DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Fulton v Chief of Army [2005] ADFDAT 1

CRIMINAL LAW – reckless infliction of actual bodily harm – self-defence – fear of apprehended attack – voluntarily induced intoxication – mistaken view of facts – whether conviction unreasonable, unsafe or unsatisfactory

Crimes Act 1900 (ACT) s 23
Defence Force Discipline Act 1982 (Cth) s 61
Defence Force Discipline Appeals Act 1955 (Cth) s 23(1)(a) and (d)

Zecevic v Director of Public Prosecutions (1987) 162 CLR 645 at 662 applied
Dziduch (1990) 47 A Crim R 378 applied
Osland v The Queen (1998) 197 CLR 316 at [172] cited
The Queen v Hackell [2002] NZCA 221 at [13] cited
Ninnes v Walker (1998) 143 FLR 239 applied
M v R (1994) 181 CLR 487 applied
MFA v R (2002) 213 CLR 606 applied

DAVID WILLIAM FULTON v CHIEF OF ARMY
DFDAT 1 OF 2005

HEEREY J (President), UNDERWOOD CJ (Deputy President)
and DUGGAN J (Member)
9 DECEMBER 2005
HOBART (HEARD IN SYDNEY)

GENERAL DISTRIBUTION

DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

DFDAT 1 OF 2005

BETWEEN:	**DAVID WILLIAM FULTON**
AND:	**CHIEF OF ARMY**
TRIBUNAL:	**HEEREY J (President), UNDERWOOD CJ (Deputy President) and DUGGAN J (Member)**
DATE OF ORDER:	**9 DECEMBER 2005**
WHERE MADE:	**HOBART (HEARD IN SYDNEY)**

THE TRIBUNAL ORDERS THAT:

The appeal is dismissed.

GENERAL DISTRIBUTION

IN THE DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

DFDAT 1 OF 2005

BETWEEN: **DAVID WILLIAM FULTON**

AND: **CHIEF OF ARMY**

TRIBUNAL: **HEEREY J (President), UNDERWOOD CJ (Deputy President) and DUGGAN J (Member)**

DATE: **9 DECEMBER 2005**

PLACE: **HOBART (HEARD IN SYDNEY)**

REASONS FOR DECISION

1 The appellant appeals from a conviction by a Defence Force Magistrate (Colonel Morrison) of one count of recklessly inflicting actual bodily harm, contrary to s 23 of the *Crimes Act 1900* (ACT), applicable by virtue of s 61 of the *Defence Force Discipline Act 1982* (Cth).

2 Argument on the appeal involved two basic submissions:

- The DFM failed to direct himself as to certain significant aspects of the evidence;
- The conviction was unreasonable or cannot be supported, having regard to the evidence and/or was unsafe or unsatisfactory (*Defence Force Discipline Appeals Act 1955* (Cth) s 23(1)(a) and (d)).

Events of 21/22 February 2003

3 The appellant was a signalman in the Australian Regular Army. He was posted to the Defence Force School of Signals – Electronic Warfare Wing.

4 On the evening of Friday 21 February, 2003, together with other service members from the School, the appellant attended the Gordon Club, a social club at Borneo Barracks,

Cabarlah.

5 Also present at the Club was the complainant Sig David Cummane. Throughout the evening the complainant behaved towards a number of those present, including the appellant, in a loud, aggressive, annoying and obnoxious manner. At one stage the complainant came up to the appellant with his hands raised in an aggressive stance and said: "Fulto, I'm going to flog you". The complainant made similar approaches to others present at the Club. However none of this behaviour resulted in any physical violence. One such incident involved Sig Boag. The complainant attempted to provoke him to fight on several occasions but there was no physical contact as Sig Boag was led away by others. Several witnesses gave evidence to the effect that it was not clear whether the complainant's words and actions in the club were actually aggressive or said and done in a joking manner.

6 The complainant was affected by alcohol, as was the appellant who consumed twelve stubbies of full strength beer and two shots of tequila over a period of about five hours.

7 After the Club closed the appellant returned to his condominium on the base at about midnight. Half an hour later the appellant received several phone calls from a person claiming to be a Lieutenant. The appellant recognised the caller as the complainant and hung up. The complainant called again three times.

8 The appellant left his condominium and joined a group of students from the School. The complainant joined this group. He stumbled as he walked and appeared to be drunk.

9 The complainant started up a conversation with the appellant. It was friendly at first but then the complainant said to the appellant, "I can kick your arse if I wanted to".

10 In a statement made two days later the appellant described the events which followed:

> *"His stance and demeanour changed to an aggressive manner. He started to wave his arms around in a slapping manner and he grabbed with his hands on both of my shoulders. He was standing within a foot of me and I feared the assault would continue further. I struck out with my right fist to prevent the assault continuing and to get away from Sig CUMMANE's grip. This punch landed on his left side of his lower jaw. After this I walked away to my room so that no further assault could occur from either Sig CUMMANE or myself."*

11 The complainant was taken to hospital. His jaw was found to be fractured in two places. It was treated by reduction and internal plate fixation under general anaesthesia.

DFM's decision

12 After summarising the evidence the DFM turned to the issue of self-defence. He stated the applicable law as being that the prosecution must establish beyond reasonable doubt that the accused did not believe, on reasonable grounds, that it was necessary in self-defence to do what he did. He cited *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645 at 662 and, on the question of proportionality, *Dziduch* (1990) 47 A Crim R 378 at 378.

13 The DFM inferred from the appellant's statement (the appellant did not give evidence) that he was aware that the various incidents involving the complainant and others during the night at the Club had not resulted in violence. He rejected the evidence of the complainant that he did not initiate any physical contact with the appellant.

14 That left open the proportionality of the appellant's response. The DFM referred to the evidence of an eye-witness, Sig Stephens, who saw the initial contact but was looking away when the appellant struck the complainant. The DFM accepted the evidence of Sig Stephens that he saw the appellant and the complainant on the balcony. He saw the complainant remove his glasses and place an arm or arms on the appellant. He saw the appellant push the complainant away and the complainant then reapproached the appellant. Sig Stephens' evidence was that he then lost interest in watching the two men and looked away. Sig Stephens said this was because he thought it was going to be another wrestle, referring to some friendly wrestling games earlier in the evening. A very short while later Sig Stephens heard the sound of the punch. The fact that the initial physical contact between complainant and appellant was insufficient to hold the attention of Sig Stephens indicated to the DFM that it was a low level of physical contact.

15 In the end result the DFM expressed himself to be satisfied beyond reasonable doubt that the complainant "had no reasonable grounds for believing that punching the complainant as he did was necessary in self-defence". In this context we take the phrase "as he did" to be a reference to the degree of force used by the appellant.

16 In reaching that conclusion the DFM took into account:

- The initial contact must only have been of a low level;
- The appellant knew of earlier incidents involving the complainant and others and how those others had been able to palm off the complainant;
- The appellant was not cornered and there was no physical barrier preventing him from moving away from the complainant;
- There had been a great deal of provocation that may have provided an "understandable motivation" for a punch in the mouth;
- The complainant did not have a physically intimidating stature.

17 As to grievous bodily harm, the DFM referred to a medical report which stated that the blow to the chin produced a direct displaced fragment on the right side and a crack fracture undisplaced on the left side. He was not satisfied that the appellant realised that really serious harm might be inflicted by his punch but went ahead anyway.

18 However, on the alternative count the DFM was satisfied that the appellant realised actual bodily harm might have been inflicted, that is to say "any hurt or injury whether permanent or otherwise which interferes with the health or comfort of the person assaulted".

Misdirection

19 The appellant submitted that the DFM failed to adequately direct himself on a number of issues relevant to self-defence.

20 The first of these criticisms is that there was no reference in the reasons for decision to the consideration that a person about to be attacked does not have to wait for the assailant to strike first.

21 The question to be asked when self-defence is raised at common law is "whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did": *Zecevic* per Wilson, Dawson and Toohey JJ at 661. Their Honours added:

"If (the appellant) 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."*

22 It is clear that this formulation is applicable to a situation "where there was no actual attack on the accused underway but rather a genuinely apprehended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike": *Osland v The Queen* (1998) 197 CLR 316 at [172].

23 The appellant's counsel at the trial made it clear that the claim of self-defence was based on fear of an apprehended attack. The matters which the DFM took into account when assessing the belief of the appellant as to the necessity of self-defence were clearly related to the appellant's anticipation of what might follow from the grabbing of his shoulders by the complainant. There is nothing in the reasons of the DFM to suggest that pre-emptive blows could not be struck by way of self-defence. If that had been his view, it would have been unnecessary for him to review the evidence in the way in which he did.

24 The DFM applied the test set out in *Zecevic*. There was no need for him to specifically refer to the concept of a pre-emptive strike: *cf. The Queen v Hackell* [2002] NZCA 221 at [13].

25 Next, it was argued that the DFM failed to refer to a range of topics said to be relevant to the determination of the issue of self-defence. Counsel for the appellant prefaced his submissions by referring to the observation in *Zecevic* at 662 that:

> *"… the whole of the circumstances should be considered of which the degree of force used may be only part".*

26 The topics were summarised in the appellant's outline of submissions:

> *"a. The fact the complainant threatened to flog the appellant (in the future);*
> *b. The fact that just before the incident the complainant had been making serious challenges to fight people too (evidence of Marson);*
> *c. The fact that the appellant had consumed a fair quantity of alcohol;*
> *d. The fact that the appellant did not really know the complainant;*
> *e. The fact that it would be hard to tell if the complainant was serious or joking (SIG Alcock);*
> *f. The fact that the DFM was not satisfied the accused knew serious harm might be inflicted [by him] (AB264/17)."*

27 It is apparent from the DFM's reasons that he did not take a narrow view of the circumstances relevant to the consideration of the claim of self-defence. In the course of his reasons he referred to the aggressive behaviour of the complainant towards the appellant and others in the Club earlier in the evening; the allegation in a statement prepared by the appellant and tendered at the hearing that the complainant said to the appellant "Fulto, I am going to flog you"; and the fact that, according to the appellant's statement, the complainant appeared to be drunk.

28 The fact that the DFM drew inferences from some of these circumstances which were contrary to inferences for which the appellant contended does not advance the appellant's argument that they were not taken into account. For example, the DFM referred to the complainant's insulting comments and challenges to fight other people, but considered as relevant the fact that the challenges were not followed up with physical action.

29 The DFM's omission to refer to other matters, such as the fact that the appellant did not know the complainant well, or the fact that one witness stated that it was hard to tell if the complainant was serious or joking, could not be regarded as vitiating the DFM's findings.

30 It was argued that the DFM failed to take into account the fact that he was not satisfied that the appellant realised that serious bodily harm might have been inflicted when he punched the complainant. Instead, he found that the appellant realised actual bodily harm might be inflicted. It was on this basis that the appellant was convicted of recklessly inflicting actual bodily harm.

31 When reaching his conclusion on self-defence, the DFM made a finding beyond reasonable doubt that the appellant was not justified in punching the complainant as he did. It was open to the DFM to determine the issues relevant to self-defence by reference to the action of the appellant in punching the complainant in the face. It was also appropriate to take into account the degree of force which was used if that could be inferred from the circumstances. However, it was unnecessary to include in the assessment an analysis of the degree of harm which the appellant realised might have been inflicted. The DFM's finding as to the appellant's appreciation of the extent of the harm he might have caused is not inconsistent with his rejection of self-defence.

32 Next, it was argued that the DFM failed to properly direct himself on the relevance of the intoxication of the appellant.

33 The extent to which voluntarily induced intoxication is relevant in applying the common law test of self-defence proposed by the High Court in *Zecevic* was considered by Miles CJ in *Ninnes v Walker* (1998) 143 FLR 239. His Honour said at 243:

> *"The intoxicated state of the accused's mind is a factor to be taken into account in deciding whether or not the prosecution has excluded the reasonable possibility that the accused believed that what he did was necessary for his self-defence and whether the accused's belief was based on reasonable grounds. The relationship between reasonableness and the belief will depend upon the state of belief, the degree of intoxication and the objective circumstances. It does no violence to the language or to common human experience to say that a person intoxicated may act unreasonably or that a person's belief, although induced by intoxication, may be unreasonable. To test the reasonableness of a belief, it is necessary to determine the objective circumstances as well as the circumstances as the person perceived them, whether intoxicated or not. In my view, it cannot be said that if it is established that a belief is genuinely held in a state of intoxication, then it follows that the belief is reasonable. Nor can it be said that the greater the intoxication the more likely that a belief (unreasonable in a sober person) is reasonable.*
> *Where the onus of proof requires that it be positively established that the person's belief lacked reasonable grounds, it is not sufficient to say that objective considerations are excluded by an intoxicated state of mind. I think that the word 'incongruous' used by the Tasmanian Court of Criminal Appeal [*McCullough v The Queen *[1982] TAS R 43] is well chosen. It would be incongruous for a court to decide that the objective circumstances were such that the accused's belief was unreasonable, but to determine further that, having regard to the accused's misconception of those facts induced by intoxication, that the belief was reasonable."*

34 In the appellant's statement, the appellant said that, during the evening, he consumed several full strength beers and "2 shots of spirits". In addition, a statement of agreed facts tendered at the hearing recorded "that the accused informed Captain G. Hayes on approximately 24 Feb 03 that he consumed 12 stubbies of full strength beer and two shots of tequila over a [period] of approximately five hours on the evening of 21 Feb 03".

35 The last mentioned statement is ambiguous in that it does not clarify whether the statement made to Captain Hayes was put forward as evidence of its truth.

36 Sig Stephens gave evidence that he was at the Club during the evening and that he

was very intoxicated. He said he did not see the appellant a lot during the evening. However, referring to the appellant, he said:

> *"He was drunk. I don't think he was as drunk as me. Definitely not as drunk as Doug [the complainant], but he was drunk."*

37 In his reasons, the DFM noted that the both the appellant and the complainant were affected by alcohol and that the complainant's level of intoxication was high.

38 It appears that the statement of the appellant, was tendered at the hearing with the consent of the prosecution. This was an indulgence to the appellant who was thereby able to present his version of the incident without the necessity of giving evidence and being cross-examined.

39 The statement, part of which has already been quoted, is reasonably comprehensive and records the appellant's movements throughout the evening and his observations of the complainant. In the statement the appellant describes the actual incident as follows:

> *"I then went across to the ground floor of A39 which is directly across from my Condo. Here I spoke to other students from the school, Seaman LAWSON and Sig JOHNSON. After several minutes walked across the ground floor of A38 (my building) and spoke to other students from the school, Seaman HAYWARD , Sig STEVENS. Sig CUMMANE was at this location and came out of the building and onto the balcony.*
> *Sig CUMMANE appeared to [be] drunk by his actions, stance and he stumbled as he walked. I had a conversation with Sig CUMMANE. This conversation starting off in a friendly manner. Then Sig CUMMANE said, 'I can kick your arse if I wanted to'.*
> *His stance and demeanour changed to an aggressive manner. He started to wave his arms around in a slapping manner and he grabbed with his hands on both of my shoulders. He was standing within a foot of me and I feared the assault would continue further. I struck out with my right fist to prevent the assault continuing and to get away from Sig CUMMANE's grip. This punch landed on his left side of his lower jaw. After this I walked away to my room so that no further assault could occur from either Sig CUMMANE or myself.*
> *After several minutes I heard male and female voices screaming from outside. I walked outside and across to the ground floor of A38 as there were a lot of fellow students crowding into it. I had a conversation with several people outside of this (that Sig CUMMANE was in the bathroom bleeding and was being treated by the girls, Sig THOMAS, Smn LAWSON and Smn HAYWARD).*
> *Whilst I was there I saw the Duty NCO, Sgt REA attend the location and was trying to find out what happened. I approached him straight away and told him what happened (the version of events stated in this statement). Whilst I*

was there a Civilian Ambulance attended and Sig CUMMANE left in the Civilian Ambulance. I then went back to my condo and went to sleep."

40 There is nothing in the statement to suggest that the appellant's ability to assess the issues relevant to self-defence was impaired to any significant degree. He was also able to explain with clarity his actions and the reasons for them.

41 As stated, the DFM recorded in his reasons that the appellant was affected by alcohol. It would appear that he attached some significance to this fact. However, in the absence of any evidence as to the effect of intoxication on the appellant and bearing in mind the contents of the appellant's own statement, it is difficult to see how the DFM could have attached very much weight to this consideration.

42 We are of the view that the appellant's argument on this ground must be rejected.

43 The next ground complains that the DFM did not direct himself as to the possibility of the appellant labouring under a mistaken view of the facts which, if true, would have supported the existence of reasonable grounds for the appellant's belief in the appropriateness of using force.

44 This is not a case in which it was suggested that the appellant relied in any respect on a mistaken view of the facts. The DFM rejected the evidence of the complainant that he did not initiate any physical contact with the appellant. The DFM accepted the statement of the appellant and the evidence of Sig Stephens that the complainant placed his hands on the appellant in the manner described by the appellant. The DFM described this as "a low level of physical contact". There was no finding contrary to the factual version of the incident given by the appellant.

45 The assessment as to whether the appellant was acting in self-defence was based primarily on the facts as he described them in his statement. Mistake of fact was not an issue in the case.

46 Another ground of appeal asserts that the DFM failed to take into account that there was no opportunity for calm deliberation by the appellant.

47 The appellant relied on the following passage from *Zecevic* at 662:

> *"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 any 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."*

When discussing the legal principles relevant to self-defence, the DFM said:

> *"How are these legal principles to be applied to the facts in the present case, bearing in mind that at all times the Prosecution bears the onus of proof beyond reasonable doubt, and that it needs to be accepted [in gauging] the actions of an accused that he would have no time for calm deliberation or detached reflection."*

48 There is nothing in the judgment to suggest that the DFM lost sight of this consideration when he came to deal with the facts, and the claim that he paid no more than lip service to it must be rejected.

49 Then it was argued that the DFM erred in taking into account purely objective considerations when considering the appellant's belief. The appellant's counsel criticised the following passage in the reasons for decision at:

> *"The true position is that the Prosecution must establish beyond reasonable doubt that the accused did not believe, on reasonable grounds, that it was necessary in self-defence to do what he did. The Prosecution may do this by establishing either: (a) the accused had no such belief; or (b) there was no reasonable ground for such belief."*

50 The complaint made was that the DFM did not add the words "on his part" at the end of the passage and that the effect of the omission was to add an element of objectivity to the test which was not warranted.

51 This argument must be rejected. The words "such a belief" refer back to the appellant's own belief. Furthermore, the impugned passage is an adaptation of Hunt J's comments in *Dziduch* (1990) 47 A Crim R 378 at 379 where his Honour said:

> *"The fundamental question which a jury has to determine in relation to the issue of self-defence is whether the Crown has established that the accused did not believe on reasonable grounds that it was necessary in self-defence to do what he did. The Crown may establish* either *that the accused had no such belief* or *that there were no reasonable grounds for such a belief. If the Crown fails to establish one or the other of those two alternatives, the*

accused, is entitled to be acquitted of the charge: Alpagut *(unreported, Court of Criminal Appeal, NSW, 26 July 1989) at p 6."*

52 There is nothing in the impugned passage or elsewhere in the reasons for decision to support the argument that the DFM applied an incorrect test for self-defence.

53 In our view the grounds of appeal which allege that the DFM misunderstood the law relating to self-defence or misapplied it to the circumstances of the case must be dismissed.

Unreasonable, unsafe or unsatisfactory

54 The appellant's second ground of appeal is that, 'in all the circumstances, no reasonable Tribunal could have convicted the appellant …'. The authority for raising this ground is the *Defence Force Discipline Appeals Act* s 23(1), which relevantly provides:

"(1) ... where in an appeal it appears to the Tribunal:
(a) that the conviction ... is unreasonable, or cannot be supported, having regard to the evidence;
(b) ...;
(c) ...; or
(d) that, in all the circumstances of the case, the conviction is unsafe or unsatisfactory
it shall allow the appeal and quash the conviction ...."

55 Little, if any distinction, can be drawn between par (a) and (d). Both reflect the law as expounded by the High Court in *M v R* (1994) 181 CLR 487 and *MFA v R* (2002) 213 CLR 606. The two joint judgments in the latter case affirmed the principle expounded in the former, at 493:

"Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty (See Whitehorn v The Queen *(1983) 152 CLR at 686;* Chamberlain v The Queen (No 2) *(1984) 153 CLR at 532;* Knight v The Queen *(1992) 175 CLR 495 at 504 – 505, 511)."*

56 McHugh, Gummow and Kirby JJ said at 623-624 that in this context the expressions "unsafe or unsatisfactory", "unreasonable" and "cannot be supported having regard to the

evidence" have the same meaning. With respect to the jury's advantage of seeing and hearing the evidence, their Honours said that in a case where the appellate court experiences a doubt about the conclusion of a guilty verdict and there appears a significant possibility that an innocent person is being convicted, the verdict must be quashed unless the fact that the jury has seen and heard the evidence can explain the different conclusions.

57 The Tribunal directs itself accordingly. In this case there is, surprisingly, little dispute in the evidence and no challenge to the primary findings of fact made by the DFM. The appellant challenges his qualitative assessment of that evidence which led him to be satisfied beyond reasonable doubt that the appellant "had no reasonable grounds for believing that punching the complainant **as he did** was necessary in self-defence" (emphasis added).

58 The notice of appeal sets out the following matters to support the submission that there is a significant possibility that the DFM's assessment of the appellant's response was wrong.

> *"Particulars*
> *(i) The complainant acted aggressively to others before the incident;*
> *(ii) The complainant threatened to 'flog' the appellant;*
> *(iii) The complainant immediately prior to the assault by the appellant said 'I could kick your arse if I wanted to'.*
> *(iv) The complainant came at the Appellant grabbing him;*
> *(v) The Appellant's response was one punch only;*
> *(vi) Immediately after the incident the Appellant said to a number of witnesses he had been acting in self-defence at the time he threw the punch."*

59 The findings and reasoning of the DFM have already been noted. As the DFM correctly put the matter, his findings of fact raised the question of the proportionality of the appellant's response to the contact made by the complainant. He then also correctly directed himself by asking the question, "has the prosecution eliminated any reasonable possibility that the (appellant) was acting in self-defence in punching the complainant as he did in response to the complainant's contact".

60 As a result of the single punch, the complainant sustained a substantial displaced fracture to the right mandible and a crack fracture to the left mandible. The displaced fracture required open reduction and internal plate fixation, together with dental wire to stabilise the front teeth. There was no opinion evidence with respect to the force required to

cause those injuries, but the DFM pragmatically and correctly said, "I don't need a medical practitioner to tell me that you'd need a blow of some force to break a normal bone."

61 The DFM concluded that he was not satisfied to the requisite degree that the appellant was guilty of the principal charge because he was not satisfied that he foresaw that his punch might inflict "really serious harm" but "went ahead anyway".

62 The particulars to support the second ground include a reference to evidence given by witnesses that after the event the appellant said he was acting in self-defence. The weight of this self-serving evidence is doubtful. Some of it was no more than a report that the appellant himself said he had acted in self-defence. According to one witness, the appellant said the complainant lunged at him and that is why he hit him. According to another, the appellant said to him that the complainant lunged at him and he thought he was going to get hit. That evidence does not accord with the appellant's statement and was given by way of affirmative answer to a leading question in cross-examination, to which the witness added "or words to those effects" [sic].

63 One of the witness, Sig Rogers, said with respect to this post-incident self-serving evidence:

> *"PROSECUTOR: Did he say anything about SIG Cummane [the complainant]?---Yes. Yes, he said – I – I naturally asked him what – what had happened. He said that SIG Cummane kept putting his hands on him and that he'd asked him on a – probably, I think, two or three occasions, I think he said, for SIG Cummane not – not to push him or, you know, to touch him and that he said that SIG Cummane kept – kept doing it and after numerous warnings that he hit him once and SIG Cummane – yes, sort of fell backwards – grabbed his mouth and went inside to SIG Stephens' condo."*

64 That answer is in complete accord with the evidence of Sig Stephens, not at variance with the appellant's statement and on all fours with the assessment of the situation made by the DFM.

65 The reasons for judgment do not suggest that the DFM was of the view that the application of any force would have been unreasonable, nor even that a punch would have been unreasonable. The finding focussed on a punch of sufficient severity to cause the injuries it did. It was delivered in response to low level contact by a drunken man.

According to the appellant's statement it was delivered because the appellant "feared the assault would continue" and "to prevent the assault continuing". It was not, as counsel for the appellant submitted, really a case of a pre-emptive strike because the appellant feared that serious violence was about to be done to him. It was a response to low level touching by a man who had been behaving in an obnoxious manner early in the evening and immediately prior to the assault. The DFM qualitatively assessed a blow delivered with sufficient force to fracture the jaw on both sides a disproportionate response to that state of affairs.

66 In those circumstances it cannot be said that his satisfaction beyond reasonable doubt that the appellant was not acting in lawful self-defence gives rise to a significant possibility that the appellant was wrongly convicted of an assault occasioning actual bodily harm contrary to s 24 of the *Crimes Act* 1900 (ACT).

Order

67 The appeal will be dismissed.

I certify that the preceding sixty-seven (67) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Heerey (President) Chief Justice Underwood (Deputy President) and Justice Dugan (Member).

Associate:

Dated: 9 December 2005

Counsel for the Appellant:	P E Smith
Solicitors for the Appellant:	A W Bale & Son
Counsel for the Respondent:	G B Hevey with J M Gaynor
Solicitors for the Respondent:	Australian Government Solicitor
Date of Hearing:	4 November 2005
Date of Judgment:	9 December 2005