit" and then attempt to continue to spit and later said he saw spittle across his shirt and arm. The Magistrate found the lack of photographs and, he said, medical evidence, did not undermine his acceptance of Mr Cullen's evidence.

[66] The learned Magistrate found Mr Holman "was not an impressive witness" who was confused and unreliable. He did not rely on his evidence, particularly with respect to Count 2. So too, he found the evidence of Mr Pal "too broad and general" and said he was "without a proper recollection to rely on".

[67] Mr Delvinios was, as I've said earlier, found to give a clear, logical, reliable and honest account in relation to Count 2, the offence involving the flicking of blood on Mr Holman. Mr Delvinios had said:

(i) the appellant flicked or moved his left arm extending it towards Mr Holman;

(ii) as a result blood landed on Mr Holman; and

(iii) the arm was directed at Mr Holman and "was not an accidental move, rather a deliberate move of the arm".

[68] On the basis of that evidence, the learned Magistrate said "I am satisfied that this was an unlawful assault on a working Corrective Services officer".

[69] I interpose that the learned Magistrate's reference to a "unlawful assault" (my emphasis) immediately after saying the flicking was not an accident action but a deliberate one is of significant importance with respect to the appellant's submission that the defence of accident was not considered.

Consideration

[70] In *Fox v Percy* (supra), Gleeson CJ, Gummow and Kirby JJ said:

> "[25] Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect". In *Warren v Coombes*, the majority of this Court reiterated the rule that:
>
> > "[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it."
>
> As this Court there said, that approach was "not only sound in law, but beneficial in … operation". (Citation omitted)
>
> [26] After *Warren v Coombes*, a series of cases was decided in which this Court reiterated its earlier statements concerning the need for appellate respect for the advantages of trial judges, and especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not. Three important decisions in this regard were *Jones v Hyde*, *Abalos v Australian Postal Commission* and *Devries v Australian National Railways Commission*. This trilogy of cases did not constitute a departure from established doctrine. The decisions were simply a reminder of the limits under which appellate judges typically operate when compared with trial judges.
>
> [27] The continuing application of the corrective expressed in the trilogy of cases was not questioned in this appeal. The cases mentioned remain the instruction of this Court to appellate decision-making throughout Australia. However, that instruction did not, and could not, derogate from the obligation of courts of appeal, in accordance with legislation such as the *Supreme Court Act* applicable in this case, to perform the appellate function as established by Parliament. Such courts must conduct the appeal by way of rehearing. If, making proper allowance for the advantages of the trial judge, they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute.

[28] Over more than a century, this Court, and courts like it, have given instruction on how to resolve the dichotomy between the foregoing appellate obligations and appellate restraint. From time to time, by reference to considerations particular to each case, different emphasis appears in such reasons. However, the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings.

[29] That this is so is demonstrated in several recent decisions of this Court. In some, quite rare, cases, although the facts fall short of being “incontrovertible”, an appellate conclusion may be reached that the decision at trial is “glaringly improbable” or “contrary to compelling inferences” in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must “not shrink from giving effect to” its own conclusion. Finality in litigation is highly desirable. Litigation beyond a trial is costly and usually upsetting. But in every appeal by way of rehearing, a judgment of the appellate court is required both on the facts and the law. It is not forbidden (nor in the face of the statutory requirement could it be) by ritual incantation about witness credibility, nor by judicial reference to the desirability of finality in litigation or reminders of the general advantages of the trial over the appellate process.” (Citation omitted)

[71] Subsequently, in *Nationwide News Pty Ltd v Rush*,[6] the Full Court of the Federal Court, after referring to those same paragraphs from *Fox v Percy*, referred to the joint judgment of Bell, Gageler, Nettle and Edelman JJ in *Lee v Lee*[7] where their Honours’ said:

“[55] A court of appeal is bound to conduct a “real review” of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law. Appellate restraint with respect to interference with a trial judge's findings unless they are “glaringly improbable” or “contrary to compelling inferences” is as to factual findings which are likely to have been affected by impressions about

6 [2020] FCAFC 115.

7 [2019] HCA 28.

> the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts. Thereafter, "in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge" (Citation omitted)

[72] The fact each of the four prison officers, in statements to police, gave the same incorrect time for each of the two offences is a matter of significant concern. One can understand why the appellant's legal officers submitted in the court below, and here, that such facts, in the absence of CCTV footage of any alleged incident when CCTV cameras were installed and operational, should have caused the learned Magistrate to have a reasonable doubt about each charge.

[73] But ultimately the learned Magistrate had the very significant advantage of seeing and hearing the witnesses. Having done so, he specifically rejected the evidence of two of those witnesses. His findings about their evidence, and that of the two whom he accepted, appears clearly to have significantly depended on his ability to see, hear and observe them give evidence. That is a matter that requires significant respect and circumspection by me if I were to interfere with their findings.

[74] In my view, the findings by the learned Magistrate as to how the four witnesses all gave the same incorrect time of both incidents is not glaringly improbable or contrary to compelling inferences to be drawn from facts proven by the evidence. During what was described by Mr Delvinios, and accepted by the Magistrate, as a "full on day" it is not "glaringly improbable" that, during debriefs subsequent to the alleged offences the supervising officer, Mr Holman, provided an estimate of time which was wrong as to when the events occurred and thereafter each officer acted on the basis of that incorrect time. Such a finding by the Magistrate, relying on the evidence of a witness whom he found to give a "reasonable, logical and honest" explanation of the error cannot be shown in my view to be glaringly improbable.

[75] The fact other witnesses gave different versions for that discrepancy is again some concern. Ultimately having seen and heard those witnesses, the learned Magistrate found their evidence unimpressive, confused, unreliable or without a clear recollection and accepted the evidence of Mr Delvinios' and also that of Mr Cullen.

That is, in my view, a demonstration of the advantage of a trial judge and does not cause me to think the Magistrate's ultimate conclusion should be characterised as glaringly improbable or otherwise such as to justify interference with his findings of fact. That another Magistrate might have come to a different conclusion does not mean that the learned Magistrate finding of proof of the necessary elements of the offences beyond reasonable doubt should be set aside on appeal.

[76] So too the acceptance of Mr Delvinios' evidence about Count 2, that the appellant's flicking blood on Mr Holman "was not an accidental move rather a deliberate move of the arm" directed at Mr Holman causing blood to land on his body. Such a result must have been anticipated by the appellant having regard to blood dripping from his bandages onto the towel on the floor as shown in CCTV footage and attested to by witnesses.

[77] The learned Magistrate did not specifically refer to s 23 of the Criminal Code in his decision but did raise that during submissions. He found the movement, which caused blood to flick on Mr Holman, was a deliberate one and not accidental. He was satisfied that "this was an unlawful assault". This indicates he found it was not an assault "authorised, justified or excused by law", as would be the case if it had occurred by accident, and shows the learned Magistrate turned his mind to, and rejected, the defence of accident.

[78] In the circumstances, I am not persuaded that the Magistrate's findings of fact were erroneous. They were based on determinations of credit which he was best placed to make. They are as not glaringly improbable or inconsistent with proven facts so as to justify interference.

[79] The appeal is dismissed.