# DISTRICT COURT OF QUEENSLAND

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| CITATION: | *Cummins v Guilfoyle* [2021] QDC 127 |
| PARTIES: | **ROLAND CUMMINS**<br>(appellant)<br>**v**<br><br>**AARON JOHN GUILFOYLE**<br>(inspector) |
| FILE NO: | Appeal No 153 of 2020 |
| DIVISION: | Appellate |
| PROCEEDING: | Appeal |
| ORIGINATING COURT: | Magistrates Court, Cairns |
| DELIVERED ON: | 25 June 2021 |
| DELIVERED AT: | Cairns |
| HEARING DATE: | 20 May 2021 |
| JUDGE: | Morzone QC DCJ |
| ORDER: | **1. Appeal allowed.**<br><br>**2. Set aside the orders and sentence made by the Magistrates Court on 17 March 2020 and 3 September 2020.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AGSINT CONVICTION - appeal pursuant to s 222 *Justices Act* 1886 – charge of intimidating a Work Health and Safety inspector contrary to s 190 of the *Work Health and Safety Act* 2011 (Qld) – sufficiency of reasons for decision - whether reasons adequate to disclose onus and standard of proof to sustain verdict – witness credit – onus of proof – whether defect in evidence and other reasons militate against a retrial. |
| LEGISLATION: | *Justices Act* 1886 (Qld) s 222, s 223(1) & 227<br>*Work Health and Safety Act* 2011 (Qld), s 190<br>*Criminal Code* 1899 (Qld), s 24, 31 & 270. |
| CASES: | |
| COUNSEL: | T Ryan for the Appellant<br>B Power for the Inspector |
| SOLICITORS: | Hall Payne Lawyers for the Appellant.<br>The Office of the Work Health and Safety Prosecutor for the |

Inspector.

**Introduction**

[1] The appellant appeals his conviction on 3 September 2020 in the Magistrates Court held in Cairns, for intimidating a work health and safety inspector at a construction site on 4 April 2018 contrary to s 190 of the *Work Health and Safety Act* 2011 (Qld).

[2] The trial proceeded over two days on 3 and 4 December 2019 when evidence was adduced by the prosecution and defence. The parties were permitted time to prepare written outlines of argument and addresses were made on 29 January 2020.

[3] The prosecution alleged that at the construction site of the Cairns Performing Arts Centre on 4 April 2018, appellant intimidated a workplace health and safety inspector, by moving closely towards him and screaming words to the effect of "*you're a fucking dog*" three times. The appellant does not deny this verbal outburst, but says that it was excusable because of the inspector's conduct immediately before the outburst. He contended that as he showed an iPad image to the inspector and pointed out deficiencies in the emergency evacuation plan, the inspector moved his arm and pointed his finger close to the CFMEU logo on the appellant's shirt and aggressively said: *"Is that what the CFMEU teaches you? Unsafe work practices?"* The appellant testified that he then felt belittled, embarrassed, and intimidated and responded as he did. The appellant argued that the whole of the circumstances coupled with the inspector's testimony showed that the prosecution did prove intimidation beyond reasonable doubt. And, even if so proved, the appellant argued that the prosecution did not exclude defences under the *Criminal Code* (Qld) to prevent a repetition of act or insult (s 270) or reacting to a perceived threat of violence (ss 24 & 31).

[4] The learned magistrate gave her oral decision on 17 March 2020. After weighing the competing evidence, her Honour concluded that "For those reasons, I find that the elements of the offence have all been made out to the required standard and that the defendant is guilty." On 3 September 2020, the appellant was sentenced for the offence with the imposition of a $5,000.00 but no conviction was recorded.

[5] The appellant appeals against the conviction in reliance on the grounds which I summarise as follows:

1. The magistrate's reasons for decision are inadequate in the absence of articulation of the applicable onus and standard of proof, findings of the elements of the offence and consideration and exclusion of any defence. (Ground 1)

2. The magistrate erred in her consideration of elements of the offence and defences. (Grounds 2, 4, 7 and 9)

3. The magistrate misapprehended the appellant's interaction with the inspector immediately before the appellant moved and shouted at the inspector. (Ground 6)

4. The evidence was not capable of establishing the elements of the offence, or capable of negating defenses beyond reasonable doubt. (Grounds 3, 5, 8 and 10)

[6] In my respectful view, the learned magistrate's reasons for decision are inadequate to support the verdict. It seems to me that the defects in the evidence about the element of intimidation at the original hearing are such that, taken at its highest, a court would have reasonable doubt about intimidation to entitle the appellant to an acquittal. In all the circumstances, I decline to remit the matter for retrial.

[7] For these reasons, I will allow the appeal and set aside the orders made by the Magistrates Court on 17 March 2020.

**Appeal against conviction**

[8] The appellant appeals pursuant to s 222 of the *Justices Act* 1886 (Qld). Pursuant to section 223 of the Act the appeal is by way of rehearing on the original evidence. However, the District Court may give leave to adduce fresh, additional or substituted evidence (new evidence) if the court is satisfied there are special grounds for giving leave. The rehearing requires this court to conduct a real review of the evidence before it (rather than a complete fresh hearing), and make up its own mind about the case.[1] Its function is to consider each of the grounds of appeal having regard to the evidence and determine for itself the facts of the case and the legal consequences that follow from such findings. In doing so it ought pay due regard to the advantage that the magistrate had in seeing the witnesses give evidence, and attach a good deal of weight to the magistrate's view.[2]

[9] For an appeal by way of rehearing "the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error,"[3] and thereby resulting in a manifestly excessive sentence.

**Adequacy of Reasons**

[10] The appellant contends that the learned magistrate's reasons made no reference to the fundamental principles applicable in a trial for a criminal offence. And he further contends that the learned magistrate did not direct herself that: the onus of proving the charge rested on the prosecution; the accused person was presumed to be innocent of the charge; that the standard of proof of each element of the charge was proof beyond reasonable doubt; that any defence fairly raised upon the evidence was required to be negatived by the prosecution beyond reasonable doubt; and the sworn evidence of the accused person was to be analysed by reference to the correct application of the onus of proof.

[11] On the contrary, the respondent asserts that: the learned magistrate framed her decision by reference to the issues raised by the parties; there is no basis to conclude that the matter was not determined on the basis that it was for the prosecution to

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1 *Fox v Percy* (2003) 214 CLR 118; *Warren v Coombes* (1979) 142 CLR 531; *Dwyer v Calco Timbers* (2008) 234 CLR 124; applied in *Forrest v Commissioner of Police* [2017] QCA 132, 5 and *McDonald v Queensland Police Service* [2017] QCA 255, [47].

2 *White v Commissioner of Police* [2014] QCA 12, [5]-[8]; *Forrest v Commissioner of Police* [2017] QCA 132, 5 & 6; *McDonald v Queensland Police Service* [2017] QCA 255, [47].

3 *Allesch v Maunz* (2000) 203 CLR 172, [22] – [23] followed in *Teelow v Commissioner of Police* [2009] QCA 84, [4]; *White v Commissioner of Police* [2014] QCA 121, [8], *McDonald v Queensland Police Service* [2017] QCA 255, [47]; contrast *Forrest v Commissioner of Police* [2017] QCA 132, 5.

prove its case beyond reasonable doubt; and by stating that each of the elements of the offence were proved to the "requisite standard", in this context her Honour clearly meant proof beyond reasonable doubt.

[12] The content and detail of reasons "will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision"[4]

[13] In the absence of an express statutory provision in a summary trial, a judge is obliged to give sufficient reasons to identify the principles of law applied and the main factual findings relied upon by the judge.[5] This serves to properly inform the parties to understand the basis for the decision including whether to exercise any rights to appeal, and correspondingly, reasons facilitate the role of an appellate court to discharge its statutory duty on an appeal from the decision.[6]

[14] In *DL v The Queen*,[7] Keane J said:

> "Not every failure to resolve a dispute will render reasons for decision inadequate to justify a verdict. At one extreme, reasons for decision will not be inadequate merely because they fail to address an irrelevant dispute or one which is peripheral to the real issues. Nor will they be inadequate merely because they fail to undertake "a minute explanation of every step in the reasoning process that leads to the judge's conclusion". At the other extreme, reasons will often be inadequate if the trial judge fails to explain his or her conclusion on a significant factual or evidential dispute that is a necessary step to the final conclusion. In between these extremes, the adequacy of reasons will depend upon an assessment of the issues in the case, including the extent to which they were relied upon by counsel, their bearing upon the elements of the offence, and their significance to the course of the trial." (references omitted)

[15] To particularise the point, His Honour quoted with approval from *AK v Western Australia,*[8] where the High Court said:

> "Ordinarily it would be necessary for a trial judge to summarise the crucial arguments of the parties, to formulate the issues for decision, to resolve any issues of law and fact which needed to be determined before the verdict could be arrived at, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and why the resolution arrived at was arrived at, to apply the law found to the facts found, and to explain how the verdict followed."

[16] When delivering the reasons for the verdict, the learned magistrate summarised the undisputed facts at an early stage to enable the later distillation of the disputed issues:

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4 *Wainohu v New South Wales* (2011) 243 CLR 181 at 215 [56]
5 Cf. *Douglass v The Queen* (2012) 290 ALR 699 at 702, [8]
6 *Justices Act* 1886 (Qld), ss 222 & 223. Cf. *Douglass v The Queen* (2012) 290 ALR 699 at 702, [14]
7 *DL v The Queen* [2018] HCA 26 at [33].
8 *AK v Western Australia* (2008) @#2 CLR 438 at 468 [85] (omitting references).

*"It has been agreed that on the 4th of April 2018 [the inspector] lawfully attended the Cairns Performing Arts Centre worksite in his capacity as inspector under the Work Health Safety Act 2011 to view and address a number of safety concerns that had arisen on the site. He properly identified himself and held the relevant permits to attend. He had a colleague accompanying him. It's also agreed that [the appellant] also attended the site at that time in his capacity as a union representative for the Construction Forestry Mining and Energy Union. There were other union representatives also present. Otherwise present were workers on site and representatives of the builder involved.*

*The parties conducted a walkthrough of the site which took about two hours in total. A number of issues were raised throughout that time. The incident leading to this charge occurred towards the end of that time and involved a dispute between the two persons about the lack of visible exit plans on site. It is further agreed that [the appellant], whilst he and Inspector Duckworth were about an arm's length apart, said to the inspector, "You're a fucking dog", or words to that effect three times in succession and that he shouted those words. In the moments before this incident, [the appellant] tried to have Inspector Duckworth look at an iPad that he held in his hand and, in doing so, placed the iPad directly in front of the inspector's face. Those matters, as I've indicated, were agreed upon by the parties."*

[17] The learned magistrate then framed the issues for determination as a mixture of matters of credibility, facts and law as follows:

*"The issues for me to determine include the following: the credibility and/or reliability of various witnesses, was the inspector biased towards the builder and against [the appellant] and, if so, does this affect his credibility? Thirdly, before shouting at the inspector, did [the appellant] move towards the inspector placing himself in close proximity to the inspector and/or did he place his face close to the inspector's face or was it, in fact, the inspector who placed himself in close proximity to [the appellant]? Fourthly, did [the appellant] behave and intimidate the inspector and, in considering that, I have looked at the definition of "intimidation", and what the inspector's behaviour to [the appellant] immediately before the incident was and whether that meant that he would not have been intimidated by [the appellant's] behaviour? Fifthly, was the inspector acting in the course of his duties at the time of the incident? Does the prosecution case prove that the inspector did not assault [the appellant] shortly before [the appellant] yelled at him? If not, was the inspector acting unlawfully and, therefore, no longer acting in his duties as inspector at the time of the incident. Was [the appellant's] behaviour towards the inspector merely a reaction to stop the inspector assaulting or intimidating him and, if so, was it necessary for that purpose? Was the apology by [the other inspector] to [the appellant] at the end of the site viewing an apology for the way [the inspector] had treated [the appellant] and, if so, is that evidence that that witness agreed the inspector had intimidated or assaulted [the appellant]."*

[18] Matters of credit of witnesses, facts and legal principles will be relevant to all the elements. However, by framing the issues in this way, there remains no clear articulation of the elements of the offence under s 190. For the offence, the prosecution bore the onus to prove beyond reasonable doubt that:

1. At the relevant time, the inspector was an inspector of Workplace Health and Safety Queensland;

2. The appellant by words or conduct acted directly or indirectly in relation to the inspector;

3. The appellant thereby intimidated the inspector.

[19] The first was not in serious contention. Although, the fifth issue, as enumerated by the learned magistrate, seems to countenance the appellant's argument about whether the inspector was acting lawfully and in the course of his duties. It seems to me that is an irrelevant consideration for the elements of the offence. The term 'inspector' is defined under the dictionary in Schedule 5 of the Act as "inspector means an inspector appointed under part 9." Section 156, which is in Part 9 of the Act, provides for the appointment of certain persons as inspectors. The inspector was duly appointed and was on the site as an inspector of Workplace Health and Safety Queensland at the time of the alleged intimidation.

[20] Consideration of the second element focuses on the appellant's words or conduct directly or indirectly in relation to the inspector. It appears that the third and fourth issues enumerated by her Honour are relevant to this element, although there is some conflation with the third element.

[21] The third element is the critical issue in the case. That is, was it proved beyond reasonable doubt that the appellant's acts intimidated the inspector? It appears that the learned magistrate had this in mind in formulating the fourth issue and in the following enumerated issues against the background of undisputed conduct. However, it is not clear to me how the last issue about the <u>other</u> inspector's apology is relevant to any element, except only as to credit of the other inspector.

[22] Finally, as to defences, whilst the enumerated issues touch on some factual aspects, the learned magistrate does not disclose a clear articulation of any defences raised by the evidence, that required the prosecution's exclusion beyond reasonable doubt. The appellant contends that defences were raised by the evidence, namely, under s 270 of prevention of repetition of insult, and under to ss 24 and 31 of compulsion to act against a threat of violence albeit mistaken.

[23] After setting out the issues in this way, the learned magistrate embarked on an evaluation of the witnesses' evidence by comparing and contrasting their competing testimony vis-à-vis each identified issue. In the course of doing so, her Honour made a number of findings of facts, including that:

1. All the prosecution witnesses were either partial towards the appellant or against him, but she accepted that, despite their partiality, each of them had attempted to give truthful evidence of what they perceived;

2. The inspector did not touch the appellant;

3. The inspector did not move towards the appellant other than by leaning towards him;

4. A dispute about exit signs versus the availability of an emergency exit plan was a topic of discussion from early in the inspection, and was a topic that was taken up and repeatedly raised by the appellant. The appellant felt that the inspector had ignored the issue and this led to the confrontation, which the appellant started by placing an iPad close to the inspector's face and insisting that he look at it. The inspector *"reacted by pointing at [the appellant's] logo and making a sarcastic comment."* But the inspector did not touch, or step forward toward, the appellant.

5. The comment made by the inspector was to the effect of "*Is that what the CFMEU teaches you? Unsafe work practices?"* This was said only once. The inspector had a mistaken memory by denying that he said those words to the appellant, but that he said those words to a different union official.

6. The inspector was likely to be red in the face as he, himself, agreed to as well as sweating but that it was a hot day and most present were also red and sweating or hot and sweating. This does not support that he was angry or aggressive. The comments made by the inspector to the appellant were said in a sarcastic or cheeky manner but they were not shouted or screamed.

7. *"The evidence is that the men were in close proximity to one another because [the appellant] had placed himself there. The inspector's voice was raised when he made the comments, but he did not shout or yell the words. The words were not threatening. The inspector said the words only once. There was no reason to make him stop repeating them. There is also no suggestion that [the appellant] was [harmed] in any way or that he was unable to step away from the situation."*

8. The inspector did not move towards the appellant other than leaning towards him, as previously described. He did not touch the appellant, he did not threaten the appellant, he did raise his voice above his normal tone but did not shout or yell. He did make a sarcastic or cheeky comment about the appellant's union. This did not amount to an assault or behaviour which would be considered illegal and which would have left the inspector acting outside his approved powers.

9. The inspector's comments were not said in a manner which would have or did intimidate or cause fear to the appellant. He was acting, at all times, within his powers and responsibilities as an inspector.

10. The inspector and the appellant were in close proximity to one another immediately before the incident when the appellant shouted the words that he did. The appellant had placed himself in front of the inspector and within an arm's length, in the course of discussion, moments before the incident as he was trying to force the inspector to look at the iPad in his hand. The inspector was avoiding doing so. The inspector finally leaned towards the appellant and pointed at his logo making a comment which the appellant found insulting.

11. On his own evidence, the appellant had moved his feet to be in front of the inspector moments before the inspector pointed and commented at him. He

then moved his feet to position himself closer or leaned towards the inspector. He did move forward and placed his face to within several centimetres of the inspector before he then shouted the words attributed to him.

12. The definition of "intimidation" is that it is to be given its ordinary English meaning. It involves behaviour by one person towards another which causes that person to feel fearful or overawed.

13. The appellant either shouted or screamed the words at the inspector.

14. The appellant was clearly angry and aggressive and moved forward, placed his face to within several centimetres of the inspector before he then shouted the words - "*You're a fucking dog*", three times.

*15. "... [the appellant] was clearly angry at the time that he reacted. He then placed his face closer to the inspector and shouted or yelled the words described. He felt that his integrity had been questioned by the inspector and that his union had been denigrated. To use his own words, he retaliated. He reacted and then yelled or screamed the words at the inspector three times in succession for emphasis. The intention was to cause the inspector to be fearful or overawed and I accept that the inspector was shocked and that he feared for his personal safety at that moment. He was, therefore, intimidated by that behaviour. The inspector's own behaviour towards [the appellant] shortly before this incident did not meet the same level of anger or aggression and would not have meant that [the appellant] behaviour would, therefore, not have had the effect of intimidating him."*

16. The appellant's conduct was motivated by preconceived perceptions about the inspector which lead to "*a build up of frustration on [the appellant's] behalf and not the other way around*."

17. The inspector was at all times acting within his powers and responsibilities as an inspector.

18. The appellant's *"retaliation to the inspector's behaviour immediately prior was excessive, was designed to intimidate the inspector and did so intimidate the inspector".*

[24] In conclusion, the learned magistrate concluded that "*For those reasons, I find that the elements of the offence have all been made out to the required standard and that the defendant is guilty.*"

[25] I am unable to discern how the learned magistrate came to this conclusion in the absence of a clear link between the findings and the elements of the offence (or defence). There is no expression of satisfaction "beyond reasonable doubt" of all the elements making up the offence, and the exclusion of any defence, or to the starting presumption of innocence, or the onus on the prosecution, or the use of the appellant's evidence in a criminal trial.

[26] The respondent argues that the term 'requisite standard' is a well-known phrase and in this context clearly meant proof beyond reasonable doubt. I disagree. As the High Court said in *Fleming v The Queen*,[9] unless a judgment shows expressly or by

[9] *Fleming v R* (1998) 197 CLR 250 at [30].

implication that a principle was applied, it should be taken that the principle was not applied, rather than applied, but not recorded.

[27] However, there is strong indicia in the reasons tending to show that the learned magistrate evaluated the evidence on the lesser civil standard of satisfaction on the balance of probabilities, or at least her Honour conflated the civil and criminal standard. For example, her Honour sought *"to decide where the truth lies in circumstances where there were opposing bodies of evidence on central matters."*[10] In doing so the learned magistrate used terminology such as: "*[i]t is very likely, therefore ...*"; "*… on the balance of evidence ..."; "... was likely to ..."; "I find, on the balance of evidence ..."; and "It is at odds with the balance of the evidence given".*

[28] This approach is also consistent with the learned magistrate's evaluation of the appellant's evidence, especially when corroborated by other witnesses whose evidence was accepted despite the denials of the inspector in relation to the precursor circumstances, contrary to the settled principles in *Liberato v R*,[11] yet still accepting the inspector's testimony that he was "*shocked and that he feared for his personal safety at that moment. He was, therefore, intimidated by that behaviour*."

[29] The approach also explains the apparent reversal of the onus of proof, for example: *"I'm asked to find that the inspector had threatened or assaulted Mr Cummins in some way that would mean he was acting unlawfully and therefore no longer acting in his duties as an inspector."* And the impermissible regard to irrelevant matters, including having regard to the appellant's "*intention was to cause the inspector to be fearful or overawed*".

[30] In my respectful opinion, the learned magistrate's reasons disclose a misapplication of the appropriate onus and standard of proof in a criminal trial to be satisfied beyond reasonable doubt of the elements of the offending and the exclusion of any defence. Consequently, the reasons for the decision are inadequate to support the verdict, and I am bound to allow the appeal against the conviction.

**Rehearing**

[31] Notwithstanding the decision below, the appellant contends that it can be shown on review by this court that the trial magistrate acting reasonably ought to have had a sufficient doubt to entitle the appellant to an acquittal.[12] This necessitates an independent examination of the evidence, including credit of witnesses subject to what I said above,[13] to make my own assessment of both the sufficiency and quality of the evidence.[14]

[32] The requisite fact finding in the case is wholly dependent on the witnesses' credit and drawing available inferences from the proved facts. This is critical to whether

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[10] Contrast *R v Calides* (1983) 34 SASR 355 at 388; *R v G* (1994) 1 Qd R 540 at 543; *Douglass v R* [2012] 290 ALR 699 at 701-702; *Murray v The Queen* [2002] 211 CLR 193 at [57].

[11] *Liberato v R* (1985) 159 CLR 50 at 7.

[12] *Whitehorn v R* (1983) 152 CLR 657, 687.

[13] *Chidiac v R* (1991) 171 CLR 432, 443-4 per Mason CJ, 452-3 per Dawson J, 459 per Gaudron J; *Knight v R* (1992) 175 CLR 495, 503 per Mason CJ, Dawson and Toohey JJ.

[14] *Morris v R* (1987) 163 CLR 454, 463-4, 466 per Mason CJ, 473 per Deane, Toohey and Gaudron JJ, 477-9 per Dawson J

the court is satisfied beyond reasonable doubt of the elements of the offence in s 190 of the *Work Health and Safety Act* 2011 (Qld), and also of the exclusion of any defence under s 270 for the prevention of repetition of insult, and/or under ss 24 and 31 of compulsion to act against a threat of violence albeit mistaken.

[33] In *Devries v Australian National Railways Commission*,[15] Brennan, Gaudron and McHugh JJ said:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused his advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'."

[34] Similarly, in *Fox v Percy*,[16] Gleeson CJ, Gummow J and Kirby J referred with approval to earlier cases,[17] as to the correct approach of an appellate court where findings of fact based on credibility are challenged, this way:

> "[28] … the mere fact that a trial judge necessarily reached a conclusion favouring the witnesses of one party over those of another does not, and cannot, prevent the performance by a court of appeal of the functions imposed on it by statute. In particular cases incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings." (references omitted)

[35] This is not an exhaustive formula. The court went on to recognise that an appellate court might interfere even though the facts fall short of being "incontrovertible", where, for example, the decision is "glaringly improbable" or contrary to "compelling inferences". Gleeson CJ, Gummow J and Kirby J said:

> "[29] … In some, quite rare, cases, although the facts fall short of being "incontrovertible", an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences" in the case. In such circumstances, the appellate court is not relieved of its statutory functions by the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must "not shrink from giving effect to" its own conclusion.

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15 *Devries v Australian National Railways Commission* (1993) 177 CLR 472; 479.
16 *Fox v Percy* (2003) 214 CLR 118, [26]-[30].
17 For example, *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479.

> [30] It is true, … that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses." (references omitted)

[36] Whilst, this is not an appropriate case, to divine the issues of credit in a whole review, I want to say something about the third element of the offence of whether the appellant intimidated the inspector, which was determinative.

[37] The term "intimidate" is not defined in the Act. It is to be given its ordinary natural meaning, that is, to frighten or overawe someone. Intimidation will be considered subjectively from the perspective of the inspector in his particular circumstances. Whilst the effect of the appellant's words or conduct are central; intimidation may be also be inferred or deduced from the surrounding circumstances from which the outcome eventuated, and from the words and conduct of the parties (including the inspector) before, at the time of, or after the appellant did the specific act which caused the outcome.

[38] In the original hearing the inspector testified about appellant's expression of anger and hatred during his outburst and that his *"initial recall was complete and utter shock. I also felt threatened for a short time, I feared for my personal safety*". However, the weight of this evidence was diminished by the inspector's denial that he had any precursor interaction with the appellant. Whilst he agreed he may have said "*What does the CFMEU teach you?*", his recollection was that he said that to another union official (not the appellant), and he never came close to the appellant or point at him. This account differs markedly and stands in stark contrast to the other witnesses whose testimony was generally consistent with the account given by the appellant. That is, to the effect, that the inspector had pointed his finger close to the CFMEU logo on the appellant's shirt, made a disparaging comment about the appellant's trade union in a raised voice, in a sarcastic tone something like "*Is that what the CFMEU teaches you? Unsafe work practices?".* It was immediately after these apparently demeaning aspersions of personal and union impropriety that the appellant moved closer towards the inspector and screamed words to the effect of "*You're a fucking dog*" three times. He then withdrew from the group to be consoled by the other inspector.

[39] When considered in its entire context, it seems to me that the defects in the evidence about the element of intimidation at the original hearing are such that, taken at its highest, a court would have reasonable doubt about intimidation to entitle the appellant to an acquittal.

**Disposition of the proceedings**

[40] I now consider the utility of sending the proceeding back to the Magistrates Court with guidance directions for rehearing or reconsideration according to law.

[41] In *Dyers v The Queen*,[18] Gaudron and Hayne JJ said of the discretion to remit:

> "22. In these circumstances, it would ordinarily follow that a new trial should be ordered, leaving it to the prosecuting authorities to decide whether to proceed with a new trial. In this case, however, the sentence imposed on the appellant has expired. The decision whether to continue a prosecution is ordinarily a decision for the executive, not the courts. There have, however, been cases where this Court has quashed a conviction, without either ordering a new trial or directing entry of a verdict of acquittal (See, eg, Callaghan v The Queen (1952) 87 CLR 115). To make an order that would preclude a new trial would constitute a judicial determination of the proceedings against the appellant otherwise than on trial by jury and in circumstances where it is not held that the evidence adduced at trial required the jury to acquit the appellant."

[42] Kirby J identified considerations relevant to ordering a retrial:[19]

> "88 Where an appellate court has not accepted an argument that a verdict is unreasonable, but has found a material error of law, the proper order is normally to provide for a retrial. Where the prosecutor's discretion is exercised in favour of a retrial, such an order permits a verdict to be taken from a jury accepted as representing the community. This is why, normally, it is left to the Director of Public Prosecutions to evaluate the competing considerations for and against a retrial.
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> 89. This said, an order for a new trial remains 'within limits, a discretionary remedy'. It is no less so in criminal appeals, although the considerations of the public interest involved in criminal proceedings are somewhat different to those in civil cases. It is a judicial act and therefore not an automatic or unthinking one.
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> 90. In the special circumstances of this case, I have concluded that a new trial of the appellant should not be ordered. The most telling circumstances are: (1) the age of the appellant and his proved medical condition that moved the Court of Criminal Appeal to substitute a non-custodial sentence; (2) the absence of any challenge by the prosecutor to that substituted sentence; (3) the fact that the appellant has fully served that sentence and that principles of double jeopardy would restrain any increase in the sentence following conviction after a retrial; (4) the absence of any reason to require a retrial in the appellant's case and the fact that the appellant does not ask for a retrial; (5) the relatively confined nature of the assault alleged; (6) the undesirability of subjecting the complainant and her mother to the ordeal of giving evidence on a further trial; (7) the fact that a

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[18] *Dyers v The Queen* (2002) 210 CLR 285 at [23].
[19] *Dyers v The Queen* (2002) 210 CLR 285 at [88]-[90] (omitting references).

> further trial would be the third occasion on which the appellant had been put on trial for the offence; and (8) the public costs and inconvenience of a further trial so many years after the alleged events and the likelihood that the prosecution might, on a new trial, be obliged to call the witnesses upon whose absence it commented in the second trial, thereby presenting its case in a different way."

[43] In the present case, the offending conduct is of a relatively minor nature and seriousness; the appellant endured the prosecutorial rigour at the original trial; the material errors found on appeal are not attributable to the conduct of the prosecution or the appellant; the defects in the evidence at the original hearing as to intimidation will not sustain a conviction; there is a likelihood that the prosecution might, on a new trial, exploit a forensic advantage and present its case with fresh evidence and in a different way; the time between the original hearing, sentence and this appeal extends about one and a half years; and the cost, delay and inconvenience of another trial will be significant.

[44] In these special circumstances, I have concluded that a retrial should not be ordered.

**Order**

[45] For these reasons, I allow the appeal, set aside the orders and sentence made by the Magistrates Court on 17 March 2020 and 3 September 2020.

**Judge DP Morzone QC**