DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

O’Neill v Chief of Army [2017] ADFDAT 6

|  |  |
| --- | --- |
| Appeal from: | Defence Force Magistrate |
|  |  |
| File number: | DFDAT 1 of 2017 |
|  |  |
| Members: | **TRACEY (PRESIDENT), LOGAN (DEPUTY PRESIDENT) AND HILEY (MEMBER) JJ** |
|  |  |
| Date of decision: | 3 November 2017 |
|  |  |
| Catchwords: | **DEFENCE** – appeal from a decision of a Defence Force Magistrate (“DFM”) – where appellant found guilty of assault occasioning actual bodily harm contrary to s 61(3) of the *Defence Force Discipline Act 1982* (Cth) and s 24(1) of the *Crimes Act 1900* (ACT) – whether the DFM erred in the application of the relevant test for self-defence – whether the DFM erred in finding that the prosecution had negatived self-defence – whether the conviction is unreasonable and/or cannot be supported having regard to the evidence and the factual findings on the evidence – whether, in all the circumstances of the case, the conviction is unsafe or unsatisfactory and should be quashed |
|  |  |
| Legislation: | *Constitution* ss 51(vi), 68*Crimes Act 1900* (ACT) s 24(1)*Criminal Code 2002* (ACT) s 42*Criminal Law Act 1967* (UK) s 3*Defence Act 1903* (Cth) Pt III Div 1, s 61*Defence Force Discipline Act 1982* (Cth) ss 33(a), 61(3)*Defence Force Discipline Appeals Act 1955* (Cth) s 21(1)(b) |
|  |  |
| Cases cited: | *AK v Western Australia* (2008) 232 CLR 438; [2008] HCA 8*Angre v Chief of Navy (No 3)* [2017] ADFDAT 2*Burdett v Abbot* (1812) 4 Taunt. 401; 128 ER 384*Burkhart v Bradley* (2013) 33 NTLR 79; [2013] NTCA 5*Dal Cortivo v The Queen* (2010) 204 A Crim R 55; [2010] ACTCA 14*Davis v Chief of Army* [2011] ADFDAT 1*Douglass v The Queen* (2012) 86 ALJR 1086; [2012] HCA 34*Filippou v The Queen* (2015) 256 CLR 47; [2015] HCA 29*Fleming v The Queen* (1998) 197 CLR 250; [1998] HCA 68*Groves v The Commonwealth* (1982) 150 CLR 113*Harafias v R* [2016] NSWCCA 268*Lin v Tasmania* (2015) 252 A Crim R 64; [2015] TASCCA 13*M v The Queen* (1994) 181 CLR 487*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53*Millar v Bornholt* (2009) 177 FCR 67; [2009] FCA 637*Miller v The Queen* (2016) 90 ALJR 918; [2016] HCA 30*R v Conlon* (1993) 69 A Crim R 92*R v Forsyth* [2013] ACTSC 174*R v Hall* [2015] ACTSC 408*R v Hawes* (1994) 35 NSWLR 294*R v Jones (Margaret)* [2007] 1 AC 136; [2006] UKHL 16*R v Winner* (1995) 79 A Crim R 528*R v Yates* [1970] SASR 302*Re Aird; Ex parte Alpert* (2004) 220 CLR 308; [2004] HCA 44*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518*Selby v R* [2017] NSWCCA 40*SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13 *W v R* [2014] NSWCCA 110*Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 |
|  |  |
| Date of hearing: | 1 June 2017 |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 124 |
|  |  |
| Counsel for the Appellant: | R Pearce |
|  |  |
| Solicitor for the Appellant: | Salerno Law |
|  |  |
| Counsel for the Respondent: | J Woodward and J Nottle |
|  |  |
| Solicitor for the Respondent: | Director of Military Prosecutions |

ORDERS

|  |  |
| --- | --- |
|  | DFDAT 1 of 2017 |
|   |
| BETWEEN: | KELLY THOMAS O’NEILLAppellant |
| AND: | CHIEF OF ARMYRespondent |

|  |  |
| --- | --- |
| MEMBERS: | TRACEY (PRESIDENT), LOGAN (DEPUTY PRESIDENT) AND HILEY (MEMBER) JJ |
| DATE OF ORDER: | 3 NOVEMBER 2017 |
| where made: | BRISBANE |

THE TRIBUNAL ORDERS THAT:

1. The appellant be granted leave to lodge his appeal after the prescribed period.
2. The appeal be dismissed.

REASONS FOR DECISION

# TRACEY AND HILEY JJ:

# Introduction

1. On 12 May 2016 PTE Kelly O’Neill was found guilty by a Defence Force Magistrate (“DFM”) of assault occasioning actual bodily harm contrary to s 61(3) of the *Defence Force Discipline Act 1982* (Cth)(“the DFDA”) and s 24(1) of the *Crimes Act 1900* (ACT)(Charge 1). The assault underlying that offence was the head-butting by the appellant of the complainant, PTE Kieran Gorey, on 6 October 2014. The appellant was acquitted of a second charge of assault contrary to s 33(a) of the DFDA (Charge 2). That charge involved an allegation that the appellant had punched the complainant shortly prior to the head-butting incident.
2. The appellant identified the following grounds of appeal in his notice of appeal and written submissions:
3. The DFM erred in the application of the relevant test for self-defence;
4. The DFM erred in finding that the prosecution had negatived self-defence;
5. The conviction is unreasonable and/or cannot be supported having regard to the evidence and the factual findings on the evidence;
6. In all the circumstances of the case, the conviction is unsafe or unsatisfactory and should be quashed.
7. The appeal was lodged out of time. The respondent does not oppose an order under s 21(1)(b) of the *Defence Force Discipline Appeals Act 1955* (Cth) extending the time for the lodgement of the application. We make such an order.
8. At the beginning of the hearing of the appeal counsel for the appellant stated that, despite there being four separate grounds of appeal, the appeal involves a “single contention”, namely, that “on the evidence, the learned Defence Force magistrate either misapplied the common law test on self-defence and/or his ultimate conclusion is one that is not sustainable”.

# Background

## Summary of relevant evidence

1. The relevant events occurred on 6 October 2014 in the car park outside the Cazalys Palmerston Club (“Cazalys”) at Palmerston in the Northern Territory. The appellant, the complainant (PTE Gorey), PTE Peter Milde and PTE Francis Deague were all friends. All but PTE Milde lived in the same complex. They decided to go out for a meal together after ceasing duty for the day, something they had previously done several times. They travelled to Cazalys in PTE Milde’s car and ate dinner. Little alcohol was consumed.
2. PTE Gorey testified that during the meal there was some light-hearted bantering between him and PTE O’Neill. PTE O’Neill told him that he was weak. PTE Gorey took offence to this and said: “At least I can do my job to a good standard.” PTE O’Neill took offence to that and said: “Say that again and I’ll knock you out.” In reply PTE Gorey said: “Okay, do it then.” He said PTE O’Neill then stood up in an aggressive manner, flailing his arms around. PTE O’Neill then went outside. PTE Milde followed him.
3. PTE Gorey said that he then got up and went to the toilet. He then went outside towards the car. He walked towards the left-hand rear door of the car. PTE O’Neill was standing on the right-hand driver’s side of the vehicle at the back of the vehicle. As PTE Gorey approached the vehicle, PTE O’Neill walked in front of him and blocked his way. PTE Gorey said that PTE O’Neill’s body language was aggressive as he moved towards him. PTE O’Neill got to within striking distance of him. PTE Gorey said to PTE O’Neill: “What are you doing? Whatever you're about to do could cost you your job.” PTE O’Neill said: “Don’t threaten me with my job.” There was then “a bit of staunching and posturing off” by PTE O’Neill; he moved closer to PTE Gorey and puffed out his chest. PTE Gorey said: “Come on, follow through with it then or get out of my way.”
4. PTE Gorey said PTE O’Neill then delivered a short quick jab to his solar plexus and winded him. He said he did not consent to this. This incident was the subject of Charge 2. He also said that he had not touched PTE O’Neill. PTE Gorey said to PTE O’Neill: “That was pathetic” and “Is that all you’ve got?” He said there was more “posturing off and staunching” with PTE O’Neill puffing out his chest and standing over him. He denied striking PTE O’Neill at any time. PTE Gorey said that he had his hands by his side and was standing his ground. He said: “Come on follow through with that or back down.” He then “received a blow to the nose from PTE O’Neill’s head” and “woke up on the ground” with PTE O’Neill standing over him. His nose began to bleed and he felt it swell. He also bit through his lip. This “head-butt” was the subject of Charge 1. PTE Milde drove him to the hospital.
5. PTE Milde said that the banter started between PTE O’Neill and PTE Gorey inside the restaurant. PTE Gorey was commenting on PTE O’Neill’s soldiering abilities and calling him a malingerer because of a shoulder injury. They both made comments to each other and became agitated. PTE O’Neill said: “Stop. You’re really getting on my nerves. If you don’t stop I’ll hit you.” PTE Gorey said: “I want you to hit me because if you hit me your career’s over.” PTE O’Neill removed himself from the restaurant and went outside to have a cigarette. PTE Milde told PTE Gorey to “let it go”, but PTE Gorey claimed he had done nothing wrong. PTE Milde also went outside for a cigarette. He saw PTE O’Neill and also told him to “let it go”. They were leaning against the car.
6. PTE Milde testified that PTE Gorey then came out of the restaurant with PTE Deague and moved to about 10 metres from PTE O’Neill. PTE Gorey said to PTE O’Neill: “What’s your problem?” They argued again. PTE O’Neill moved about two metres towards PTE Gorey. PTE O’Neill told PTE Gorey to back off or he would hit him. PTE Gorey said: “I want you to hit me. If you hit me … [y]our career is going to be over”. PTE O’Neill said, “Just stop talking, Gorey. I’ve had enough” and they came together. PTE O’Neill pushed PTE Gorey away from him. PTE Gorey moved forward again. PTE Deague tried, unsuccessfully, to defuse the situation. As PTE Gorey moved back in towards PTE O’Neill, PTE O’Neill “grabbed him around the collar, head-butted him and then let go”. PTE Gorey took some steps back and sat down.
7. During cross-examination PTE Milde agreed that once they were outside PTE Gorey was the agitator. He agreed that there was some pushing between them but he did not agree that PTE Gorey put his hands on PTE O’Neill. He said PTE Gorey had moved into PTE O’Neill’s personal space and, when he moved forward after being pushed by PTE O’Neill, he said: “Do it again. Come on, do it again.” After that, he was hit with the head-butt. PTE O’Neill had given PTE Gorey several warnings to back off before the head‑butt.
8. PTE Deague did not give evidence-in-chief but was cross-examined. He was living with PTE O’Neill at the time of the incident. He was friends with both PTE O’Neill and PTE Gorey. The three of them served together in Malaysia, where the appellant badly injured his shoulder. PTE Deague said that, at the restaurant, PTE Gorey was making negative comments towards PTE O’Neill concerning his ability as a soldier and suggesting that he was a malingerer in relation to the injury to his shoulder. Eventually PTE O’Neill warned PTE Gorey that if he continued to say these things he was going to hit him. PTE Deague said that PTE Gorey became louder and angrier in response to being asked to stop by PTE O’Neill. PTE Deague sent PTE O’Neill outside to have a cigarette and cool down and, together with PTE Milde, tried to convince PTE Gorey to “drop it and calm down himself”.
9. PTE Deague said that as he and PTE Gorey left the restaurant together PTE Gorey continued to accuse PTE O’Neill of being a malingerer and a hopeless soldier. PTE Gorey appeared to be aggressive. PTE O’Neill had been standing by the car apparently waiting to get into the car. He came around towards PTE Gorey. PTE Gorey poked PTE O’Neill to the chest with his finger possibly more than once. PTE Gorey also pushed PTE O’Neill in an aggressive way. PTE O’Neill also pushed back when PTE Gorey got too close to him.
10. Although he was in close proximity to the other three men at the time and would have seen and heard what happened next, PTE Deague was not asked any further questions about what happened after PTE O’Neill pushed PTE Gorey back. In particular, he was not asked about the verbal exchanges that followed, whether he saw PTE O’Neill strike PTE Gorey in his solar plexus, or whether he saw the head-butt or PTE Gorey fall to the ground.
11. PTE O’Neill gave evidence in his defence. He said PTE Gorey became increasingly aggressive towards him when they were outside. PTE Gorey had, earlier that evening, “had a go” at him about his soldiering abilities and his injuries, calling him a “linger” and a “shit soldier”. PTE Gorey continued with this even when the appellant asked him to stop. PTE O’Neill said that, when PTE Gorey came outside, he was angry and walked quickly towards PTE O’Neill. When he got to PTE O’Neill, PTE Gorey “was poking” him and waving his arms around and speaking loudly. PTE O’Neill told him to stop or he would hit him. There was pushing between the two of them. PTE Gorey came towards him again and the accused told him to “fuck off” and head-butted him. PTE O’Neill said that, before he pushed PTE Gorey away, PTE Gorey had grabbed him and he had grabbed PTE Gorey. He said he could not use his left arm because it was only recently out of a sling, where it had earlier been for 12 weeks because of the injury. He assumed PTE Gorey was going to do something to him and his aim was to get PTE Gorey away. He could not use his arm so he head-butted him. During cross-examination he was asked about his training in self-defence and escalation-of-force.

### DFM’s findings and conclusions

1. The DFM found the accused not guilty of Charge 2 on the basis that he could not be satisfied beyond reasonable doubt that the punch to PTE Gorey’s solar plexus occurred and further, even if it did, that consent had been excluded.

#### Witnesses

1. The DFM found the complainant to be “an honest and broadly reliable witness”. He also found that the complainant suffered a severe blow to the face, as a result of which his ability to recall events closely surrounding the blow accurately and in detail was likely to have been significantly affected. He would be hesitant before acting on PTE Gorey’s uncorroborated evidence in relation to events around the time of the head-butt.
2. The DFM found that PTE Milde was “an honest and reliable witness and the closest to [a] dis-interested witness in this case”. The DFM inferred that PTE Deague was on more friendly terms with PTE O’Neill than he was with PTE Gorey and noted that the cross‑examination of him by PTE O’Neill’s counsel was not such as to probe or test his credibility or reliability. He found that, despite some qualification in his ability to observe PTE Deague in the normal way when witnesses are examined and cross-examined, PTE Deague too was “an honest and reliable witness”.
3. The DFM found that PTE O’Neill was, “on most points, an honest and reliable witness”. He made appropriate concessions, including that he threatened to hit PTE Gorey if he continued to taunt him, that he was uncertain as to who initiated the pushing and grabbing, and that he delivered the head-butt.

#### Findings

1. The DFM found that the four men were friends who worked together and often socialised out of hours. There was no evidence of previous strong animosity or recent issues between PTE Gorey and PTE O’Neill. PTE Gorey did make a comment early in the evening that had upset PTE O’Neill. In the scheme of things that did not seem like an extraordinary comment.
2. The DFM found that “for whatever reason Gorey proceeded to and continued to disparage [PTE O’Neill’s] soldiering abilities”. The appellant indicated his distress to the complainant, most likely simply at first, and then, as the night went on, with more animation and emotion. As part of this the appellant told the complainant on more than one occasion that, if he continued with this conduct, he would hit him. The DFM found that the PTE Gorey was aware of PTE O’Neill’s distress. PTE O’Neill went outside to get away from PTE Gorey and to calm down. PTE O’Neill was clearly disturbed by the events. PTE Gorey knew this and went outside. As the four men had travelled in the same vehicle, there was nothing unsurprising about the fact that PTE Gorey walked in the direction of the car where PTE O’Neill was standing, presumably so that they could travel home together.
3. The DFM found it likely that PTE Gorey made the first verbal remark. The exchange of words was found to have “escalated to the two being in each other’s faces, to standing off, to staunching, and so forth.” Each was essentially repeating himself to the other – PTE Gorey was being insulting and PTE O’Neill was telling him to stop or he would hit him.
4. The DFM then said:

It is around this point that O’Neill says that Gorey was poking him. This is supported by Deague. Milde did not see this, although he did see O’Neill push Gorey. Gorey says his arms were by his side. This is in a context of O’Neill saying that he would hit Gorey and Gorey baiting him to that effect. Indeed O’Neill says that they were pushing each other.

1. The DFM expressed reservations about PTE Gorey’s assertion that his arms were by his side while facing off a person who was threatening to hit him when they were face-to-face and in very close proximity. However, he noted that young male infantry soldiers do sometimes act in unusual ways. He repeated his reluctance to rely on PTE Gorey’s memory of events close to the head-butt in the absence of corroboration. He found there was some corroboration that showed some physical contact between the complainant and the appellant. However, he was not satisfied beyond reasonable doubt that that physical contact amounted to a punch, a blow, or some other significant degree of force, so as to equate to the conduct alleged in Charge 2. In any event, whatever degree of contact was made by PTE O’Neill to PTE Gorey at that point “came within the consensual facing off of [sic] pushing and shoving between Gorey and O’Neill.”
2. The DFM then turned his attention to Charge 1. It was not contested that PTE O’Neill head‑butted PTE Gorey, that this caused the particularised injuries, and that those injuries at law amounted to actual bodily harm. The only issue therefore was self-defence.
3. The DFM made a number of factual findings. These included that:
	1. The head-butt occurred in the context of the verbal taunting by PTE Gorey, and PTE O’Neill’s verbal responses to shut up or be hit. This was a loud and aggressive exchange.
	2. PTE O’Neill was still recovering from a shoulder injury and reconstructive surgery. Although his left arm was no longer in a sling he was not fully recovered.
	3. PTE Gorey was slightly the taller of the two and more heavily built. However the difference between the two was a matter of small degree.
	4. Both PTE Milde and PTE Deague were in the immediate vicinity, physically able and fit.
	5. In PTE O’Neill’s mind, PTE Gorey was behaving strangely. Prior to this evening there had been no history of purported violence between PTE O’Neill and PTE Gorey, or any propensity for violence by PTE Gorey. Nor was there any earlier physical altercation this evening, beyond the pushing that immediately preceded the head-butt.
	6. PTE O’Neill had warned PTE Gorey repeatedly that, if Gorey did not shut up, PTE O’Neill would hit him. PTE Gorey responded with further taunting, including whether or not PTE O’Neill would hit him.
4. The DFM then said:

I find that O’Neill’s recounting of his deliberative process prior to the head-butt to that of a well-trained soldier giving evidence after the fact. For example, and taking what is purely a hypothetical in this case, if private O’Neill was asked what he did when confronted with a stoppage of his Steyr rifle, no doubt, he would calmly and clearly outline his thought process and physical actions with respect to an [Immediate Action] drill. I also suspect that at the time of the stoppage he would have acted somewhat instinctively.

1. The DFM proceeded to discuss the law in relation to self-defence. In the context of this particular charge it is common ground that the common law applies. This is because s 42 of the *Criminal Code 2002* (ACT), which provides for a statutory defence of self-defence, did not apply in relation to s 24(1) of the *Crimes Act 1900* (ACT) at the time: see *Angre v Chief of Navy (No 3)* [2017] ADFDAT 2 at [51] (Tracey (President), Logan (Deputy President) and Brereton (Member) JJ); *Davis v Chief of Army* [2011] ADFDAT 1 at [32] (Tracey J (President), White JA (Deputy President) and Mildren J (Member)).
2. He noted that the starting point for dealing with self-defence at common law in Australia is the test expressed by the High Court in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645. At 661, Wilson, Dawson and Toohey JJ stated:

The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal.

1. The DFM said:

… that is the common law test as set out in the High Court case of *Zecevic v DPP* … per their Honours, Wilson, Dawson and Toohey. The test is whether the accused believed, upon reasonable grounds, that it was necessary in self-defence to what he did.

There is well known two elements to this test. First, the accused must have believed at the time that he committed the relevant act that what he was doing was necessary, the subjective element; and second, that that belief must have been based on reasonable grounds, the objective element.

…

When considering self-defence, I must look at all the surrounding circumstances. I have set out the circumstances in my factual findings. Consistent with authority, the option for the [sic] retreat is but one factor to be considered in looking at whether the accused believed, on reasonable grounds, that what he did was necessary. It is not a positive requirement to have retreated as far as possible first. Also, the accused can act first if he believes, on reasonable grounds, that he is about to be the subject of an attack.

Per the decision of Hunt CJ at CL in *R v Conlon* [1993] 69 A Crim R 92 at 98:

*A person defending himself from a threatened attack and who has to react instantly to imminent danger cannot be expected to weigh precisely the exact measure of self-defensive action which is required.*

… See also … *Dziduch v The Queen* [1990] 47 A Crim R 378 at 380:

*For the prosecution to negate self-defence the prosecution must remove any reasonable doubt that the act was not done in self-defence.*

1. The DFM then said:

The questions I must ask myself are: is there a reasonable possibility that the accused believed that what he did was necessary to defend himself? And if yes, is there a reasonable possibility that the accused had reasonable grounds for such a belief? In considering this, I must take into account O’Neill’s circumstances including the fact he was recovering from a shoulder reconstruction. If the prosecution failed to disprove at least one of these elements, the accused will be entitled to an acquittal.

1. The DFM proceeded to make the following findings in relation to the first of those questions:

I find that O’Neill honestly believed what he did was necessary. He had received escalation of force training and was putting it into effect. He perceived a threat and he wished to negate that threat. He believed a head-butt was necessary to negate the threat.

1. He then made the following findings in relation to the second question:

However, I find he had no reasonable grounds for such a belief. It is not just a question of was there a threat, but what was the degree or nature of the threat. The altercation is between two mates, well known to each other. It was and had been principally verbal and had been going on for a lengthy period. The physical aspect was, up until that point, no more than pushing at, at the highest, a mutual grabbing. Two mutual mates were standing close by.

There are no reasonable grounds for perceiving a level of threat, i.e. a degree of physical harm about to be caused to O’Neill, that warranted O’Neill delivering a head-butt to the face of Gorey, an action that was always likely to be a significant use of force, as being a necessary response in the circumstances as I have found them. *His response was out of all proportion to any attack that he could reasonably have believed was threatened by Gorey.*

*It is not enough that he perceived that there was a threat, but what was the nature of that threat and the level of that threat.* Accordingly, I find the prosecution has negated or disproved self-defence beyond reasonable doubt.

(Underlining and emphasis in italics added.)

1. The DFM proceeded to find the appellant guilty of Charge 1.

## Ground 1 – the wrong test?

1. Counsel for the appellant agreed that the test to be applied was that set out in *Zecevic*. He contended that the DFM erred in his application of the “second limb” of the test. His appeal focuses upon the words underlined in the passage quoted in paragraph 33 above. His written submissions quoted part of the passage quoted in paragraph 33 above. However those submissions did not quote from, or refer to, what the DFM said immediately after the words which we have underlined. In particular, the written submissions did not refer to those words which we have italicised.
2. The appellant’s written submissions stated:

1.6 The DFM erred in his application of the ‘second limb’ by failing to consider whether the head-butt was necessary in the circumstances as the Appellant perceived them to be, rather than in the circumstances as the DFM ‘found them’.

1.7 A correct application of the common law test for self-defence should have involved a consideration by the DFM of the evidence of the Appellant as to the circumstances as the Appellant perceived at the relevant time, and then making a determination as to whether the Appellant’s response was proportionate to the circumstances, as the Appellant had perceived them.

(Underlining in original.)

1. The submissions referred to passages in a number of authorities which are to the effect that the second limb does require the relevant tribunal to consider the circumstances as the accused perceived them: see *R v Forsyth* [2013] ACTSC 174 at [115] (Penfold J); *R v Hall* [2015] ACTSC 408 at [11], [15]-[16] (Penfold J) and *Harafias v R* [2016] NSWCCA 268.
2. The question then, in the second limb of the test, is whether there were reasonable grounds for the accused’s belief that it was necessary in self-defence to do what he did, based as it was on those circumstances. As Hunt CJ at CL (Simpson and Bruce JJ agreeing) said in *R v Hawes* (1994) 35 NSWLR 294 at 306:

… it is the belief of the accused, based upon the circumstances as he perceived them to be, which has to be reasonable, and not the belief of the hypothetical person in his position.

1. This passage and the surrounding discussion was recently endorsed by the New South Wales Court of Criminal Appeal in *Harafias* where Meagher JA (Rothman and Button JJ agreeing) said, at [5]:

It follows that had that common law test applied to the appellant, to eliminate there being any reasonable possibility that he was acting in self-defence, the Crown would have had to prove *either* that he did not believe that it was necessary in self-defence to do what was done *or* that there were no reasonable grounds for that belief. The first matter was concerned with the accused’s actual belief based on the circumstances as he perceived them. The second was concerned with whether there were reasonable grounds for that belief, based as it was on those circumstances: see, for example, *R v Hawes* (1994) 35 NSWLR 294 at 305-306 (Hunt CJ at CL, Simpson and Bruce JJ agreeing).

(Emphasis in original.)

1. See too *Burkhart v Bradley* (2013) 33 NTLR 79; [2013] NTCA 5, where the Northern Territory Court of Appeal said, at 84 [23]:

The common law requires two things for the defence of self-defence to be made out: first, a belief in the mind of the accused; second, that the belief of the accused, based on circumstances as he perceived them to be, must be reasonable.

1. The test in the second limb is partly objective. But it necessarily requires the tribunal to consider the circumstances as the accused perceived them to be. In *Zecevic*, Wilson, Dawson and Toohey JJ said, at 662-663:

For example, it will in many cases be appropriate for a jury to be told that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered. However the whole of the circumstances should be considered, of which the degree of force used may be only part. … No doubt it will often also be desirable to remind the jury that in the context of self-defence it should approach its task in a practical manner and without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection.

1. In *Dal Cortivo v The Queen* (2010) 204 A Crim R 55; [2010] ACTCA 14, the Australian Capital Territory Court of Appeal said, at 57 [15]:

It is clear that the grounds must actually exist or be objectively so perceived as “reasonable”.

In support of that proposition, the Court cited *Zecevic* at 652-654 (Mason CJ) and 661 (Wilson, Dawson and Toohey JJ).

1. In *R v Conlon* (1993) 69 A Crim R 92 at 98-99 Hunt CJ at CL said, in relation to the second limb of the test, that:

The Crown … argued that the decision as to whether there were reasonable grounds for any belief on the part of the accused that it was necessary in self-defence to do what he did was a completely objective one. But it is clear from the formulation of the issue in *Zecevic v DPP* that it is the belief of the accused, and not that of the hypothetical reasonable person in the position of the accused, which has to be reasonable. … The submission by the Crown that the decision is a completely objective one is rejected.

…

[T]he mixed objective and subjective nature of the assessment as to whether the accused’s belief was based on reasonable grounds means that account must be taken of those personal characteristics of this particular accused which might affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of his response to that danger …

1. In relation to the second limb of self-defence, Meagher JA (Rothman and Button JJ agreeing) saidin *Harafias* at [9]:

Under the common law the further inquiry was as to whether the accused had reasonable grounds for that belief [that it was necessary in self-defence to do what he or she did]; and included whether there were reasonable grounds for the accused’s belief that the conduct was necessary in self-defence, as well as whether there were reasonable grounds for the accused having responded with the degree of force used.

1. Penfold J directed herself in *Forsyth* at [115] as follows:

(a) The prosecution needs to establish, beyond reasonable doubt, that at the time the accused acted:

(i) the accused did not believe that it was necessary in self-defence to do what he did; or

(ii) there were no reasonable grounds, in the circumstances as he perceived them to be, for such a belief.

(b) Whether the accused had reasonable grounds for his belief is to be assessed having regard to the circumstances as he perceived them to be at the time of that conduct, but as the Court of Appeal explained in *Dal Cortivo* at [15]:

It is clear that the grounds must actually exist or be objectively so perceived as “reasonable”.

(c) That is, the reasonableness of the accused’s grounds for any belief is to be assessed objectively.

(d) Among the various circumstances to be considered in determining whether the accused believed upon reasonable grounds that what he did was necessary in self-defence are:

(i) the scope for the accused to retreat from the apprehended attack; and

(ii) the degree of force used by the accused.

(e) Neither of those considerations is decisive, but each of them may be relevant to whether the accused had the necessary belief or to whether there were reasonable grounds for that belief.

1. After quoting the passages in *Forsyth*, *Hall* and *Harafias*, the appellant contended in his written submissions that:

1.11 When addressing the second limb of the common law test, the DFM (at TT212) erred by:

(a) reviewing the Appellant’s defensive response by reference to ‘the circumstances **as I have found them**’ (line 36) – rather than by reference to the circumstances **as the Appellant had perceived them** to be;

(b) applying his own objective assessment of the circumstances (lines 24 – 30) – rather than an objective consideration of the Appellant’s actions by reference to the circumstances as the Appellant subjectively perceived them to be;

(c) finding ‘there are no reasonable grounds for perceiving a level of threat ie. a degree of physical harm …’ (line 32) – rather than considering whether, in the circumstances as the Appellant perceived them, there were reasonable grounds for the Appellant to believe (as the DFM found he did, in fact, believe) it was necessary he do what he did;

(d) finding ‘his response was out of all proportion to any attack that he could reasonably have believed was threatened by Gorey’ (lines 36-38) – because the test is what did the Appellant believe\*, not what the Appellant should have reasonably believed;

(\*Based on the Appellant’s subjective belief as to the circumstances, the question should be: Was there reasonable grounds for the belief that the response was a necessary one? Proportionality should be considered as part of that assessment.)

(e) by applying the wrong assessment of the proportionality of the response – because it was by reference to the DFM’s objective assessment of the circumstances, rather than by reference to the accused’s subjective perception of the circumstances; and

(f) by unduly inflating the issue of proportionality – rather than considering the necessity of the response by reference to the circumstances as a whole and as perceived by the Appellant, as required by *Zecevic* (at p.662):

*… it will in many cases be appropriate for a jury to be told that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered. However, the whole of the circumstances should be considered, of which the degree of force used may be only part.*

(Emphasis in original.)

#### Consideration

1. The underlying basis of the appellant’s contentions is misconceived. The contentions wrongly assume that the DFM applied his own objective assessment of the circumstances and ignored the appellant’s perception of the circumstances. This assumption is based on the words of the DFM underlined in the passage quoted in paragraph 33 above: “the circumstances as I have found them”.
2. This assumption is wrong, for several reasons. First, it is clear that the DFM was considering PTE O’Neill’s actual belief as well as the relevant objective circumstances. So much is apparent from the DFM’s express references to PTE O’Neill’s belief and perception in the two sentences that we have italicised in the passage quoted in paragraph 33 above that immediately followed the critical words relied upon by the appellant (namely the underlined words). It is also apparent from the first sentence of the passage quoted in paragraph 33 above. Secondly, although the DFM’s findings set out in the first paragraph of the passage quoted in paragraph 33 above were findings of objective circumstances they were circumstances known to and perceived by PTE O’Neill at the time. So too were most of the circumstances found by the DFM in the earlier part of his reasons, referred to in paragraphs 20 to 24 above. Thirdly, the DFM’s findings quoted in paragraph 32 above, although relevant to the first limb, were also findings in relation to PTE O’Neill’s perception of his circumstances. They were findings that the DFM would have had in mind when referring to “the circumstances as I have found them” in his consideration of the second limb of the test.
3. Perhaps the DFM could have used slightly different language to emphasise his intended meaning. For example, in the first sentence of the paragraph that contains the words underlined, he could have said something like “There were no reasonable grounds for the appellant’s perception of the level of threat, i.e the degree of physical harm about to be caused to him, that warranted him delivering a head-butt to the face …” and omitted the words “as I have found them”. But, in our opinion, there is no doubt about the processes by which the DFM applied the two limbs of the test, particularly when one looks beyond the five words (“as I have found them”) and considers the rest of his reasons. As the respondent pointed out, it is generally insufficient to point to a particular sentence, or in this case particular words in a sentence, in isolation, as one might when construing a statute or formal legal document. The reasons should be read as a whole: cf *R v Yates* [1970] SASR 302 at 306 (Bray CJ, Zelling and Wells JJ); *Lin v Tasmania* (2015) 252 A Crim R 64 at 92; [2015] TASCCA 13 at [108] (Porter J, Wood and Pearce JJ agreeing); and *Selby v R* [2017] NSWCCA 40 at [41] (Leeming JA, Schmidt and Wilson JJ).
4. The DFM applied the correct test.

## Ground 2 – erroneous finding that the prosecution had negatived self-defence

1. In his written submissions counsel for the appellant contended that:

2.1 The DFM failed to provide a reasoned basis for finding the prosecution had discharged its onus of disproving self-defence beyond a reasonable doubt. In this regard, the DFM said only:

‘It is not enough that he perceived that there was a threat, but what was the nature of that threat and the level of that threat. Accordingly, I find the prosecution has negated or dis-proved self-defence beyond reasonable doubt.’ (TT212, lines 40-44)

2.2 While the DFM identified the burden of proof (TT221, lines 22-25), he did not integrate his consideration of the burden of proof with the elements the prosecution was required to disprove.

2.3 The prosecution carried the onus of proving beyond reasonable doubt that the accused did not act in self-defence. To negative self-defence, the prosecution must prove beyond a reasonable doubt:

(a) that the accused did not believe it was necessary in self-defence to do what he did; or

(b) that there were no reasonable grounds, in the circumstances as the accused perceived them, for him to hold such a belief.

2.4 Respectfully, the DFM did not identify the basis on which the prosecution had discharged its burden of disproving the second limb – noting that the DFM had found the accused had a particular belief (thereby, at least inferentially, acknowledging the ‘first limb’ had not be disproved by the prosecution).

2.5 The DFM made a determination without proper consideration or regard to the applicable onus of proof, and then described his determination in terms of what the prosecution had negated. In this regard, the DFM did not identify a basis for having (apparently) applied the onus of proof to the legal test he was considering by reference to facts that were proven beyond a reasonable doubt.

2.6 For the reasons outlined above and following, the DFM’s determination that the prosecution had disproved self-defence was not supported by the evidence, and wrong in law. It follows that the resulting conviction was also wrong, and ought be quashed.

1. There is no proper basis for these contentions. The passage referred to in paragraph [2.1] of the appellant’s written submissions was the final and concluding paragraph of the DFM’s reasons. It was not the “only” thing the DFM said about the discharge by the prosecution of its onus of disproving self-defence beyond a reasonable doubt.
2. That concluding paragraph was preceded by the DFM’s assessment of the credibility of each witness, his findings of fact, his identification of the relevant legal principles including those pertaining to the onus and burden of proof, and his findings in respect of each of the two limbs of self-defence. He had given careful consideration to the events leading up to the head-butt and in particular the appellant’s evidence about those events, considered all relevant circumstances, directed himself correctly in relation to the law and made findings in relation to each of the two limbs.
3. In particular, he made the findings quoted in paragraph 33 above, which culminated in the finding that “[PTE O’Neill’s] response was out of all proportion to any attack that he could reasonably have believed was threatened by Gorey.” These findings included the finding that there were no reasonable grounds for perceiving a level of threat on the part of PTE Gorey that warranted PTE O’Neill head-butting the complainant. Indeed there was no evidence, even from PTE O’Neill, that he feared that PTE Gorey would inflict any physical harm upon him.
4. We agree with the respondent’s contentions that the findings made by the DFM were reasonable and supported by the evidence before him. The prosecution and defence counsel had the opportunity to adequately examine witnesses and, importantly, the accused gave evidence in his defence. For all intents and purposes, the evidence before the tribunal could not have been more complete.
5. We also agree that a judge is not required to record every consideration which has been taken into account in reaching a determination of guilt, nor expressly refer to all the matters that would need to be stated to a jury: see *R v Winner* (1995) 79 A Crim R 528 at 531 (Kirby ACJ). A judge trying a matter alone must include a statement of the principles of law and expose a reasoning process that shows, at least by implication, how those principles were applied: cf *Fleming v The Queen* (1998) 197 CLR 250 at 263; [1998] HCA 68 at [30] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); *AK v Western Australia* (2008) 232 CLR 438 at 445-446, 453-454, 467-468, 480-481; [2008] HCA 8 at [16] (Gleeson CJ and Kiefel J), [44], [48] (Gummow and Hayne JJ), [85], [107] (Heydon J); *Douglass v The Queen* (2012) 86 ALJR 1086 at 1088-1089; [2012] HCA 34 at [8] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *W v R* [2014] NSWCCA 110 at [110] (Bathurst CJ, Hoeben CJ at CL and Bellew J agreeing). This is what the DFM did in this case.

## Grounds 3 and 4

1. In Ground 3, the appellant contends that the conviction is unreasonable and cannot be supported on two bases:

(a) First, the DFM’s factual findings are such that the appellant’s assertion that he acted in self-defence cannot be disproved.

(b) Secondly, the DFM did not have proper regard of the evidence. Had he done so, he would have found that self-defence had not be negatived.

1. In Ground 4, the appellant contends that, in all the circumstances of the case, the conviction is unsafe or unsatisfactory and should be quashed. In his written submissions, the appellant asserted that the DFM’s determination that self-defence had been negatived was at odds with his general acceptance of the evidence of PTE Milde and PTE Deague, the fact that he found the appellant’s evidence “broadly consistent with that of the three prosecution witnesses”, and his finding that the appellant “honestly believed what he did was necessary”.
2. It is convenient to deal with Grounds 3 and 4 together. As the Chief of Army noted in his written submissions, Grounds 3 and 4 reflect s 23(1)(a) and (d), respectively, of the *Defence Force Discipline Appeals Act 1955* (Cth). Little distinction can be drawn between them: see *Fulton v Chief of Army* [2005] ADFDAT 1 at [55]-[56] (Heerey J (President), Underwood CJ (Deputy President) and Duggan J (Member)).
3. The role for this Tribunal, in relation to Grounds 3 and 4, is to make an independent assessment of the evidence: cf *Filippou v The Queen* (2015) 256 CLR 47 at 53-54, 75-76; [2015] HCA 29 at [11]-[12] (French CJ, Bell, Keane and Nettle JJ), [82]-[83] (Gageler J). It was not contested, and we are satisfied that, PTE O’Neill engaged in the impugned conduct such as to satisfy the elements in s 24(1) of the *Crimes Act 1900* (ACT). The issue for determination is whether there was sufficient evidence for the DFM to conclude that self-defence was negatived beyond reasonable doubt or whether that finding was otherwise unreasonable, unsafe or unsatisfactory.
4. Some of the appellant’s submissions seem to assume that, because the appellant honestly believed that what he did was necessary, as found by the DFM in the passage quoted in paragraph 32 above, the DFM should have had a reasonable doubt in relation to the second limb. Such an assumption is flawed because it does not allow for the objective element of whether there were reasonable grounds for that belief, in the circumstances as the appellant perceived them. That question is not concluded by reference to the opinion of the accused that his belief was reasonable. Clearly the appellant’s belief and perceptions must be taken into account, but so too must other factors such as proportionality and whether there existed opportunities to retreat.

### Regard to the evidence

1. Counsel for the appellant took this Tribunal to a number of the DFM’s findings of fact and to various parts of the evidence. These included evidence and findings about PTE Gorey behaving strangely and taunting PTE O’Neill about his injured arm and his ability as a soldier, the escalation of that taunting in the car park including aggressive body language on the part of PTE Gorey, PTE O’Neill’s reactions to that taunting and his threats to hit PTE Gorey if he continued, PTE O’Neill’s evidence that PTE Gorey was poking him in the chest, evidence about some pushing and grabbing, PTE O’Neill’s inability to use his left arm, and evidence about escalation of force training.
2. Counsel for the appellant contended that the DFM was heavily influenced by the fact that the conduct involved was a head-butt and that he paid insufficient attention to other matters. Those other matters included the events immediately preceding the head-butt, in particular the alleged chest-poke and PTE Gorey’s increasingly aggressive conduct. He also failed to take proper notice of the evidence concerning the appellant’s training in relation to self‑defence and escalation-of-force, and he wrongly concluded that the administration of the head-butt constituted excessive force in the circumstances.
3. At the outset, we note that the DFM did consider each of those matters, albeit not expressing his views and reaching his conclusions in the manner contended for by the appellant’s counsel.
4. Most of those matters were clearly relevant to PTE O’Neill’s subjective belief of the necessity of his conduct and to the DFM’s consideration of the first limb of self-defence. In relation to the second limb, those matters were also relevant to PTE O’Neill’s perception of the circumstances. However, with the exception of the head-butt itself, those matters had little if any relevance to the objective aspects of the second limb.
5. This is particularly so in the absence of any evidence, from PTE O’Neill, to the effect that he had a real fear that unless he took the action that he did, namely head-butting PTE Gorey, he felt in danger of any harm.
6. We reject counsel’s characterisation of the head-butting as “pre-emptive self-defence”.

#### Chest-poking

1. Counsel for the appellant submitted that the DFM failed to give proper consideration to PTE O’Neill’s evidence that Gorey poked him in the chest.
2. There was in fact very little evidence about the so-called chest-poking. The appellant mentioned it in passing, as a reason for him thinking that PTE Gorey was angry, not as a reason for him later head-butting PTE Gorey. After giving evidence about the heated discussion inside the restaurant, the appellant talked about how PTE Gorey was walking towards him in the car park and continuing to verbally taunt him.
3. Most of PTE O’Neill’s evidence about what happened then appears in the following exchange, which occurred in the course of his evidence-in-chief:

DEFENDING OFFICER: When he was speaking to you as he was walking towards you, what tone of voice was he using? — Yes. He seemed angry.

What made him seem angry? — Just because he was walking really quick towards my direction and I was still telling him to stop, but he just kept going.

What words were you using? — The same, “Stop or I’m going to hit you.”

So you’ve said he was walking towards you fast. Was there anything else about his body language that made you think that he was angry? — When he got to me he was poking me, but …

Just for the start just as he moved towards you? — Yes, he was waving his hands around when he was talking as well.

What was the level of his voice? — It was loud.

Was he speaking normally? — No, he was speaking really quick, yes.

You said you were telling him to “Stop”. Did he stop? — No, m’am.

When he got to you what, if anything, happened then? — We both moved towards each other. I probably stepped out a metre from the car. He kept coming towards me then it was still going on, that conversation, that argument, and we moved towards really close to each other.

When you say “that argument” can you just reiterate what you mean by that? — What he was saying, the previous dialogue with the (indistinct) shit soldier stuff and I’m telling him to “Stop”.

What were you saying? — Saying, “Stop or I’m going to hit you”.

So after he got to you and you were both standing close to each other, what happened then? — There’s some pushing.

When you say some pushing who pushed who? — It was both of us.

What happened next? — Then he come over towards me, and again when I was telling him to “Fuck off” and the head-butt happened.

When you say “the head-butt happened”, can you indicate what happened directly before that? — So he come up to – again after I pushed him away.

Yes? — And at that point he’d already grabbed me and I’d grabbed him. I only had one arm because my left shoulder was still injured at that time. And at that point that’s when the head-butt happened.

…

DEFENDING OFFICER: So just to reiterate what you’ve said, you’ve indicated that there was some pushing to start with? — Yes, ma’am.

By both of you? — Yes.

That you pushed PTE Gorey away? — Yes, ma’am.

At the time you also told him to “Fuck off”? — Yes.

And PTE Gorey proceeded to come back towards you? — Yes, ma’am. That’s what I found really strange at that point because he just wouldn’t stop coming.

How did you feel at that point? — At that point I didn’t know, like I said, before what his angle was. I thought we were mates and he’s coming at me like that. And it was kind of – I didn’t – I felt really agitated and I, kind of, felt vulnerable because I didn’t have really my whole body to work with and I was trying to protect myself as much, so.

When you say you didn’t have the use of your whole body to work with, can you just explain what you mean by that? — Well, I couldn’t use my left arm to push him away. Yes.

What state was Gorey in at that point? — He was really angry at that point. He kept coming back, especially after the first couple of pushes.

Well can I just clarify, you’ve said — you’ve indicated that he seemed angry and he kept coming back towards you? — Yes, ma’am.

What was going through your mind at that time? — At that point I just wanted him to stop because I didn’t know whether he was going actually do anymore, because he kept coming towards me and I couldn’t really react as well as what I could with one arm.

How were you feeling in relation to PTE Gorey’s behaviour? — Well, if he kept coming at me after I was pushing him away, I assumed he was going to do something, so.

What was the aim at that point? — To get away from him.

After that happened, what did you observe PTE Gorey to do? — He grabbed me – well we grabbed each other first. I was, kind of, going backwards at that point and then that’s when I decided I couldn’t use my arm to actually push him away, so I head-butted him.’

(Underlining added.)

1. We have underlined the appellant’s (only) evidence about being poked.
2. The appellant’s evidence about PTE Gorey poking him was supported by evidence of PTE Deague during cross-examination by the Defending Officer. PTE Deague referred to PTE Gorey’s aggressive behaviour as he approached PTE O’Neill. The following exchange took place:

At some stage did the two men come together? — Yes.

Did PTE Gorey touch PTE O’Neill at that stage? — Yes, I believe he was poking him and he pushed him. There was pushing involved, yes.

So to reiterate, PTE Gorey poked PTE O’Neill? — Chest poked, yes.

With his finger? — Yes.

Was it more than one poke? — I believe so.

Then PTE Gorey pushed PTE O’Neill? — Yes.

DEFENCE FORCE MAGISTRATE: Can I just ask for clarification — Some people have different ideas of what a chest poke is. In your mind, does a chest poke involve making contact with the finger or the chest? — Yes.

Or pushing close to someone’s chest? — No, there was contact. It was a few successions of (witness demonstrates). While he’s getting the point across, his finger touched him. A few successions as he was saying what he was trying to get across to PTE O’Neill.

…

Now, you said that in addition to the chest poke, PTE Gorey also pushed PTE O’Neill? — Yes.

Where were you when the chest poke and the push occurred? — About a metre away.

Was there anything restricting your view of PTE O’Neill and PTE Gorey? — No.

…

Did you see what happened after PTE Gorey pushed PTE O’Neill? — I believe at one point Kelly pushed back when Gorey got too close to him.

Did that look like a defensive response to you? — Yes.

1. The Defending Officer did not ask PTE Deague about what happened next, although one would think that he must have seen the subsequent pushing and shoving and eventually the head-butt.
2. PTE Milde did not refer to any “chest-poking” in his description of the events, although he agreed that some pushing occurred between the two men. PTE Gorey did not say that he poked PTE O’Neill in the chest and was not asked about it in cross-examination. In examination-in-chief he denied that he touched PTE O’Neill prior to the head-butt. Under cross-examination PTE Gory conceded that there was some “some shaping up” between the two of them.
3. Counsel for the appellant submitted that the DFM should have rejected PTE Gorey’s denial, in light of his reluctance to accept PTE Gorey’s evidence as reliable in the absence of corroboration. Counsel was also critical of the DFM for not making a finding as to whether or not PTE Gorey poked PTE O’Neill in the chest. It was submitted that he should have taken into account that chest-poking as part of the circumstances which would have been in PTE O’Neill’s mind when he head-butted PTE Gorey.
4. We note that, when addressing the DFM, the Defending Officer only made passing reference to chest-poking as one of the many events that occurred in the short time prior to the head‑butt and did not ask the DFM to make an express finding about that. As we have noted, (in paragraph 23 above) the DFM did in fact refer to the chest-poking in his reasons.
5. Even if there was some chest-poking, it appears to have been relatively insignificant. PTE O’Neill only referred to it once and only in the context of describing PTE Gorey’s angry disposition. PTE Deague described it as PTE Gorey touching PTE O’Neill’s chest with his finger. There is no suggestion that the poke or poking caused any discomfort, even momentarily, to PTE O’Neill.
6. Further, such chest-poking as there might have been was temporally distant from the head-butt. After the alleged chest-poking there was pushing and shoving which included PTE O’Neill pushing PTE Gorey. This was followed by further verbal exchanges and then the head-butt. This evidence appears in the transcript quoted in paragraph 70 above.
7. Further, as we have pointed out, there was no evidence from PTE O’Neill that the chest-poke, or any other of PTE Gorey’s conduct, made him fear that he was going to be assaulted in any way. As appears from the evidence quoted in paragraph 70 above, PTE O’Neill “felt vulnerable” and “assumed [PTE Gorey] was going to do something.” He did not say what he assumed PTE Gorey was going to do. In particular, he did not say that he assumed PTE Gorey was going to assault him.
8. Further, even if PTE Gorey did poke PTE O’Neill in the chest and even if this was a basis for PTE O’Neill forming a reasonable belief that it was necessary to head-butt Gorey (in relation to the first limb of the test), that did not objectively justify PTE O’Neill responding as he did (in relation to the second limb of the test).
9. At its highest there was some chest-poking and some pushing of a harmless nature. Even if some or all of those additional things occurred, there was no justification for PTE O’Neill head-butting PTE Gorey.
10. There was no need for the DFM to make the express findings asserted by the appellant, including in relation to whether the chest-poke occurred, and there was thus no error in him failing to do so.

#### Training in self-defence

1. Counsel for the appellant contended that the DFM misused or misapplied the evidence before him concerning PTE O’Neill’s training, particularly in self-defence and escalation-of-force. He referred to what the DFM had said about this topic in the passage quoted at paragraph 27 above. Counsel contended that the DFM erred in two respects:

(a) First, the DFM was unfairly sceptical about PTE O’Neill’s evidence about this topic. He failed to say why he was sceptical about that evidence, particularly where there was no evidence of the kind sometimes tendered that explains the circumstances in which such an aggressive response is appropriate, or any evidence to show that the application of force in this instance went beyond, or was inconsistent with, the pattern of training.

(b) Secondly, the DFM should have used the evidence in the appellant’s favour, as providing a reasonable explanation for his response.

1. There were only two references to self-defence or escalation-of-force training in the evidence. The first was introduced by the Defending Officer during his cross-examination of PTE Deague. The second reference was introduced by the prosecutor in the course of her cross-examination of PTE O’Neill.
2. The topic was introduced during the cross-examination of PTE Deague immediately after his evidence about the chest-poking referred to in paragraph 72 above:

Did you see what happened after PTE Gorey pushed PTE O’Neill? — I believe at one point Kelly pushed back when Gorey got too close to him.

Did that look like a defensive response to you? — Yes.

PTE Deague, how long have you been in the army? — Just about four years.

In that time you’ve had some training, haven’t you, in relation to self-defence principles? — Self-defence (indistinct), yes.

How many times have you received that sort of training since being in the army? — It was a week course during our [Initial Employment Training] period at School of Infantry at Singleton.

What do you understand to be a defensive response? — Defensive response would first be verbally to clearly and loudly tell an individual to back off, stop, get back, get back. Then to take the lowest means of aggression towards someone, maybe a push or something along those lines. Then to the point, if you felt your life was threatened, you would react in a way that would stop the escalation.

Based on that training and your understanding, do you consider that PTE O’Neill’s response here was a defensive response? — Yes.

And that was in response to the aggression from PTE Gorey. To agree with that? — Yes.

(Underlining added.)

1. PTE Deague’s evidence about a defensive response is clearly related to his evidence about PTE O’Neill’s conduct when PTE O’Neill “pushed back when Gorey got too close to him.” PTE Deague did not say anything at all about the subsequent events, in particular about the head-butting. Even if such training was thought to be relevant to PTE O’Neill’s subsequent conduct, in particular the head-butt, there was never any suggestion that PTE O’Neill felt his life was threatened. Nor was there any suggestion by PTE Deague that he felt that PTE O’Neill was in any danger of being physically harmed in any way by PTE Gorey, let alone having his life threatened. Had PTE Deague had any such concerns, he and PTE Milde were able to intervene immediately. PTE Deague’s evidence about this topic was irrelevant.
2. Despite having previously introduced this topic through PTE Deague, the Defending Officer did not attempt to elicit any evidence from PTE O’Neill about his training and its possible relevance to PTE O’Neill’s reason or explanation for head-butting PTE Gorey. PTE O’Neill’s only evidence-in-chief about the events immediately leading up to the head‑butting and what was going through his mind at the time of reacting in the way that he did was that which we have quoted in paragraph 70 above.
3. Rather, the topic was introduced by the prosecutor during her cross-examination of PTE O’Neill:

PTE Deague spoke about the training you receive and the self-control that you are intended to have as a result of that training? — Yes, ma’am.

The escalation of force course that you do while you’re at Singleton? — Yes, ma’am.

The fact that, as a professional soldier, you should understand layers of graduation in your responses to situation? — Yes, ma’am.

That’s right isn’t it? — Yes, ma’am.

You take pride in your soldierly ability, don’t you? — Yes, ma’am, that’s why I acted proportionally.

They didn’t teach you to head-butt on that course though, did they? — Yes, they did ma’am. Military self-defence in 2012 taught head-butting, ma’am.

They didn’t teach you to head-butt a fellow soldier in a car park after you’d been out to dinner, did they? — We don’t have scenarios, ma’am.

No, because they don’t envisage that you will be head-butting one of your platoon mates, do they? — No, ma’am.

1. PTE O’Neill’s only other reference to that training occurred at the end of his cross‑examination during the following exchange:

You were saying, “If you don’t stop I’ll hit you”, weren’t you? — That’s a warning. Yes, ma’am, a verbal warning, like we’re taught in force escalation, verbal first.

1. Very little was said about this topic, and its possible relevance, by counsel during their addresses to the DFM. The Defending Officer said:

So the learned prosecutor has talked a lot about there being a deliberate and calm and measured approach to a response. Well, I accept that, I guess the – what you might draw from the evidence of PTE O’Neill is that he’s been trained in matters of self‑defence and he’s had some training. So in any response that he brought to such an incident as this, that there might be an instinctive response to bear those issues in mind, to have consideration to those issues whether he knew it or not. Certainly we accept there’s some evidence of him saying he was considering his response or endeavouring to.

1. The Defending Officer later said:

It was put to him that he was giving as good as he got. PTE O’Neill said:

*No, I gave him a verbal warning as per force escalation as we’re taught.*

PTE O’Neill did give evidence about his understanding of applying a proportionate escalation of force and self-defence, and referred specifically to having been taught about the use of the head-butts in self-defence.

1. The topic was of little, if any, relevance as it was not raised by PTE O’Neill in his evidence‑in-chief as a reason for him head-butting PTE Gorey. The DFM was entitled to be dismissive of the belated attempt to refer to it as some kind of justification for PTE O’Neill’s conduct.
2. We reject the contentions summarised in paragraph 83 above. The DFM was entitled to have reservations about the applicability of such training, and the appropriateness of the head-butt, in circumstances where the assailant was not an enemy potentially about to inflict lethal force.
3. As was the case in relation to the chest-poke contentions, although his training may have had some relevance to him giving PTE Gorey the “verbal warnings”, none of the evidence went to the objective reasonableness of him inflicting the head-butt. This is particularly so in the present circumstances where his putative assailant was not an enemy soldier who might be about to kill him, but a good friend who had been taunting him without any threat of violence.

#### Excessive force

1. We reject the appellant’s contention that the DFM was not entitled to conclude that the head‑butt was excessive force in the circumstances (as PTE O’Neill perceived them). Counsel contended that there “was almost no evidence as to the degree of force”. The single blow inflicted by PTE O’Neill upon PTE Gorey was sufficient to knock him to the ground and to fracture his nose and cause him to bite through his lip. The DFM did not require expert or other evidence to enable him to conclude beyond reasonable doubt that the force used was unreasonable in the circumstances.
2. In addition to the interaction between PTE Gorey and PTE O’Neill prior to the head-butt, the DFM was entitled to take into account other circumstances. These included the alternative actions open to PTE O’Neill by way of response to PTE Gorey’s conduct or any threatened conduct. As the DFM observed, the four soldiers were friends. The DFM also observed that PTE Milde and PTE Deague were standing close by at the time of the incident. They were very close at hand if there was any real prospect of the verbal arguments and the pushing and shoving escalating towards physical violence on the part of PTE Gorey. They had both intervened earlier, by telling PTE O’Neill to go outside and cool down, and by telling PTE Gorey to back off. Clearly they would have intervened if either of them thought there was any risk of PTE Gorey’s conduct developing into something more physical towards PTE O’Neill. The DFM was entitled to take into account that it was open for PTE O’Neill to rely on his friends to assist him to negate any threat that might arise with a lower level of force, instead of resorting to a head-butt.

## Conclusions

1. PTE Gorey was continuing to cruelly and inappropriately taunt PTE O’Neill after they both left the restaurant. PTE O’Neill was feeling frustrated and upset, partly because of the taunting and his physical disability and partly because PTE Gorey continued to taunt him. He was clearly provoked into doing what he did. But he did not say that he was fearful of PTE Gorey striking him or otherwise inflicting some kind of physical harm on him. There was no evidence that PTE Gorey was threatening any such action or, more importantly, that PTE O’Neill felt that any such action was being threatened.
2. Notwithstanding PTE Gorey’s poor behaviour and the DFM’s reluctance to rely on uncorroborated parts of his evidence of the events immediately leading up to the head-butt because of the effect that the head-butt may have had on the reliability of such evidence, the facts were such as to enable the DFM to reach the conclusions that he did reach, in particular that the prosecution had negatived self-defence.
3. It was, “upon the whole of the evidence … open to the [DFM] to be satisfied beyond reasonable doubt that the accused was guilty”: *M v The Queen* (1994) 181 CLR 487 at 493 (Mason CJ, Deane, Dawson, Toohey JJ); *MFA v The Queen* (2002) 213 CLR 606 at 614, 623-624; [2002] HCA 53 at [25] (Gleeson CJ, Hayne and Callinan JJ), [55]-[59] (McHugh, Gummow and Kirby JJ); *SKA v The Queen* (2011) 243 CLR 400 at 405-406; [2011] HCA 13 at [11]-[14] (French CJ, Gummow and Kiefel JJ); *Filippou v The Queen* (2015) 256 CLR 47 at 53-54, 75-76; [2015] HCA 29 at [11]-[12] (French CJ, Bell, Keane and Nettle JJ), [82]-[83] (Gageler J).
4. It was not unreasonable, unsafe or unsatisfactory for the DFM to conclude that PTE O’Neill’s conduct by inflicting the head-butt was excessive in the circumstances despite the conduct of PTE Gorey. In other words, it was not unreasonable for the DFM to find that the prosecution had proved beyond reasonable doubt that the appellant did not have reasonable grounds for his belief that it was necessary to defend himself by way of a head-butt with such force as to break the nose of the complainant.

# Disposition

1. None of the grounds of appeal has been made out. The appeal will be dismissed.

# post script

1. Since preparing these reasons we have had the opportunity to read the reasons for decision prepared by Logan J. We would express our agreement with his Honour’s reasons.

|  |
| --- |
| I certify that the preceding one hundred and two (102) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justices Tracey and Hiley. |

Associate:

Dated: 3 November 2017

# Logan J:

1. I have had the benefit of reading in draft the reasons of Tracey and Hiley JJ. I agree with their Honours’ proposed disposition of the appeal and with their reasons.
2. As a consequence of an exchange which occurred with counsel in the course of submissions in relation to observations made by Lord Hoffmann (with which Lords Rodger of Earlsferry, Carswell and Mance expressly agreed) in *R v Jones (Margaret)* [2007] 1 AC 136 at 171; [2006] UKHL 16 at [70] and following under the heading, “The limits of self-help”, I wish to add the following.
3. As Tracey and Hiley JJ record, it was common ground on the appeal that, in relation to Charge 1, the content of any defence of self-defence was governed by the common law. It was for the Chief of Army, as prosecutor, to negative any such defence beyond reasonable doubt.
4. Necessarily, the requirement is to look the content of the defence of self-defence according to the common law of Australia. *Miller v The Queen* (2016) 90 ALJR 918; [2016] HCA 30 offers a recent reminder (in the context of the doctrine of complicity in the criminal law known as “extended common purpose” or “extended joint criminal enterprise”) that the understanding of the content of common law criminal law doctrines, offences and defences may differ as between the High Court of Australia (whose role it is to declare the common law of Australia) and the courts of the United Kingdom or other countries. Where there is a need to look to the common law, the requirement mentioned applies just as much to appeals to this Tribunal and to service tribunals trying service offences as it does to courts exercising the judicial power of the Commonwealth or in solely State jurisdictions. Hence the necessary survey of Australian authority by Tracey and Hiley JJ and, in particular, the reference to *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.
5. The possibility of a different Australian understanding is one reason why United Kingdom authority in relation to the content of the common law must, in Australia and in modern times, be approached with a careful eye as to whether a judgement of the High Court has made that possibility manifest.
6. In relation to Lord Hoffmann’s observations in *Jones*, another cautionary note is sounded by the fact that his Lordship’s observations were *obiter*. Yet another is that they were made with particular reference to the content of s 3 of the *Criminal Law Act 1967* (UK) (“the 1967 Act”), which provides:

**3. Use of force in making arrest, etc.**

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

(2 ) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.

1. The principal purpose of that Act was to abolish the distinction at common law between felonies and misdemeanours. Another was simplification of the law arising from that division and its abolition. As Lord Hoffmann explained (at 169 [54]), that Act was responsive and gave effect to recommendations made in the Seventh Report of the Criminal Law Revision Committee, Felonies and Misdemeanours, published in May 1965. A feature of the report of that committee (at paragraphs 20-23) was a recommendation “against any attempt to clarify the degree of force which could be used or the circumstances in which it could be justified” in relation to the use of force to prevent a crime and a suggestion that it should make clear that there was no difference as to whether the crime was once a felony or a misdemeanour. The related clause in the committee’s draft became s 3 of the 1967 Act.
2. With respect to s 3 of the 1967 Act, Lord Hoffmann observed (at 174 [73]):

I am willing to assume that, in judging whether the defendant acted reasonably, it must be assumed that the facts were as he honestly believed them to be. But the question remains as to whether in such circumstances his use of force would be reasonable. And that is an objective question. … [S]ection 3 of the 1967 Act does not excuse a defendant if he uses such force as he himself thinks to be reasonable. It must actually have been reasonable.

1. It was put to counsel that this formulation was consistent with *Zecevic*. Each accepted this. At the time, I considered that this mutual acceptance was correct in its understanding of what amounted to self-defence but it must be said that there was no opportunity then for either counsel or me to study s 3 of the 1967 Act. The focus of that section is not on the use of force in self-defence but for other purposes.
2. It is not necessary, in order to resolve this appeal, to explore the extent to which the formulation does indeed accord with the common law of Australia in relation to self-defence. What is more important for present purposes is that, in enunciating why, in terms of English legal history, a circumspect approach has always been taken as to the lawful limits of self‑help, his Lordship makes particular reference to self-defence and its limits. An objective element is a common feature of each.
3. In speaking of the statutory formulation of lawful help in relation to the prevention of crime, Lord Hoffmann observed (at 174-175 [77]):

… when Parliament speaks of a person being entitled to use such force as is reasonable in the circumstances, the court must, in judging what is reasonable, take into account the reason why the state claims the monopoly of the legitimate use of physical force. A tight control of the use of force is necessary to prevent society from sliding into anarchy, what Hobbes (*Leviathan*, ch 13) called the state of nature in which:

“men live without other security, than what their own strength, and their own invention shall furnish them withal. In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of commodities that may be imported by sea; no commodious building; no instruments of moving, and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and what is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.”

1. This same understanding surely underpins the common law, for it is the Nation State (and subordinate polities in a federation) which “claims the monopoly of the legitimate use of physical force”: Lord Hoffmann at 174 [77]. In constitutional monarchies, such as the United Kingdom and Australia, it is the Nation State which has the primary responsibility for the preservation, domestically, of the Queen’s Peace. That is why the prosecution on indictment of those alleged to have breached that peace is brought by the Crown.
2. Correspondingly, it is the Nation State which has primary responsibility for the Defence of the Realm. That is why s 68 of the *Constitution* vests the command in chief of the Australian Defence Force (“the ADF”) in the Governor-General, as the Queen’s representative. We have neither vigilantes nor mercenaries in Australia. And, as will be seen, that the ADF is established and maintained by parliamentary authority also reflects our heritage.
3. That it is the Nation State which has primary responsibility for the preservation of peace has ramifications for when and the extent to which the use of force by a private individual is lawful. The following explanation of these ramifications, offered by Lord Hoffmann in *Jones* (at 175 [78]-[80]), highlights the interplay between self-help and self-defence in relation to legitimate use of force:

78 In principle, therefore, the state entrusts the power to use force only to the armed forces, the police and other similarly trained and disciplined law enforcement officers. Ordinary citizens who apprehend breaches of the law, whether affecting themselves, third parties or the community as a whole, are normally expected to call in the police and not to take the law into their own hands. In *Southwark London Borough Council v Williams* [1971] Ch 734, 745 Edmund Davies LJ said: “the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances.”

79 There are exceptions when the threat of serious unlawful injury is imminent and it is not practical to call for help. **The most obvious example is the right of self-defence.** As Hobbes said (*Leviathan*, ch 27):

“No man is supposed at the making of a Common-wealth, to have abandoned the defence of his life, or limbes, where the Law cannot arrive time enough for his assistance.”

**But, he went on to say:**

“To kill a man, because from his actions, or his threatnings, I may argue he will kill me when he can, (seeing I have time, and means to demand protection, from the Soveraign Power) is a Crime.”

80 In the same spirit as Hobbes, Lord Upjohn said in *Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate* [1965] AC 75, 164–165:

“No doubt in earlier times the individual had some … rights of self-help or destruction in immediate emergency, whether caused by enemy action or by fire, and the legal answer was that he could not in such circumstances be sued for trespass on or destruction of his neighbour's property. Those rights of the individual are now at least obsolescent. No man now, without risking some action against him in the courts, could pull down his neighbour’s house to prevent the fire spreading to his own; he would be told that he ought to have dialled 999 and summoned the local fire brigade.”

(Emphasis added.)

1. PTE O’Neill’s resort to a head-butt as a self-help, self-defence remedy was, in the circumstances prevailing, out of all reasonable proportion as a response. This remained so even though there was evidence that PTE O’Neill had received escalation training and training in self-defence which included this particular response to a threat.
2. That such training is a feature of the profession of arms, especially, within the Army, for members of combat and combat support arms is unremarkable in itself. But an understanding that what is apt for the battlefield or even, in the agony of the moment, in life threatening situations if ever deployed in aid of the civil power, is not apt during periods of stand down out of barracks is also an essential feature of the profession of arms.
3. Also part of our constitutional heritage is the requirement for parliamentary authority for the establishment and maintenance of the ADF and the subordination of the military to the civil power. That is recognised in an express grant of legislative power to the Commonwealth Parliament by s 51(vi) of the *Constitution* to make laws with respect to naval and military defence, pursuant to which the *Defence Act 1903* (Cth) has been enacted. It is that Act (Part III, Division 1), not s 68 of the *Constitution*, which provides lawful authority for the establishment and maintenance of the ADF.
4. Such a statutory provision is a contemporary, Australian manifestation of the sequel in 17th century England to the Restoration and the Glorious Revolution. I discussed this subject in greater detail in *Millar v Bornholt* (2009) 177 FCR 67 at 73-75; [2009] FCA 637 at [17]‑[21]. It is not necessary here to repeat that detail.
5. Also part of our heritage is the basal proposition that membership of the military does not confer exemption from civil law, with our understanding of martial law being confined to military discipline, i.e. only that which is necessary for the maintenance of the discipline of the ADF: *Groves v The Commonwealth* (1982) 150 CLR 113 at 125-126, where, *inter alios*, the following observation made by Lord Mansfield CJ in *Burdett v Abbot* (1812) 4 Taunt. 401 at 449-450; 128 ER 384 at 403 was cited with approval by Stephen, Mason, Aickin and Wilson JJ:

[A] soldier is gifted with all the rights of other citizens … the mistake should be corrected which supposes that an Englishman, by taking upon him the additional character of a soldier, puts off any of the rights and duties of an Englishman.

1. As with an Englishman, so with an Australian such as PTE O’Neill who takes on the additional character of a soldier.
2. Charge 1 alleged an offence which could have been prosecuted under either the civil law or under the DFDA*.*  There has always been a recognition that the legitimate reach of military discipline extends to the maintenance of orderly behaviour by soldiers during periods of stand down in relative proximity to barracks. Subject to limitations (*Re Aird; Ex parte Alpert* (2004) 220 CLR 308; [2004] HCA 44) unnecessary to discuss, the DFDA, by s 61, permissibly (*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 545 per Mason CJ, Wilson and Dawson JJ) incorporates by reference and makes a service offence if committed by a “defence member” a body of norms of conduct constituting civil law criminal offences. It would be completely antithetical to the constitutional heritage mentioned to afford the DFDA or those incorporated norms a meaning and application which extended to exculpatory self-defence including, in every circumstance in Australia, conduct which manifested military escalation training and training in self-defence.
3. The present case offers a useful opportunity to recall and emphasise these features of the system of laws by which we and, in particular, our military, are governed.

|  |
| --- |
| I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Logan. |

Associate:

Dated: 3 November 2017