DISTRICT COURT OF QUEENSLAND

CITATION:	*Cotter v Commissioner of Police* [2020] QDC 91
PARTIES:	**ROBERT RODNEY COTTER** **(Appellant)** **v** **COMMISSIONER OF POLICE** **(Respondent)**
FILE NO/S:	BD 4322/19
DIVISION:	Criminal
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Brisbane
DELIVERED ON:	26 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2020
JUDGE:	Farr SC DCJ
ORDER:	**Delivered on 24 April 2020** **1. Appeal upheld.** **2. Verdict of guilty entered by Magistrate on 7 November 2019 is set aside.** **3. Verdict of not guilty entered and complaint dismissed.**
ORDER RE: COSTS	**Delivered on 26 May 2020** **1. The respondent pay the appellants costs of the proceedings in the Magistrates Court in the agreed amount of $7250.00**
CATCHWORDS:	CRIMINAL LAW – APPEAL – APPEAL AGAINST CONVICTION – APPEAL BY WAY OF REHEARING – whether the learned magistrate erred in law, and misconceived the evidence, such that the decision was contrary to the evidence and the weight of the evidence was unreasonable – whether the learned magistrate failed to consider the *Criminal Code 1899* (Qld) excuses of self defence and provocation – whether the learned magistrate erred in finding the prosecution had negatived beyond reasonable doubt the excuse in s 31(1)(a) of the Criminal Code raised by the defendant – whether the learned magistrate erred in applying s 31(1)(d)(ii) to the interpretation of *reasonably necessary force* pursuant to the *Corrective Services Act 2006* s 143 – whether the learned magistrate

misconceived the evidence of prosecution witnesses Cussh and Wells by finding that their evidence meant the complainant posed no threat of harm to the defendant – whether the learned magistrate erred in wrongly applying the evidence of the prosecution witness Speck by concluding that there were use of force alternatives available to the defendant and that the force used by the defendant was not reasonably necessary – whether the learned magistrate erred in relying on the evidence of police officers Cussh and Wells to make findings about the procedures at Woodford Correctional Centre – whether the learned magistrate misconceived the relevance of the evidence that material parts of the CCTV footage of the incident were deleted – whether the learned magistrate erred in not considering the prior inconsistent statement of the complainant to the witness Cunliffe – whether the learned magistrate further erred in not weighing the impact of this evidence on the credibility of the complainant – whether the learned magistrate erred in disregarding the evidence of the defendant – whether the learned magistrate erred in accepting the evidence of the complainant.

COUNSEL: J W R Sibley, Solicitor for the appellant

L Maleckas, Solicitor for the respondent

SOLICITORS: Sibley Lawyers for the appellant

Office of the Director of Public Prosecutions for the Respondent

Background

[1] The appellant was convicted of assault occasioning bodily harm after trial in the Magistrates Court at Brisbane on 7 November 2019. He appealed against that conviction and relied on the following grounds of appeal:

I. The learned magistrate erred in law, and misconceived the evidence such that the decision was contrary to the evidence and the weight of the evidence was unreasonable including for the following reasons;

(a) The learned magistrate erred in failing to consider the *Criminal Code* excuses of self-defence and provocation raised fairly on the evidence and not challenged by the prosecution through cross-examination of the defendant;
(b) The learned magistrate erred in finding that the prosecution had negatived beyond reasonable doubt the excuse in s. 31(1)(a) of the *Criminal Code* raised by the defendant;
(c) The learned magistrate erred in applying the discussion of s 31(1)(d)(ii) in *R v Lentini* [2018] QCA 299 to the interpretation of *reasonably necessary force* pursuant to s. 143 of the *Corrective Services Act 2006*;

II. The learned magistrate misconceived the effect of the evidence of the prosecution witnesses Cussh and Wells and then wrongly found that:
(a) their evidence was inconsistent with the evidence of the defendant; and

(b) their evidence meant that the complainant posed no threat of harm to the defendant;

III. The learned magistrate erred in wrongly applying the evidence of the prosecution witness Speck in finding that there were use of force alternatives available to the defendant and that the force used by the defendant was not reasonably necessary;

IV. The learned magistrate erred in relying on the evidence of police officers, Cussh and Wells, to make findings about the procedures at Woodford Correctional Centre, when that evidence was inconsistent with the evidence of all of the witnesses who were Correctional Services officers;

V. The learned magistrate misconceived the relevance of the evidence that material parts of the CCTV footage of the incident were deleted;

VI. The learned magistrate erred in not considering the prior inconsistent statement of the complainant to the witness Cunliffe. The learned magistrate further erred in not weighing the impact of this evidence on the credibility of the complainant;

VII. The learned magistrate erred in disregarding the evidence of the defendant;

VIII. The learned magistrate erred in accepting the evidence of the complainant, and, finding that it was consistent with the CCTV footage and the witnesses Cussh and Wells;

IX. The learned magistrate intruded unreasonably into the adversarial arena of the trial resulting in an unfair trial by preventing the defence from:

(a) making proper submissions;

(b) leading admissible relevant evidence;

(c) developing argument;

(d) cross-examining witnesses; and

(e) answering objections raised by the prosecution.[1]

[2] The appeal was heard by this Court on 24 April 2020. The respondent conceded the appeal and agreed that the verdict of guilty should be set aside and substituted with a verdict of not guilty.

[3] I then upheld the appeal and entered a substituted verdict of not guilty on that date.

[4] These are my reasons for that decision.

Legal Framework

[5] The appellant appeals the conviction pursuant to s. 222 of the *Justices Act 1886 (Qld)*. An appeal by way of rehearing involves the appellate court conducting a "real review" of the evidence given at first instance and the reasons for judgment to determine whether the learned magistrate erred in fact or law.[2] To succeed the appellant must establish some legal, factual or discretionary error by the learned magistrate.[3]

[6] A verdict may be disturbed, if the learned magistrate reasonably ought to have had a sufficient doubt to entitle the appellant to an acquittal.[4] This necessitates the court to independently examine the evidence, including the credibility of witnesses, to make an assessment of the sufficiency and quality of the evidence.[5]

[7] While due respect should be given to a magistrate being in a position to view the evidence, and bear in mind any advantage he or she had in seeing and hearing the witnesses give evidence, this does not remove the requirement of the judge on appeal to review the evidence and weight the conflicting evidence, and to draw his or her own conclusions. As per *Fox v Percy* at paragraph 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*

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1 There was a tenth ground of appeal alleging apprehended bias, but the appellant abandoned that ground.

2 *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679.

3 *House v The King* (1936) 55 CLR 499 at 504 – 505.

4 *Whitehorn v R* (1983) 152 CLR 657, 687.

5 *Chidiac v R* (1991) 171 CLR 432, 443 – 4 per Mason CJ, 452 – 3 per Dawson J, 459 per Gaudron J; *Knight v R* (1992) 175 CLR 495, 503 per Mason CJ, Dawson and Toohey JJ; *Morris v R* (1987) 163 CLR 454, 463 – 4, 466 per Mason CJ, 473 per Dean, Toohey and Gaudron JJ, 477 – 9 per Dawson J.

> *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.*"[6]

Evidence regarding the incident

[8] The complainant, Matthew James Long, was serving a term of imprisonment at Woodford Correctional Centre. The appellant, Rodney Robert Cotter, was a Corrective Services Officer at that Centre.

[9] It is alleged that on 23 January 2018, Cotter unlawfully assaulted Long, and did him bodily harm. The bodily harm suffered by the complainant was a strain to the neck. The date, place and the fact of bodily harm were not contentious issues at trial.

[10] The respondent has accurately summarized the evidence of each witness of relevance in the written outline of submissions and I have borrowed heavily from that in the following summation.

[11] The evidence consisted of nine witnesses for the prosecution and three witnesses, including the appellant, for the defence. Three exhibits were tendered at trial.

[12] The below summaries do not include summaries of the evidence of police officer Watt or Stephen Anthony Jones.

Evidence of the complainant

[13] The complainant testified that immediately prior to the incident he had received a phone call from his solicitor and discussed an upcoming parole release date. After that phone call ended he was escorted to an interview room. At that stage nothing untoward occurred. He sat down in the interview room with police and was told about another charge that they intended to bring against him. This upset him.

[14] At the conclusion of that interview, Senior Constable Cussh told the complainant to take his paperwork and "*fuck off*". The complainant stated that Senior Constable Cussh stood up and was "*swearing and carrying on*" and he believed that the officer was going to hit him to the side of the head. The complainant said he "*just stood there, with* [his] *arms down beside* [himself], *waiting for the door to open to get out*". He denied saying anything in response to Senior Constable Cussh and was adamant that his arms were down by his side as he did not want to agitate the

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6 (2003) 214 CLR 118, 126 – 7.

situation. He referred to the conclusion of the interview with police and said "*I wasn't too good…I just wanted to get out of there and back to me unit*."[7]

[15] He then testified that when the interview room door opened his arms remained by his side. He stood approximately half a metre away from the door when he heard the appellant yell "*he assaulted me*"[8] and grabbed him by the throat. In cross-examination the complainant was played the CCTV footage which showed part of the incident and which showed him standing directly in front of the appellant. The complainant responded "*the door opened…I was walked in, like to go out…I didn't threaten him, nothing like that. I didn't assault him…*".[9] The complainant did concede eventually that he was standing directly in front of the appellant and not half a metre away.[10]

[16] The complainant stated that when the appellant grabbed him by the throat he used two hands, picked him up and "*banged*" him against the wall.[11] He said his head and shoulders hit the wall causing him to feel a "*humming or buzzing*" sensation.[12]

[17] When describing the way in which the appellant grabbed him, the complainant said:

> "*he grabbed me, one around me throat and one on me chest and pushed me back up against the wall and he had his two, his thumb and his four fingers wrapped in around me throat, like he was going to rip it out*."[13]

The complainant agreed that when he referred to his throat he was referring to his windpipe.[14] He described the pressure used by the appellant as "*phenomenal*".[15]

[18] The complainant stated that while he was against the wall, the appellant told him not to look at him and to stop resisting. The complainant said he wasn't resisting and "*I was just saying* [to Mr Cotter] *just to stop*".

[19] The complainant stated that while he was pushed against the wall the appellant repeated "*how do you like that, sonny?*"[16] The complainant said that after that occurred that it all started getting a bit blurry and that that was all he could remember.[17] The police prosecutor then asked the complaint what happened next. The complainant responded,

> "*it was just – you know, resist. Pulled my arms right up around me shoulders, swung me around into the corner. Winched me hands right up behind me back and then next minute, hands down, I was escorted out of the room and down to the DU*."[18]

The complainant said that he thought his shoulder was about to be "*ripped out*".[19]

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7 Day 1, Page 41, ll 35 – 40.
8 Day 1, Page 43, ll 15 – 20.
9 Day 1, Page 100, ll 5 – 8.
10 Day 1, Page 100, ll 35 – 41.
11 Day 1, Page 44, ll 1 – 10.
12 Day 1, Page 46, ll 28 – 34.
13 Day 1, Page 44, ll 35 – 40.
14 Day 1, Page 44, l 41.
15 Day 1, Page 44, l 8.
16 Day 1, Page 45, ll 16 – 39; Page 46, ll 1 – 3.
17 Day 1, Page 47, ll 34 – 36.
18 Day 1, Page 47, ll 38 – 41.
19 Day 1, Page 48, ll 16 – 26.

[20] In cross-examination, the complainant maintained that he did not behave in any way which was aggressive or abusive.[20] In response, the following extract from the complainant's initial recorded statement was placed on the record:

> "*You know there was a bit of aggression there. I went, here we go. I was grabbing the paperwork and I looked for him. Well, open the door and out – let's go, you know what I mean? And he (Mr Cotter) just went, "boo"*.[21]

[21] When asked if he recalled making that statement to police the complainant said "*no*". Later however the complainant said that when he had said "*there was a bit of aggression there*", he was referring to the police officer and not himself. He later conceded that "*he had the shits*"[22] and agreed he was angry about the "*new charge*".[23]

[22] The complainant was also cross-examined about a statement he made to police where he said "*I call it an eye for an eye*" but the complainant said he could not recall making such statement.[24]

[23] When asked in cross-examination if he recalled being loud and aggressive in his tone towards police, the complainant said "*I had the shits and I was – yeah I was pissed off. Yes.*"[25] The complainant also agreed that his tone and body language were aggressive throughout the course of the interview.[26] Late in cross-examination though, the complainant denied being abusive or aggressive and denied raising his voice to police.[27]

[24] The complainant could not recall speaking with the prison psychologist Leanne Cunliffe, where he allegedly made admissions to being abusive and aggressive, resulting in him being placed in what he described as a headlock as a result of his behaviour. In fact he denied telling anyone he had been abusive or aggressive.

[25] Later in cross-examination the complainant said that the appellant "*might have summoned me back, but all I can remember is him grabbing me around the throat and up against the wall. That's all I remember.*"[28]

[26] In both examination-in-chief and cross-examination the complainant stated he suffered the following injuries as a result of the alleged assault by the appellant:[29]

(a) croaky voice and difficulty speaking for at least three or four days after the event;
(b) sore throat;
(c) bruising and swelling to his throat;
(d) struggled to drink water and swallow food;
(e) a lot of swelling, which he said was also noted by the treating doctor;

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20 Day 1, Page 94, ll 17 – 18.
21 Day 1, Page 96, ll 23 – 25.
22 Day 1, Page 97, l 8.
23 Day 1, Page 97, ll 21 – 22.
24 Day 1, Page 97, ll 36 – 41.
25 Day 1, Page 105, ll 6 – 16.
26 Day 1, Page 105, ll 42 – 44, Page 109, ll 3 – 5.
27 Day 1, Page 124, ll 5 – 8; Page 125, ll 2 – 8.
28 Day 1, Page 132, ll 2 – 15.
29 Day 1, Page 70, ll 22 – 24, l 44 and l 45; Page 71, ll 4 – 5, l 9, l 27, ll 11 – 23, Page 128, ll 18 – 29, l 39.

(f) lump at the back of his head; and
(g) tight and sore right shoulder.

Evidence of Dr Hearn

[27] Dr Hearn examined the complainant the day after the alleged assault. Dr Hearn stated that the complainant presented with pain to his shoulder and neck but was able to eat and drink and had no damage to his airway. The complainant was diagnosed with a moderate strain or pain in his neck.

[28] Dr Hearn noted the following when examining the complainant:[30]
(a) he looked normal on inspection;
(b) significant tenderness to palpation from the middle of the cervical spine to the paravertebral muscle (back of the neck) on both sides, but was more to the left than to the right;
(c) mild bony tenderness to the left shoulder;
(d) no tenderness to the front of the throat/windpipe;
(e) no pain to the rear of the head; and
(f) no bruising or swelling anywhere to the head, neck or back.

Evidence of Senior Constable Wells

[29] Senior Constable Wells said as soon as the complainant entered the interview room he was agitated, slumping down in the chair, turning away from police, shaking his legs, moving/swinging his arms and occasionally whistling.[31] She recalled the complainant raising his voice at intermittent periods and that, although she did not feel threatened by his behaviour, it nevertheless concerned her and she wanted the interview to be over and done with as she found him to be unpredictable.[32]

[30] In cross-examination, Senior Constable Wells said although she did not consider the complainant's tone of voice to be personally abusive, she recalled it having an "*abusive element*". She stated that the complainant was angry about something which was reflected in "*the tone of his manner*".[33] She said that she did not feel personally threatened because she knew Corrective Services were outside and were able to take control if necessary.[34] She also clarified that her threshold for feeling personally threatened was higher than others due to the nature of her job.[35]

[31] Senior Constable Wells recalled that when the appellant came into the room she recalled him saying words to the effect of "*don't fucking move*". She understood this to mean "*to not resist*".[36]

[32] Senior Constable Wells agreed that she was trained in a number of restraint methods and that one of those methods was the hypoglossal neck restraint technique.[37]

Evidence of Senior Constable Cussh

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30 Day 1, Page 51, l 4 to Page 53, l 4.
31 Day 2, Page 10, ll 43 – 46.
32 Day 2, Page 11, ll 4 – 11, Page 12, ll 2 – 25.
33 Day 2, Page 25, ll 44 – 46; Page 26, ll 2 – 7.
34 Day 2, Page 28, l 36.
35 Day 2, Page 30, ll 9 – 10.
36 Day 2, Page 30, ll 25 – 35.
37 Day 2, Page 32, ll 35 – 43.

[33] Senior Constable Cussh stated that shortly after the complainant entered the interview room he was very belligerent, aggressive, and raised his voice to a yell. He did not believe that the complainant was yelling at anyone in particular. When questioned as to what he was yelling about, Senior Constable Cussh said that the complainant said words to the effect that his "*life was fucked*".[38] The witness described the complainant becoming red in the face and clenching his fists throughout the interview.[39] The officer said that although he did not feel threatened, the complainant was one of the most difficult prisoners he has ever had to deal with.[40]

[34] Senior Constable Cussh agreed that Exhibit 1 (the CCTV footage) did not reflect the severity of the complainant's behaviour. He said the footage showed the complainant to be "*calmed down from when he was initially spoken to*" although at the end of the interview the complainant was still ranting and being rude.[41]

[35] At the end of the meeting Senior Constable Cussh said to the complainant "*here's your paperwork now fuck off*". He acknowledged it was not a comment he should have made. At this time he opened the door and the complainant started to exit the room. After he exited the room the police officer believed that the complainant walked into the appellant.[42]

[36] Senior Constable Cussh initially said he did not intervene in the incident because he was not supposed to get involved in incidents at correctional centres as it was the responsibility of Corrective Services officers. In cross-examination he agreed that he did in fact assist the appellant in restraining the complainant by grabbing the complainant's arm and putting it behind his body.[43]

Evidence of Corrective Services Officer, Timothy Smith

[37] Mr Smith was a Corrective Services officer at the Woodford Correctional Centre. He escorted the complainant from the phone room, where he had spoken to his solicitor, to the interview room, where the incident occurred. Whilst escorting the complainant to that room he said that the complainant appeared to be "*agitated and abrupt*". He said the complainant became more annoyed when he was taken to the interview room and his voice became quite elevated.[44] Mr Smith said that upon entering that room he instructed the complainant to sit down and remain seated with his hands visible on the table.[45]

[38] Mr Smith closed the door to the interview room which remained unlocked. He then watched the complainant through the glass and observed him occasionally to stand up, pace and sit down. He also heard the complainant raising his voice.[46] A short time later, Mr Smith was called to another location. Due to the complainant's

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38 Day 2, Page 38, ll 19 – 46.
39 Day 2, Page 62, ll 35 – 39; Page 63, l 12 – 13.
40 Day 2, Page 40, ll 10 – 11; Page 62, ll 5 – 6.
41 Day 2, Page 42, ll 36 – 37.
42 Day 2, Page 44, ll 27 – 28.
43 Day 2, Page 67, l 2.
44 Day 2, Page 80, ll 6 – 17.
45 Day 2, Page 81, ll 45 – 46. It is standard procedure for prisoners to keep their hands visible during a meeting/interview.
46 Day 2, Page 82, ll 2 – 20; Page 84, ll 5 – 10.

behaviour and concern that he had for the safety of the police officers inside the interview room, Mr Smith instructed the appellant to watch the complainant.[47]

[39] When Mr Smith was in another room he later heard elevated voices coming from that interview room and upon attending he observed the appellant securing the complainant against the wall. He then assisted in restraining the complainant who was resisting by trying to push himself from the wall and moving his hands while being handcuffed.[48]

[40] In cross-examination, Mr Smith agreed that he was trained in pain compliance techniques. He stated that one of the techniques used is applying pressure to the hypoglossal area under the jawline in short, sharp jabs. Force is applied repeatedly until the person complies with the direction.[49]

Evidence of Craig Steley, Intelligence Officer at Woodford Correctional Centre

[41] Mr Steley was involved in the downloading of the CCTV footage of the incident. He agreed that it is normal practice for him to capture all footage from a day irrespective of its relevance. [50] He stated that after being informed of the incident involving the appellant, he decided to capture only a period of what he considered to be relevant in the interview room.

[42] In cross-examination, Mr Steley explained that he captured a 30-minute period of the hallway (Exhibit 3) in the event it became relevant, despite the incident not occurring in the hallway. He was unable to explain why he considered it relevant to only capture three minutes of the interview room where the incident had actually occurred.[51]

Evidence of Correctional Centre Supervisor, Jorge Speck

[43] Mr Speck was the acting supervisor at the residential compound of Woodford Correctional Centre.

[44] His experience included 17 years in the New South Wales Police Force where he held the rank of Detective Sergeant, Acting Commander of the Plantation Squad and Acting Commander of the Undercover Unit. He was also a trainer at the Police Academy for detective courses and detective designation. He subsequently spent 10 years as an investigation manager for the Australian music industry and was a consultant who provided law enforcement management to both domestic and international clients.[52]

[45] Mr Speck gave evidence regarding the training of Corrective Services officers and the use of pain compliance techniques. He referred to techniques used by officers which involve the neck. He referred to unfavourable methods which involved officers striking a prisoner and escalating a situation to a point where the officer is assaulted.[53]

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47 Day 2, Page 84, ll 26 – 31; Page 100, ll 37 – 45, Page 101, ll 2 – 4.
48 Day 2, Page 88, ll 24 – 32; Page 102, ll 20 – 31.
49 Day 2, Page 104, ll 2 – 27.
50 Day 2, Page 111, ll 1 – 4.
51 Day 3, Page 32, ll 1 – 4.
52 Day 3, Page 90, ll 11 – 21.
53 Day 3, Page 92, l 23 – 35.

[46] Mr Speck stated the more favourable option would be for an officer to use the hypoglossal pain restraint technique. The technique involves pressure being applied to a pressure point which is located under the jawline, approximately one inch forward of the mandibular angle. He said when using this technique, the person applying the technique moves their thumb to the pressure point and uses short jabs for compliance. If a person does not comply, the officer tries three or four more times before moving onto another technique.[54]

[47] Mr Speck explained the importance of gaining control of the prisoner's head when applying the technique. If the head is not controlled a prisoner is able to spit, bite, grab, head butt or otherwise assault the officer.[55] Mr Speck explained to have control of the head an officer needs to get hold of the prisoner's head however they can (from the front or from behind). He explained controlling the prisoner's head may involve pushing it into a wall to get some stabilization.[56]

[48] Mr Speck discussed his experience in applying the hypoglossal technique:

> "*It's an approach I have taken and I would take and I would encourage…people to take if you need to encourage them in confined spaces, so in cells…or in narrow walkways…where you don't have room to take somebody to the ground, or, you know, you don't want into…an exchange of physical blows, or you don't want to otherwise be overpowered. So if you want to get in and get some compliance by force…it's very effective, and there are less risks than some of the other obvious techniques that you could think about using…it's tidy and it doesn't invite an escalation…*"[57]

[49] In re-examination Mr Speck was questioned in relation to the continuum of compliance. He was asked to consider how an officer would respond in circumstances where they "*had all the time in the world*". Mr Speck said if there was no immediate need to gain compliance the officer could make declarations.[58]

Evidence of Corrective Services Officer, Per Thor Arronson

[50] Mr Arronson was a Corrective Services officer at Woodford Correctional Centre and assisted in restraining the complainant at the time of the incident. When he entered the room he observed the complainant being restrained against the wall by the appellant. He then assisted the appellant, noting that the complainant's body at the time was tense. He said once the complainant was handcuffed his body relaxed.[59]

Evidence of Robert Rodney Cotter

[51] Mr Cotter described the complainant as yelling and being aggressive. He said at one stage the complainant looked towards the Corrective Services officers and said, "*wait 'til I come out there. I'll wipe that fucking smile off your face.*"[60] The witness said that when inside the interview room the complainant was whistling, shaking his

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54 Day 3, Page 92, ll 38 – 45; Page 93, ll 2 – 40.
55 Day 3, Page 94, ll 2 – 7.
56 Day 3, Page 94, ll 10 – 25.
57 Day 3, Page 94, ll 29 – 46.
58 Day 3, Page 107, ll 40 – 47; Page 108, ll 2 – 24.
59 Day 3, Pages 13 – 19.
60 Day 4, Page 16, l 7.

legs, was red in the face and was verbally abusing police. He said that he believed that the complainant was going to assault someone.

[52] Mr Cotter continued to monitor the complainant, and at one time observed the complainant to jump up after causing a loud bang noise with some paper. He said that he remembered thinking at that stage, "*fuck, it's on in there. It's on in there. There's going to be an assault.*"[61]

[53] At this time the appellant observed Senior Constable Cussh stand up to reach for the door. He believed that this was for the purposes of allowing the appellant to enter the room. The door opened and the complainant looked at the appellant directly with a look of rage.[62] The appellant said that he believed that the complainant was going to "*knock him out*". The complainant then walked directly towards the appellant, who at that time was unsure if he was about to be assaulted or whether police were about to be assaulted. The appellant explained that there was a requirement for all prisoners to remain seated in such circumstances and that they should do so until a Corrective Services officer escorts them from the room.[63]

[54] The appellant stated in evidence that his primary concern at that particular point in time was for the welfare of the police. He said that he consequently moved closer towards the police officers at which time the complainant approached him and struck his chest with either his shoulder or his chest. The appellant said he reacted by pushing the complainant backwards to create space between them. The appellant described the tension in the room as being "*next level*" and believed that the complainant was about to assault him again. He said that he then grabbed the complainant as safely as he knew how, and tried to control his head and neck, and pushed him into the corner.

[55] The appellant said that after pushing the complainant towards the wall the complainant resisted. The appellant said that he did "*the only thing that I felt safe enough to do and grabbed hold of the prisoner.*"[64]

[56] The appellant recalled grabbing the complainant around the back of the neck with his thumbs underneath the jawline to try to control his head so that he could not head butt, bite or spit. He said that by securing his head it enabled him to pin him to the wall with his elbows and achieve a pain compliance technique through the hypoglossal. He said that the complainant continued to resist by tensing his body.

[57] The appellant was questioned about the expression on his face when he pushed the complainant toward the wall. The appellant said that he did not feel anger or rage and elaborated further:

> "*At that particular point in time, I did feel threatened. I can't tell you whether it was anger. I can tell you that it was not 'angry rage' and when you are explaining to a prisoner the ramifications of assaulting staff whilst you are a prisoner in a correctional facility, it's not done with a smile on your face*."[65]

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61 Day 4, Page 18, l 19 – 20.
62 Day 4, Page 18, ll 19 – 22.
63 Day 4, Page 18, ll 29 – 31.
64 Day 4, Page 20, ll 16 – 17.
65 Day 4, Page 37, ll 40 – 43.

Evidence of Leanne Cunliffe

[58] Ms Cunliffe is a psychologist with Queensland Corrective Services. She spoke to the complainant the day after the incident and took contemporaneous notes. There was contention in regards to whether the complainant used certain words such as "*aggressive*" and "*chokehold*" when speaking with her. She maintained that he used the word "*chokehold*" but was unable to clarify the precise words regarding his abusive behaviour.

[59] Ms Cunliffe's notes were read aloud for the record and stated:

> "*Prisoner Long reported…significant distress in relation to the charge and wanted* [indistinct] *reported he had spoken to his lawyer when QPS officers approached him and served him* [indistinct]*…The prisoner reported he became extremely agitated and became abusive, thus QCS staff intervened and he was placed in a chokehold, and then was transferred to the DU.*"

Evidence of Adele Juffs

[60] Ms Juffs was employed as a Corrective Services officer and was the appellant's supervisor. She considered the appellant to be professional and reliable and she never had concerns about his use of force.

Grounds of appeal

> **The learned magistrate erred in failing to consider the *Criminal Code* excuses of self-defence and provocation raised fairly on the evidence and not challenged by the prosecution through cross-examination of the defendant.**

[61] The learned magistrate concluded that the complainant did not assault the appellant, and therefore it was not necessary to consider self-defence or provocation.

[62] Section 271(1) of the *Criminal Code* provides that if a person is unlawfully assaulted and did not provoke the assault, then that person is permitted to use such force as is reasonably necessary to make effectual defence.

[63] The appellant stated in evidence that when the door to the interview room first opened, the complainant rushed towards him with an angry look on his face. He then made contact with the appellant's chest and the appellant reacted by pushing the complainant to create distance and then applied the pain compliance technique in order to gain compliance.

[64] It is a defence at law if there are circumstances which may justify a pre-emptive strike in self-defence. The primary rule, as outline in *R v Lawrie,*[66] per Connolly J at 505:

> "*…this is not to say however that what is reasonably necessary to make effectual defence will not depend on the circumstances as*

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66 [1986] 2 Qd R 502.

> *perceived by the defender. An honest and reasonable belief that a blow is about to be struck may justify a pre-emptive blow.*"

[65] In the case of *Whyte v R*,[67] what was reasonable in making an effectual defence depended on the nature of the attack. If a person is in imminent danger, it may be necessary for that person to take immediate action to avert that danger. This is relevant in circumstances when a defendant did what he/she honestly and instinctively thought was necessary in a moment of unexpected anguish.

[66] The defence of provocation is defined under s. 268(1) of the *Criminal Code* as:

> "*including wrongful act or insult of such a nature as to be likely, when done to an ordinary person…to deprive the person of the power of self-control, and induce the person to assault the person by whom the act or insult is done or offered.*"

[67] A number of witnesses gave evidence that the complainant was belligerent, aggressive and was behaving in an unpredictable manner. The appellant had been instructed by another officer to watch the complainant as a result of the complainant's behaviour and the appellant was concerned not only for his own safety, but for the safety of others. The appellant believed that an assault was imminent, particularly when the interview room door opened and the complainant moved towards him with an angry look on his face. The complainant subsequently made contact with the appellant's chest which caused the appellant to react by pushing him to create distance and then applying the hypoglossal restraint technique as per his training.

[68] It is clear upon the evidence that the appellant was faced with an escalating situation at a maximum security prison in an area where a number of unsecured prisoners were not contained by any locked doors. There were a number of other non-prisoners within the visitation area who were also at risk, as well as the police who were unarmed and unfamiliar with the procedures.

[69] It is entirely consistent with the evidence that the appellant was not only acting in self-defence, but that he may also have been aiding another in self-defence. Such a defence was clearly open on the evidence and should have been considered. Even if the learned magistrate was not satisfied that the circumstances were such that the appellant was unlawfully assaulted, it would have been relevant to then consider s. 24 of the *Criminal Code*, namely whether the appellant had an honest and reasonable but mistaken belief that the complainant had, or was about to, unlawfully assault him.

[70] The failure on the part of the learned magistrate to turn her mind to this potential defence is an error of law and has resulted in an unfair trial, in that the appellant was unfairly denied the opportunity of an acquittal on a most obvious and compelling basis.

[71] Insofar as the defence of provocation is concerned, the appellant's evidence was not that he acted as a result of losing the power of self-control, but rather that he maintained control and acted in accordance with his duties as a Corrective Services

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67 [1987] 3 All ER 416; (1987) 85 Cr App R 283.

officer with the primary purpose of protecting himself and/or the police officers from being assaulted. Given that evidence, the defence of provocation was not open.

The learned magistrate erred in applying the discussion of s. 31(1)(d)(ii) in *R v Lentini* [2018] QCA 299 to the interpretation of *reasonably necessary force* pursuant to s 143 of the *Corrective Services Act* 2006.

[72] The learned magistrate considered the general principles of s. 31(1)(d)(ii) which were applied in *R v Lentini*[68]. Her Honour considered the general assessment of the overall principle relevant and helpful[69] and referred to the case immediately before delivering her verdict.

[73] It has been submitted that the learned magistrate however did not correctly apply the discussion of that section as referred to in that case, and the respondent has agreed with that submission.

[74] The magistrate concluded that although the appellant had a subjective view that the complainant was going to assault him, there was no evidentiary basis for this to be a reasonable belief.[70] Although her Honour did not consider the belief to be reasonable, she did not consider if the appellant's belief was mistaken, which she was required to do consistent with the statements of Sofronoff P in *Lentini*:

> "*[44] What is reasonable depends upon the situation of the appellant herself. The reasonableness of her belief is to be judged according to what the appellant knew to be the facts, or reasonably believed to be the facts, at the time. Her grounds of belief might be mistaken but, provided that the appellant's belief in the existence of those grounds was itself reasonable in the circumstances, and provided that those grounds reasonably supported her mistaken belief, the provision will be engaged. If that were not the meaning of s. 31(1)(d)(ii), then in any case s. 24 of the Criminal Code would achieve the same result.*"

[75] The failure of the learned magistrate to direct herself as to the basis of the appellant's belief was a mistake at law and one which deprived the appellant of a reasonable chance of acquittal.

The learned magistrate erred in finding that the prosecution had negatived beyond reasonable doubt the excuse in s. 31(1)(a) of the *Criminal Code* raised by the defendant.

[76] It has further been submitted by both parties that the learned magistrate did not consider the potential defence which arises as a result of the provision of s. 31(1)(a) of the *Criminal Code* being considered in conjunction with the provisions of s. 143 of the *Corrective Services Act 2006.*

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68 *R v Lentini* [2018] QCA 299, [42] – [46].
69 Day 5, Page 3, ll 22 – 37.
70 Decision, Page 12, ll 11 – 14.

[77] Section 31(1)(a) excuses criminal liability where the act occurs in the execution of the law.

[78] The learned magistrate concluded that the appellant had a subjective view that the complainant was going to assault him, but she rejected the possibility that such an assault was occurring as she concluded that the complainant's hands remained by his side. Her Honour considered the complainant's behaviour to be "*ill-mannered and anti-social…a minor breach of custodial behaviour at most.*"[71]

[79] The learned magistrate therefore found that the appellant's use of force was not reasonably necessary to prevent any offence and was not authorised or justified by law. In fact at page 12 of the Decision, the learned magistrate stated that as there was no assault by the complainant, it was not relevant to consider the *Corrective Services Act*.

[80] Both parties submit that the learned magistrate erred in dismissing the application of the *Corrective Services Act* by virtue of a conclusion that no assault had occurred.

[81] Section 143 of the *Corrective Services Act* allows the use of reasonable force and states the following:

> "**Section 143 Authority to use reasonable force**
>
> *(1) A corrective services officer may use force, other than lethal force, that is reasonably necessary to—*
>
> *(a) compel compliance with an order given or applying to a prisoner; or*
> *(b) restrain a prisoner who is attempting or preparing to commit an offence against an act or a breach of discipline; or*
> *(c) restrain a prisoner who was committing an offence against an Act or breach of discipline;*
>
> *…*
>
> *(2) The corrective services officer may use the force only if the officer:*
>
> *(a) reasonably believes the act or omission permitting the use of force cannot be stopped in another way; and*
> *(b) gives a clear warning of the intention to use force if the act or omission does not stop; and*
> *(c) gives sufficient time for the warning to be observed; and*
> *(d) attempts to use the force in a way that is unlikely to cause death or grievous bodily harm.*
>
> *(3) However the Corrective Services officer need not comply with sub-section (2)(b) or (c) if doing so would create a risk of injury to:*
>
> *(a) the officer; or*
> *(b) someone other than the person who was committing the act or omission*

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[71] Decision, Page 11, ll 31 – 33.

..."

[82] This section permits the reasonable use of force by an officer in circumstances where a prisoner is committing an offence against the *Act* or a breach of discipline. Breaches of discipline are defined under s. 5 of the *Corrective Services Regulation*. The *Regulations* provide circumstances which may be considered a breach of discipline, for example:

> *(h) a prisoner who uses abusive or threatening language; or*
>
> *(i) a prisoner who attempts to act or acts in a way that is contrary to the security or good order of the prison is also breaching discipline.*

[83] Such breaches may give rise to an officer using reasonable force necessary in the circumstances. By failing to have regard to the appropriate legislation the learned magistrate did not have appropriate regard to the security and good order of the prison. In making this decision, the learned magistrate rejected Mr Speck's evidence to the appropriateness of using the hypoglossal restraint technique. Her Honour failed to consider the location of the interview room being less than 10 metres from various members of the public and unrestrained prisoners.

[84] It is submitted by both parties that in circumstances where the complainant was generally aggressive and confronted the appellant in a small space, it was reasonable for the appellant to be unsure as to what the complainant intended to do next. The appellant said that the complainant hit him in the chest with either his shoulder or chest which caused him to then push the complainant backwards and use the hypoglossal pain compliance technique as he was trained to do. The parties submit that the learned magistrate failed to appropriately consider this use of force being reasonable and necessary to compel compliance and to restrain the complainant as permitted by the *Corrective Services Act*.

[85] I agree with that submission. The failure of the learned magistrate to consider this potential defence was an error in law and one that denied the appellant the very reasonable prospect of an acquittal.

The learned magistrate misconceived the effect of the evidence of Senior Constables Cussh and Wells and then wrongly found that:

(a) their evidence was inconsistent with the evidence of the defendant; and
(b) their evidence meant that the complainant posed no threat of harm to the defendant.

[86] The learned magistrate considered the evidence of Senior Constables Wells and Cussh to be credible and independent. When summarising their evidence she repeated that the officers did not feel personally threatened by the complainant's behaviour, however failed to raise other crucial pieces of their evidence.

[87] The learned magistrate did not consider the relevance of Senior Constable Wells' testimony that she "*wanted to get* [the interview with Mr Long] *over and done with because of his behaviour.*" The learned magistrate also failed to have regard to

Senior Constable Wells' evidence that she observed the complainant moving his arms a lot throughout the interview or that the complainant's unpredictable behaviour caused her to check that the appellant was standing at the door.[72] The learned magistrate did not appropriately refer to Senior Constable Cussh's evidence that the complainant had "*become rapidly aggressive*", raised his voice to a yell and became red in the face.

[88] In relation to this ground of appeal, it is also relevant to note that the learned magistrate did not appear to have regard to the fact that the appellant knew that prisoners were required to keep their hands in full view on top of the table during interviews such as this, and that prisoners were not allowed to leave an interview room of their own volition.

[89] In my view the evidence of the police officers was not consistent with the evidence of the complainant. In fact, the police officers' evidence is consistent with the evidence of the defendant in important and relevant respects. The evidence of all three witnesses was compelling and unambiguously demonstrated that the complainant did pose a threat of harm to the appellant and/or others.

The learned magistrate erred in wrongly applying the evidence of Mr Speck in finding that there were use of force alternatives available to the defendant and that the force used by the defendant was not reasonably necessary

[90] The learned magistrate considered Mr Speck's evidence to be honest, informative, truthful and forthright. She nevertheless only relied on a small extract of his evidence which generally outlined techniques for handling prisoners. Both parties submit however that her Honour did not appropriately consider the entirety of Mr Speck's evidence which was relevant to the issues at hand.

[91] Mr Speck gave evidence regarding the layout of the prison. He referred to the interview room where the complainant was speaking with police. Approximately three metres away from the interview rooms is an unsecured door which opens to a chute waiting area. The chute leads to the back entrance of the general visitation area.[73] There can be up to 40 unsecured/unrestrained prisoners waiting for visitation. Mr Speck recalled that prisoners were in the chute when he responded to the code yellow (relating to this incident).[74]

[92] Mr Speck discussed issues relating to security and order of the visitation area. In order to appropriately convey these issues, it was necessary to elaborate on the layout and pedestrian traffic in the visitation area. He explained that next to the rear entrance to visitation is the rear entrance to the non-contact booth. Directly next to the non-contact booth is the primary "*move and control*" station for that specific area, it being referred to as "*Central One*". Opposite Central One is a gate to an oval which holds up to 50 prisoners. Next to the gate is a gate to a non-custodial area which is staffed by numerous civilians. On the other side of the movement and control area is the door to the administration area. That area constitutes the highest pedestrian traffic in the entire centre. Mr Speck stated that any person that comes to

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72 Day 2, Page 28, ll 38 – 40.
73 Day 3, Page 82, ll 5 – 11.
74 Day 3, Page 85, ll 33 – 46.

the prison (including non-prisoners) has to go through that area.[75] Mr Speck stated that the visitation area, which was under 10 metres away from the interview rooms, was a "*major thoroughfare*", and can have up to 100 prisoners at the gate or walking past, which cannot be controlled.[76]

[93] Mr Speck explained that the hallway outside the interview room could have a range of persons passing through to the chute.[77] He explained this area of the prison was problematic as it lacked "*optimal control*" and had large numbers of unsecured prisoners.[78] By lacking control there is a risk that prisoners may involve themselves in the code in order to assist the prisoner who was the subject of the code.[79] Mr Speck stated that it was his concern and his experience that any issue between a guard and a prisoner can quickly escalate to multiple risks if other prisoners involve themselves.[80]

[94] Mr Speck referred to gaining control of prisoners with pain management compliance techniques. He considered pain compliance was warranted or required to maintain the security and good order of the prison. He agreed it was appropriate to apply the technique to have a prisoner comply with a direction or to prevent the prisoner from doing something which concerned an officer.[81]

[95] In cross-examination, Mr Speck was asked if he has applied the hypoglossal technique from the front of a prisoner. He said it is an approach he has taken and would encourage others to take, particularly in confined spaces.

[96] Mr Speck referred to the continuum of compliance and necessity of force. He stated that if there was enough time, the officer could make a declaration that they intended to use force.[82] Mr Speck stated that the application of pain compliance to a prisoner is utterly subjective to the officer in the situation, elaborating:

> "*you alone and nobody else…in the area can make the decision for you, and if you make the decision that you've reached a point where…you need compliance, and the only way you're going to get compliance from that prisoner in those circumstances, based on all the circumstances in your purview, then yeah, that's the technique you'd use...You wouldn't want to grapple with most of the prisoners…you'd want to use the most effective technique.*"[83]

[97] In re-examination it was put to Mr Speck that he was not recommending "*ramming somebody's head against a brick wall*" when applying the hypoglossal technique. Mr Speck responded that the technique is not a neat application, and that the officer would be pushing at the head and if it is not working the officer is "*just holding an praying*".[84]

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75 Day 3, Page 86, ll 33 – 47.
76 Day 3, Page 87, ll 3 – 10.
77 Day 3, Page 88, ll 3 – 20.
78 Day 3, Page 88, ll 9 – 25; Page 89, ll 20 – 22.
79 Day 3, Page 89, ll 20 – 29.
80 Day 3, Page 89, ll 33 – 44.
81 Day 3, Page 95, ll 37 – 47.
82 Day 3, Page 96, ll 2 – 7.
83 Day 3, Page 96, ll 21 – 30.
84 Day 3, Page 106, ll 27 – 35.

[98] In re-examination the prosecution asked Mr Speck what the lowest level of compliance that could be used in relation to an unruly prisoner would be. Mr Speck said that the officer could ignore them, followed by verbally setting expectations. The prosecutor then asked, "*If you had all the time in the world to deal with a person what would your next level up be*?"[85] Mr Speck responded and went through various alternatives in circumstances where officers had "*all the time in the world*". I note that this was the part of Mr Speck's evidence that was quoted by the learned magistrate at page 8 of her decision.

[99] The learned magistrate's reliance on the availability of alternative techniques as suggested by Mr Speck in circumstances where officers "*had all the time in the world*" was not appropriate to the circumstances that presented themselves in this matter. Mr Speck gave extensive evidence in relation to the dangers of the area of the prison at, and near, where the incident occurred. He further considered that pain compliance to the hypoglossal was recommended in such circumstances where an officer needed immediate compliance with minimal risk.

The learned magistrate erred in relying on evidence of Senior Constables Cussh and Wells to make findings about the procedures at Woodford Correctional Centre when that evidence was inconsistent with the evidence of all the witnesses who were Correctional Services officers.

[100] This ground of appeal relates to the evidence that the complainant left the interview room unescorted. The learned magistrate was correct in concluding that there could be no criticism of the complainant leaving the interview room when directed to do so by a police officer. But that was not the point of the evidence. Her Honour failed to consider that it was required procedure for a prisoner to wait for a Corrective Services officer and that the appellant was unaware that Senior Constable Cussh had opened the door and told the complainant to leave.

[101] Such evidence was directly relevant to the situation as it presented itself to the appellant at that time and to the basis of his stated belief.

The learned magistrate erred in disregarding the evidence of the defendant.

[102] The learned magistrate rejected the evidence of the appellant and found that he was not honest, truthful or reliable. At page 10 of the decision her Honour stated that the appellant could have simply asked the complainant to calm down. She considered his application of force to be contrary to his own training. She found that the appellant's evidence was not borne of objective facts, and that his elaborations of the complainant's conduct were confabulations and a failure of his own character.

[103] Upon my reading of all of the material and viewing all the evidence, in my view the appellant's evidence was consistent with the CCTV footage and the evidence of each witness other than for the evidence of the complainant himself. It follows that there was no proper reason before the court for a rejection of the appellant's evidence.

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85 Day 3, Page 107, ll 40 – 47.

The learned magistrate misconceived the relevance of the evidence that material parts of the CCTV footage of the incident were deleted.

[104] Both parties submit that the learned magistrate erred in concluding that the deleted portions of the CCTV footage did not affect the case against the appellant. On this point the learned magistrate concluded:

> "*It was suggested by the defence that there was other behaviour of Mr Long which was captured on CCTV footage and made unavailable by its non-collection for this trial. There is no objective evidence of any impropriety in the gathering of relevant evidence in this prosecution. …The suggestion that CCTV footage was not collated which would support Mr Cotter's evidence of Mr Long's behaviour is not in any way supported by the objective evidence of police officers Wells or Cussh…*"[86]

[105] In summary, the appellant described the complainant's behaviour in the interview room, which was not captured on the footage as being:

> "*very aggressive…verbally yelling at the officers, swearing at the officers, acting in a…belligerent manner towards the officers…He would turn away from them and start whistling. And then he would come back and give them a verbal spray. He would wave his hands around*."[87]

[106] The learned magistrate concluded that there was no evidence to support the appellant's evidence of the complainant's behaviour in that regard. Yet, Senior Constable Wells testified that the complainant was "*moving his arms around a fair bit*" (something which was not captured in the footage), and Senior Constable Cussh testified that the complainant became red in the face during the interview, clenched his hands into fists, became rapidly aggressive and raised his voice to a yell. Furthermore, Timothy Smith testified that the complainant occasionally paced the interview room. Again, this was not captured on footage.[88]

[107] This evidence is entirely consistent with and supportive of the evidence of the appellant. The issue is not whether any impropriety existed in the gathering of the CCTV footage, but rather whether the appellant's evidence is supported by the evidence of other witnesses in the context of the CCTV footage of the incident being incomplete.

[108] It follows, that I accept that the learned magistrate erred in the way alleged.

Complainant's credibility

[109] The respondent has conceded that evidence before the court significantly impacted upon the complainant's credibility and identified the following areas relevant in that regard:

(a) the complainant's evidence that he kept his arms by his side when exiting the interview room was contrary to the CCTV footage;

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86 Decision, Page 11 at ll 18 – 44.
87 Day 4, Page 15, ll 43 – 46.
88 Day 2, Page 82, ll 5 – 7.

(b) the complainant's evidence that he was standing half a metre from the appellant was contrary to the CCTV footage;
(c) the complainant's denial that he resisted the appellant was contrary to the evidence of Mr Smith and the appellant;
(d) the complainant's evidence of his alleged injuries were contrary to the evidence of the treating doctor;
(e) the complainant's denial of ever acting in a way that was aggressive or abusive during the interview with police was contrary to the evidence of police officers Cussh and Wells, the prison psychologist, Ms Cunliffe and prison officers Smith and Cotter;
(f) the complainant's denial of yelling or using a loud voice during the interview with police was contrary to the evidence of police officers Cussh and Wells, the prison psychologist, Ms Cunliffe and prison officers Smith and Cotter; and
(g) the complainant's evidence where he denied offending in relation to previous offences despite having pleaded guilty to such offences.

[110] The respondent has conceded that the complainant gave evidence which clearly attempted to minimise his own wrongdoing in the subject incident and that his overall credibility should have been significantly affected as a consequence.

[111] The final ground of appeal alleges that the learned magistrate intruded unreasonably into the adversarial arena of the trial such that an unfair trial resulted.

[112] Given my conclusions in relation to the other grounds of appeal however, I do not need to consider this ground. Whilst the ground was conceded by the respondent, it is not one which would result in a verdict of not guilty being entered by this Court. It, at best, could only result in the matter being remitted to the Magistrates Court for a retrial.

Outcome

[113] The respondent has conceded that the setting aside of the guilty verdict and the entry of a verdict of not guilty is the appropriate outcome of this appeal. In fact, the respondent conceded from the bar table that this was a prosecution that, when the law was correctly applied to the appropriate facts, had no reasonable prospects of success and should not have proceeded.

[114] I agree with that assessment hence the order I made on 24 April 2020.

Costs

[115] The appellant seeks an order for costs in relation to the proceedings in the Magistrates Court in the amount of $7250.00.

[116] The respondent does not oppose the application.

[117] Section 225(3) of the *Justices Act* enables this court to exercise any power that could have been exercised by the learned magistrate.

[118] Accordingly, s. 158 of that Act has application. It provides that upon dismissal of a complaint, the complainant may be ordered to pay such costs as seem just and reasonable.

[119] Section 158A sets out matters which may be considered when deciding whether it is proper to make an order for costs.

[120] Relevantly, the respondent has conceded the following:

a. it is questionable whether the proceeding was continued in good faith (s. 158A(2)(a));

b. there was a clear and persistent failure to take the appropriate steps to obtain relevant evidence (s. 158A(2)(b));

c. there was a clear and persistent failure to consider the potential application and merit of relevant excuses and defences, such that the appellants pre-trial submission to discontinue the prosecution was rejected;

d. the trial ran over a period of five days; and

e. upon a proper consideration of the facts and the law, this was a prosecution that had no reasonable prospect of success and should not have proceeded.

[121] The parties have therefore agreed that costs be awarded to the appellant in the amount as defined in Schedule 2 of the *Justices Regulation*. The breakdown of costs is as follows:

Mentions:	10 August 2018	$250.00
	7 February 2019	$250.00
	28 February 2019	$250.00
	11 April 2019	$250.00
	8 May 2019	$250.00
	19 June 2019	$250.00
	7 August 2019	$250.00
Directions Hearing:	19 November 2018	$250.00
Trial:	10 September 2019	$1,500.00
	11 September 2019	$875.00
	13 September 2019	$875.00
	17 October 2019	$875.00
	18 October 2019	$875.00
Judgement/Verdict:	7 November 2019	$250.00
	TOTAL	$7,250.00

[122] In these circumstances I am satisfied that it is appropriate to order costs in the amount sought, being costs in relation to the proceedings in the Magistrates Court.

[123] Section 232(4) of the *Justices Act* precludes costs of the appeal in circumstances where an indictable offence has been dealt with summarily, as was the case in this matter.

[124] I therefore order that the respondent pay the appellants costs of the proceedings in the Magistrates Court in the agreed amount of $7250.00.