IN THE FALKLAND ISLANDS SUPREME COURT

Case Reference: SC/CRIM/09/15

BONO JOHN McKAY

Appellant

v.

THE QUEEN

Respondent

Judgment

The subject-matter of the appeal

1. This is an appeal from the Senior Magistrate by the Appellant Bono John McKay ("Mr McKay") in relation to two counts of common assault (charges 1 and 2) and one of assault occasioning actual bodily harm (charge 3), the appeal being against conviction and sentence (following findings of guilt at the conclusion of a trial) (charges 1 and 3), and against sentence following a guilty plea (charge 2).

2. The charges reflect three incidents all on the night of the 29th June 2014 that took place outside, and in the general vicinity of, the "Trough", a well-known entertainment venue in Stanley, and involved (at trial) two other defendants Dylan Stephenson and Arthur Turner. Another defendant, Lauren McKay, pleaded guilty to a section 4 public order offence before trial. The complainant in each case was George Toolan ("Mr Toolan").

3. As appears from the Schedule of Agreed Facts at trial (the "Agreed Facts"), Mr Toolan sustained a number of injuries in the context of the incidents in the form of abrasions, bruises and swellings to his head, neck, back, arms and legs, the most numerous injuries being to his head, including a haematoma in the shape of a boot or training shoe across the back of his head. X-rays also revealed a significant amount of whiplash injury. Whilst it is impossible to identify precisely which injuries were suffered in relation to which incident, the evidence is consistent with some of the most significant injuries being suffered in the context of incident 3

(when Mr Toolan was on the ground), which is also reflected in charge 3 (assault occasioning actual bodily harm).

4. The incidents the subject matter of the three charges were referred to, throughout the trial, as incidents 1, 2 and 3, and the perfected Grounds of Appeal (the "Grounds of Appeal") and the Crown's Argument in Response thereto (the "Argument in Response") adopt the same categorisation of events. I will do the same. The three incidents (taken chronologically) are represented by Charges 1 to 3.

Charge 1

5. Charge 1 is a charge only against the Appellant, Mr McKay, and is in the following terms:

"That you at Stanley on 29 June 2014 assaulted George Toolan by beating him (contrary to section 39 Criminal Justice Act 1988 in its application in the Falkland Islands by virtue of S.6 and Schedule 1, Part 1 of the Crimes Ordinance)"

6. This incident was alleged to have taken place outside the front door of the Trough to the left of the car park. After this incident Mr Toolan returned to the Trough. Mr McKay pleaded not guilty to this charge, and raised self-defence. However the Senior Magistrate found that he was the aggressor, and found him guilty of Charge 1.

Charge 2

7. Charge 2 is a charge against Mr McKay, Mr Stephenson and Mr Turner, and is in the following terms (at trial):

"That you at Stanley on 29 June 2014 together with [Mr Stephenson and Mr Turner] assaulted George Toolan by beating him (contrary to S.39 of the Criminal Justice Act 1988 in its application in the Falkland Islands by virtue of S.6 and Schedule 1, Part 1 of the Crimes Ordinance)"

8. This incident followed on from incident 1, and took place approximately 10-15 minutes later when Mr Toolan went back outside the Trough, this second incident occurring slightly away from the front door in the car park, when Mr McKay, Lauren McKay, Mr Stephenson and others came outside. It is in respect of her involvement in this incident that Lauren McKay entered a plea of guilty. Mr McKay, by his own admission in his basis of plea, unlawfully hit Mr Toolan twice during the course of this incident, but he asserted that he was acting alone, and had not kicked Mr Toolan. The Senior Magistrate found that there was no evidence of kicking. She did, however, reject the assertion that Mr McKay was acting alone and held that a joint enterprise had developed by this point. In this regard Mr Stephenson was also found guilty in respect of Charge 2. Mr Turner was found not guilty.

Charge 3

9. Charge 3 is a charge against Mr McKay, Mr Stephenson and Mr Turner, and is in the following terms (at trial):

> *"That you at Stanley, on 29 June 2014 together with [Mr Stephenson and Mr Turner] assaulted George Toolan, thereby occasioning him actual bodily harm (contrary to section 47 of the Offences against the Person Act 1861 in its application in the Falkland Islands by virtue of S.6 and Schedule 1, Part 1 of the Crimes Ordinance).*

10. Following incident 2 Mr Toolan ran down the side of the Trough, on the pavement, on VPC Road towards the former Sea Cadets' hut (that has since been removed) and got to a gravelled area by the boat that was, and still is, in that location. At this point Mr Toolan stumbled and fell to the ground, where, said the Crown, he was assaulted by Mr McKay, Mr Stephenson and Mr Turner as part of a joint enterprise to assault him. Such assaults as there were, occurred whilst Mr Toolan was on the ground, during the course of which a Miss Burucua felt so concerned about what was going on that she physically threw herself on top of Mr Toolan with a view to protecting Mr Toolan from further injury. Mr Toolan was ultimately helped into a taxi and taken away from the scene first to the police station and then to hospital.

11. All three defendants were found to be guilty of assault occasioning actual bodily harm (Mr Stephenson had admitted that he assaulted Mr Toolan causing him actual bodily harm). So far as Mr McKay was concerned, the Senior Magistrate accepted the evidence of a witness Paige Mitchell that she saw Mr McKay kick Mr Toolan twice (paragraph 52 of the Written Judgment of 2 June 2015), and in respect of all three Defendants, she found that the assaults were part of a joint enterprise between them stating, at paragraph 54 of the Written Judgment, in these terms:

> *"I have not heard any evidence of any actions by any of the defendants to indicate that any one of them tried to withdraw or disassociate from the hostile activity shown by the others to Mr Toolan. They had been all involved in one way or another in Incident Two a few minutes before and the evidence shows that they were sticking together in their shared hostile attitude to Mr Toolan and were willing to use violence against him. I find as a fact that they acted together with the common design or purpose of assaulting Mr Toolan. They were all involved in a joint enterprise in Incident Three when he was seriously assaulted. As parties to a joint enterprise they all have to take responsibility with and for the others taking part in that joint enterprise. There is ample evidence in the accounts of the witnesses to Incident Three. Dr Edwards' report and the photographs to satisfy me beyond any doubt that Mr Toolan suffered physical injuries as a result of Incident Three."*

12. The Senior Magistrate announced her verdict on 17 April 2015 and at that time gave oral explanatory reasons for her findings (which have been transcribed - hereafter - the "Oral Reasons"), indicating that these would be followed by a handed-down judgment. The subsequent handed-down judgment (entitled, "Record of Verdict and Reasons"), hereafter the "Written Judgment", was delivered on 2 June 2015. In this context section 54 of the Administration of Justice Ordinance (the Ordinance), provides:

> "54 **Reasons for judgment to be given**
> A justice or a judge sitting without a jury in any civil or criminal case shall record its judgment in writing and every such judgment shall contain the point or points for determination, the decision thereon and the reasons therefor and shall be dated by the justice, magistrate or judge at the time of pronouncement."

13. It seems to me that there is much to be said for verdicts to be announced as soon as possible following the conclusion of the evidence so that the defendant or defendants know where they stand. In many cases it will be possible either to give

an oral judgment at that time which can be transcribed and form the written judgment and reasons, or to give a written judgment at that time. In other cases, such as where the evidence has been lengthy, or complicated, it may be best to adjourn for a period of time before pronouncing the verdicts and giving judgment (which again can take the form of either an oral judgment subsequently transcribed, or a written judgment).

14. In the present case, in circumstances where the Senior Magistrate indicated on pronouncing the verdicts that there would be a handed down judgment in due course, and in circumstances where the Appellant awaited the Written Judgment before appealing, and places reliance upon that Written Judgment on this appeal (albeit also referring to matters stated in the Oral Reasons) I consider that the decision being appealed against is properly to be regarded as the Written Judgment. It is, however, open to the Appellant to refer, and rely, upon matters stated in the Oral Reasons as part of his appeal, as he sees fit.

The nature of an appeal to the Supreme Court

15. The nature of an appeal to the Supreme Court is identified in Section 48(2) of the Administration of Justice Ordinance 1949 (the "Ordinance") which provides:-

> "48 **Practice and Procedure**
> ...
> (2) So far as is convenient and practicable, the practice and procedure of the Supreme Court in the exercise of its appellate jurisdiction shall be that of the Court of Appeal in England (disregarding or modifying any provisions relating to a multiplicity of judges)."

16. Section 57 of the Ordinance also provides:-

> "**Powers of Supreme Court on criminal appeal**
> The Supreme Court shall have the following powers in relation to an appeal from the Magistrate's Court or a Summary Court:
> (a) on an appeal against conviction, or against conviction or sentence, the power...
> ...
> (v) to order a retrial before a court of competent jurisdiction; and
> ...
> (d) in the exercise of its appellate jurisdiction under this section the Supreme Court may in its discretion hear additional evidence, and may substitute a finding of guilty but insane for any sentence."

17. An issue that arose at the directions stage of this appeal was whether an appeal to the Supreme Court takes the form of a rehearing (a hearing de novo) or a hearing on submissions as to the safety of the conviction. This question was considered squarely, and in detail, by Chief Justice Wood in the case of Brian John Williams v R (SC/CRIM/03/05). He concluded, rightly in my view, and for the reasons he gave (to which I draw attention and adopt on the nature of an appeal), that an appeal to the Supreme Court follows the practice and procedure of the Court of Appeal in England, and as such is not a hearing de novo.

18. That this is so is made clear by the express wording of section 48(2) of the Ordinance that so far as is convenient and practicable, the practice and procedure of the Supreme Court in the exercise of its appellate jurisdiction shall be that of the Court of Appeal in England. This is also reinforced by the fact that section 57(d) provides that the Supreme Court, "in the exercise of its appellate jurisdiction... may in its discretion hear additional evidence" (emphasis added), which makes clear that it is in the discretion of the Supreme Court as to whether to allow additional evidence, a provision which would not be necessary, and is, or arguably is, inconsistent with, a right to a re-hearing. It is also clear, in the context of sections 48 and 57 read together, that the power to order a re-trial is a power to order a re-trial as a consequence of the Supreme Court's decision on the appeal.

19. Section 48 of the Ordinance does not provide that the provisions of the Criminal Appeal Act 1968 (as originally enacted or as amended by the Criminal Appeal Act 1995) as such applies to an appeal to the Supreme Court in the Falkland Islands (indeed the Criminal Appeals Act 1968 is expressly disapplied under the Interpretation and General Clauses Ordinance (No.17 of 1977)).

20. Accordingly section 2 of the Criminal Appeal Act 1968 (as originally acted or as amended by the Criminal Appeal Act 1995) does not apply as a matter of law in the Falkland Islands. However it does reflect the practice and procedure of the Court of Appeal in England as to the approach adopted by the Court of Appeal on an appeal from the Crown Court in England, and in furtherance of section 48 of the Ordinance, and so far as is convenient and practicable, the practice and

procedure of the Supreme Court in the exercise of its appellate jurisdiction shall be that of the Court of Appeal in England.

21. Section 2(1) of the Criminal Appeal Act 1968(as originally enacted) provides:

> **"2 Grounds for allowing appeal under s. 1**
>
> (1) Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think—
>
> (a) that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory ; or
>
> (b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or
>
> (c) that there was a material irregularity in the course of the trial,
>
> and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred. "

22. The grounds in section 2(1) as originally enacted, were thereafter subsumed within the overall ground of unsafety (the "safety test") by reason of the substitution of the original wording of section 2(1) (by the Criminal Appeal Act 1995) with the following:-

> **"2 Grounds for allowing appeal under s. 1.**
>
> (1) Subject to the provisions of this Act, the Court of Appeal—
>
> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
>
> (b) shall dismiss such an appeal in any other case.
>
> (2) In the case of an appeal against conviction the Court shall, if they allow the appeal, quash the conviction."

23. Accordingly in the Falkland Islands, as in the Court of Appeal of England and Wales, an appeal is to be allowed, and a conviction quashed, if the Court thinks (ie considers) that the conviction is unsafe.

24. In the case of R. v. Cooper [1969] 1 Q.B. 267 Widgery LJ, in relation to a summing up which was recognised as being fair and putting all relevant material

before the jury (ie as not showing any misdirection or irregularity), stated at page 271B-G as follows:

> *"It is, therefore, a case in which every issue was before the jury and in which the jury was properly instructed, and, accordingly, a case in which this Court will be very reluctant indeed to intervene. It has been said over and over again throughout the years that this Court must recognise the advantage which a jury has in seeing and hearing the witnesses, and if all the material was before the jury and the summing-up was impeccable, this Court should not lightly interfere. ... (W)e are ... charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe .... That means that in cases of this kind the Court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the Court experiences it".*

25. That the "lurking doubt" aspect of unsafety survived the restatement of the test of unsafety as inserted into section 2(1) by the Criminal Appeal Act 1995, was confirmed in the case of R v Criminal Cases Review Commission, ex p. Pearson [2000] 1 Cr.App. R.141 in which Lord Bingham CJ, as he then was, considered the meaning of the word "unsafe" at paragraph 10 of his judgment:-

> The expression "unsafe" in section 2(1)(a) of the 1968 Act does not lend itself to precise definition. In some cases unsafety will be obvious, as (for example) where it appears that someone other than the appellant committed the crime and the appellant did not, or where the appellant has been convicted of an act that was not in law a crime, or where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant legal misdirection, or where the jury verdict, in the context of other verdicts, defies any rational explanation. Cases however arise in which unsafety is much less obvious: cases in which the Court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done (Cooper (Sean) (1969) 53 Cr.App.R. 82, [1969] 1 Q.B. 267 at 271). If, on consideration of all the facts and circumstances of the case before it, the Court entertains real doubts whether the appellant was guilty of the offence of which he has been convicted, the Court will consider the conviction unsafe. In these less obvious cases the ultimate decision of the Court of Appeal will very much depend on its assessment of all the facts and circumstances."

26. The boundaries of the "lurking doubt" aspect of unsafety was considered in the recent decision of R v Pope [2013] 1 Cr.App.R.14, in which Lord Judge said this at paragraph 14:

"14 ...As a matter of principle, in the administration of justice when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge, nor indeed with this court, but with the jury. If, therefore, there is a case to answer and, after proper directions, the jury has convicted, it is not open to the court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or may be unsafe. Where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence or the trial process, or both, which leads to the inexorable conclusion that the conviction is unsafe. It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury."

27. In the context of an appeal from the Senior Magistrate to the Supreme Court the Senior Magistrate is in the position of the (Crown Court) judge so far as correctly directing herself as to the law, and the jury in terms of assessing the evidence, finding facts, and reaching a verdict on each charge.

28. In reaching my judgment on this appeal I have borne well in mind, and had regard to, the principles I have identified above when considering the overall question that is before me for determination, namely as to whether the convictions in respect of Mr McKay, or any of them, are unsafe.

The Grounds of Appeal

29. The grounds of appeal (which I take verbatim from the perfected Grounds of Appeal) are as follows:-

(1) The conviction of the Appellant was against the weight of the evidence.

(2) The Learned Judge erred in not stopping the case in whole or in part at half time on submission.

(3) The Honourable Court has misinterpreted the Appellant's interview and used it incorrectly as evidence of his guilt in respect of incident 1.

(4) The Honourable Court has placed insufficient weight on the aggressive behaviour of Mr Toolan when rejected the defence of self-defence.

(5) The learned Judge has erred in not recognising the Appellant had raised the defence of self-defence in interview.

(6) With regard incident 2 the Learned Judge has erred in using the interview of Dylan Stephenson as evidence of a joint enterprise taking place.

(7) The Learned Judge has place (sic) insufficient weight on the prosecution witnesses especially Dahiana Burucua in respect of incident 3 while placing too much weight on the uncorroborated testimony of Paige Mitchell.

Preliminary observations

30. I will consider each of these Grounds of Appeal separately below. However before doing so there are a number of preliminary observations to be made:-

(1) It is not alleged that the Senior Magistrate misdirected herself in law in terms of the ingredients of any of the offences.

(2) It is not alleged (save in relation to the submission of no case to answer) that the Senior Magistrate made a wrong decision on any question of law.

(3) It is not alleged that the Senior Magistrate misdirected herself in relation to the burden or standard of proof (including as to the potential defence of self defence).

(4) It is not alleged that there was any specific irregularity or instance of unfairness in the course of trial.

(5) It is not suggested that any of the verdicts defy any rational explanation.

31. In the above circumstances, and subject to Ground (2), the "safety" test stands to be considered by reference to the principles that I have identified above including (though not in any way limited to) the "lurking doubt" principle addressed above, based on a reasoned analysis of the evidence.

32. It follows that it is not the role of an appellate court to consider a matter de novo, or to make its own findings of fact, or to substitute its views on questions of fact for those of the Senior Magistrate. The question is whether I consider that a

conviction is unsafe, not whether I would necessarily have reached the same conclusions and findings based on the evidence before me. In this regard I bear well in mind, and am alive to the fact, that the Senior Magistrate heard all the evidence, observed the witnesses giving evidence, and was best placed to reach conclusions on demeanour and credibility, and make findings based on her view as to the evidence as a whole. It is against that backdrop that the Grounds of Appeal are advanced, and I have to decide whether I consider the convictions, or any of them, are unsafe applying the principles in relation to safety identified above.

(1) The conviction of the Appellant was against the weight of the evidence

33. No specific points are made in the Grounds of Appeal under this heading. To the extent that specific points are made on behalf of the Appellant in relation to the evidence concerning any particular charge I will address those points separately below. Any analysis as to the weight of the evidence arises only in the context of my considering whether a conviction is unsafe, applying the principles identified above. To the extent that this Ground of Appeal is an invitation for me to substitute my views as to the evidence as a whole for those of the Senior Magistrate, that is an inappropriate invitation on an appeal to this Court, and I have not taken that invitation up.

(2) The Learned Judge erred in not stopping the case in whole or in part at half time on submission

34. The leading case on a submission of no case to answer remains that of Galbraith. In R. v. Galbraith 73 Cr.App.R. 124, CA, the court reviewed the earlier authorities and gave guidance as to the proper approach on a submission of no case to answer at the close of the prosecution case. At page 1042B-E Lord Lane CJ, giving the judgment of the Court, stated as follows:

"How then should the judge approach a submission of "no case"?

(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty-the judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because

of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury...

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

35. As a riposte to Galbraith, submissions of no case usually involve reliance upon the decision of Turner J in R. v. Shippey [1988] Crim.L.R. 767 and the present case is no exception (albeit that Mr Teate, when addressing the Court, rightly recognised that R v Shippey is no more than an application of the principles set out in Galbraith to the facts of that case. In Shippey, Turner J held that the requirement to take the prosecution evidence at its highest did not mean, "*picking out all the plums and leaving the duff behind*". The judge should assess the evidence and, if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all common sense, then such evidence was tenuous and suffered from inherent weakness. His Lordship did not interpret Galbraith as meaning that if there are parts of the evidence which go to support the charge then that is enough to leave the matter to the jury, no matter what the state of the rest of the evidence is. It was, he said, necessary to make an assessment of the evidence as a whole and it was not simply a matter of the credibility of individual witnesses or of evidential inconsistencies between witnesses, although those matters may play a subordinate role.

36. In R v Pryer, Sparkes and Walker, unreported, April 7, 2004, CA [2004] EWCA Crim 1163, Hooper LJ, giving the judgment of the Court, said this about Shippey, at paragraphs 27 to 29 of the judgment:

"27. It has been the experience of at least two members of this Court that Shippey is often cited by counsel at the close of the prosecution's case. What counsel often do, and what in our view counsel have done in this case, is to convert Shippey from what it actually is, namely a decision on the facts, into a decision on the law. Mr Moses and Miss Stapleton seek to find in Shippey, as many counsel have done before them, some principle of the law called "the plums and duff principle".

28. What is a trial judge being asked to do when a submission of no case is made either at the close of the prosecution case, or, as sometimes happens, after all the evidence in the case has been given? He has a task to perform which is stated simply and clearly in Galbraith:

"Could a reasonable jury properly directed properly be sure of the defendant's guilt on the charge which he faces."

29. Although the test is a very simple one, it is often difficult to answer the question. Help may sometimes be found in the case of Shippey in resolving that question, provided it is remembered that Shippey is no more than another case on the facts. Galbraith gives significant assistance to judges when being asked to resolve that question when the reliability of witnesses is in issue."

37. So far as the credibility of witnesses is concerned, and the views of the Senior Magistrate having heard the evidence of a number of witnesses after a lengthy trial, the Crown refer me to the observations of Lord Woolf (giving the judgment of the Court) in Brooks v. DPP [1994] 1 A.C. 568 PC, in which he stated (in the context of committal proceedings) at 581A-C:

"The abuse of process issue

This is the issue which has caused their Lordships the greatest concern. The resident magistrate came to her decision after a long hearing during which she had ample time to form an assessment as to the credibility of the witnesses. Her decision is therefore entitled to be treated with considerable respect. There was however ample evidence on which she would have been entitled to find that there was a prima facie case which justified the applicant being committed for trial. The resident magistrate's decision must therefore have been based on the lack of credibility of the prosecution witnesses and in particular of the girl who is alleged to have been raped.

Questions of credibility, except in the clearest of cases, do not normally result in a finding that there is no prima facie case. They are usually left to be determined at the trial. Nevertheless there are features of the evidence of the complainant which make her decision understandable and their Lordships accept Lord Gifford's submission that an application for certiorari to quash the resident magistrate's decision would have failed."

38. The Crown also refer to the judgment of the Court of Appeal in R. v. G. and F. [2012] EWCA Crim 1756, [2013] Crim.L.R. 678, CA (considering R. v. Jabber [2006] 10 Archbold News 3, CA, and R. v. Hedgecock, unreported, November 26,

2007, CA ([2007] EWCA Crim. 3486), in which Aikens LJ (giving the judgment of the Court) stated as follows at paragraph 36:

"36. We think that the legal position can be summarised as follows: (1) in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the "classic" or "traditional" test set out by Lord Lane CJ in Galbraith. (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether a reasonable jury, not all reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."

39. In ***R. v. Goring [2011] EWCA Crim 2, [2011] Crim.L.R. 790, CA*** Leveson LJ (giving the judgment of the Court), said the following (in the context of inconsistencies in the evidence on a submission of no case):

"36. It has long been a principle that, absent good reason (such as the witness being unworthy of belief), the prosecution is obliged to call all witnesses who give direct evidence of the primary facts and which the prosecution, when serving statements, consider to be material, even if there are inconsistencies between one witness and another: see R v. Russell-Jones [1995] 1 Cr. App. R. 538. Further, although taking the prosecution at its highest does not mean "picking out all the plums and leaving the duff behind" (see per Turner J in R v Shippey [1988] Crim. L.R. 767), it is necessary to make an assessment of the evidence as a whole and not simply consider the credibility of individual witnesses or evidential inconsistencies between witnesses. It is for the jury to decide what evidence to accept and what evidence to reject and the fact that a witness called by the Crown gives evidence in some respects inconsistent with the inferential case being advanced by the Crown cannot, by itself, be determinative of a submission of no case to answer: it is obviously, however, a factor to be taken into account."

40. In the present case counsel for Mr McKay (Mr Teate) made a detailed submission of no case, which was followed by a shorter submission of no case by Mr Crowder on behalf of Messrs Turner and Stephenson, which was responded to by Mr Rowe on behalf of the Crown. The Senior Magistrate then gave a short ruling in which she rejected the submissions of no case, stating as follows:

"SENIOR MAGISTRATE FAULDS: Please sit down. I have given careful consideration and have decided to reject both Mr Teate's submission and the one that Mr Crowder, not wishing to be impolite about it, but made on the back of Mr Teate's submission.

MR. CROWDER: Indeed your Honour.

SENIOR MAGISTRARE FAULDS: I have also questioned in my mind as to whether it is appropriate for me to give full reasons. You will no doubt be aware that we have a hybrid system here and were you in the Magistrates' Court the Magistrates would not be obliged to give reasons. I am halfway between the two, as it were, and I think it appropriate there for me to give very limited reasons. Perhaps more reasons for not giving reasons than giving reasons, if you can follow that? I feel that if I were to go through the evidence, and at this stage decide what I feel was strong and what was weak, and assess it all, I would be in fact pre-judging the trial, and that is not the purpose of dealing with a submission such as this.

However, on the basis of the guidance that I can take from R v Shippey in particular, and the famous statement picking out the plums and leaving behind the duff, I think I must taken (sic) an overview, and I am starting really at the end in terms of what the evidence was that the doctor saw on Mr Toolan. Something must have happened. I have heard enough, and without going into the detail, to say that there are several versions of the details of what happened, but there are consistent threads within those versions that satisfy me that it is appropriate for the defendants' trial to continue, and that is all I shall say at this stage."

41. The Senior Magistrate had been addressed in relation to the principles arising from the cases of Galbraith and Shippey and indeed refers to Shippey in her short ruling. She was clearly alive to the danger of "picking out the plums and leaving behind the duff". It is also understandable that she was somewhat reticent (in the context of her dual role) in addressing the evidence in detail at that stage, and was right not to express concluded views on the evidence at that stage (for that is not the role of the judge at that stage of the trial). It is clear from the last paragraph of her evidence that she had, however, undertaken an assessment of the evidence which must have been for the purpose of applying the Galbraith test (to which she had been referred), and had reached the conclusion that this was not a case (for present purposes in relation to the charges against Mr McKay) where the judge should conclude that the prosecution case, taken at its highest, was such that a jury (or in the present case the judge herself) having properly directed herself, could not properly convict on the charge in question.

42. I consider that it is appropriate for the Senior Magistrate, when ruling on a submission of no case to answer, to refer to the test in Galbraith, and identify (if it be the case) what prosecution evidence exists which, if accepted, could lead to a conviction whilst identifying, in brief terms, any inconsistencies in the evidence so as to demonstrate that the Senior Magistrate has had regard to the evidence as a whole for the purpose of the submission of no case to answer. Whilst the Senior Magistrate did not do so in the present case (at least expressly), I do not consider that any failure to do so itself assists the Appellant on this appeal in circumstances where full transcripts of the evidence are available to the Court from which the evidence before the Senior Magistrate at that time can be seen. It is also apparent from the Oral Reasons and Written Judgment what prosecution evidence she had in mind (as such evidence had already been given at the time of the submission). Ultimately the question is whether the Senior Magistrate erred in law in not stopping the case on the basis of the evidence that was before her.

43. Although the contemporary submissions of no case were made in relation to incident 1 and 2 (at least as to findings that could be made on the Newton hearing) as well as incident 3, the Grounds of Appeal focus on incident 3. For the avoidance of doubt, however, I consider there is no basis on which it can be said that the Senior Magistrate erred in law in not stopping the trial on the basis of a submission of no case in relation to incident 1 (the issue of who was the aggressor and self-defence being matters for the judge as jury on the evidence as a whole), nor indeed for letting matters proceed to factual findings against Mr McKay in relation to incident 2. As to the former I also refer to the matters identified below in the context of incident 1 and ground of appeal 5. As to the latter I also refer to the matters identified below in the context of incident 2 and ground of appeal 6.

44. So far as incident 3 is concerned, it is undoubtedly the case (as Mr Rowe conceded before the Senior Magistrate) that there were inconsistencies in the testimony of different witnesses, as to whether Mr McKay was involved in the kicking of Mr Toolan when he was on the ground. This is also the subject matter of ground of appeal 7 in relation to the safety of the conviction on charge 3. In the context of fast moving events and a chaotic scene, and the obligation of the Crown to call all material witnesses who give direct evidence of the primary facts, it will often be the case, as in the present case, that there will be inconsistencies between

what such witnesses saw, who they believed was involved at any particular point in time, and who is seen to do what. This is just the sort of situation where, "*although taking the prosecution at its highest does not mean "picking out all the plums and leaving the duff behind"…it is necessary to make an assessment of the evidence as a whole and not simply consider the credibility of individual witnesses or evidential inconsistencies between witnesses. It is for the jury to decide what evidence to accept and what evidence to reject and the fact that a witness called by the Crown gives evidence in some respects inconsistent with the inferential case being advanced by the Crown cannot, by itself, be determinative of a submission of no case to answer"* though it is, of course, a factor to take into account.

45. Turning then to the evidence. At the heart of the prosecution evidence against Mr McKay in relation to incident 3 was the testimony of Paige Mitchell. Her evidence in chief was that she saw Mr Toolan lying on the ground, Dahiana Burucua covering him and Mr McKay, Mr Stephenson and Lauren being there. She could see them and their faces, and she stated that, *"I saw Bono kicking George [Toolan]"*, she saw Bono kick George twice, and she saw the kicks actually hitting Mr Toolan on the chest (Transcript 13 April 2015 p. 117D-E). Whilst she accepted, when cross-examined, that Dahiana Burucua was in a better position to see what was going on than her (p. 120F) (and as appears below Dahiana Burucua's evidence was that Mr McKay was not involved in the kicking), Paige Mitchell maintained that at the time when Dahiana Burucua was on top of Mr Toolan she did see Mr McKay kick Mr Toolan (p.121G), and maintained when pressed that whilst she did not have the greatest view of what was going on, "I did see Bono kicking George" (p.122G). Her evidence concluded with it being put to her as to whether "it is possible given the amount of things you can't remember, you cannot remember Bono McKay kicking?" to which she responded, "He did kick" (p. 123E).

46. There was also the evidence of Ryan Watson in relation to the third incident that he saw Mr McKay, Mr Stephenson and Mr Turner surrounding Mr Toolan whilst he was on the ground, that they were "quite angry" and that they were

"threatening George" (Transcript 13 April page 45A-B and H). Whilst he could not remember[ed] the words used, he said he remembered McKay and Mr Stephenson sort of trying to get Mr Toolan to get up, sort of like being aggressive towards him. He said that he only heard one person say something, namely Arthur [Turner] who said, "Are you a man or a mouse" (p. 46C). He said that he "remember Bono [McKay] and Dylan [Stephenson] sort of like trying to make him get up, sort of like being aggressive to him". He stated that Mr McKay was, "trying to sort of edge [egg] George on to fight him back" and that he was doing this by speaking to him, though he stated that he could not remember what he said (p. 46E). When cross-examined, and asked what he saw Mr McKay doing, he said that he saw him standing in front of Mr Toolan with Mr Toolan on the ground – but did not say he saw Mr McKay kick Mr Toolan (p. 74F-G).

47. As for Mr Toolan himself, in his evidence in chief he stated that when he ran and stumbled "As I fell, I turned around and seen Arthur [Turner], Dylan [Stephenson] and Bono [McKay] running towards me", he could see quite clearly and he could see their faces, at that point they were within "a metre, 2 metres" (transcript 9 April 2015 page 30D-H). As to what happened next he then stated, "I was kicked repeatedly while I was on the ground making me fall to the ground completely, and then while I was on the ground I was stamped on and kicked" (p. 31B). When asked if he could see who did the kicking he stated, "I could feel all three kind of simultaneously" (p. 31D). He stated that it felt like this went on for a fairly long time before Dahiana came over and placed herself over him (p.32A). His evidence was that after this the kicking and stamping, "carried on, but there was less of it" (p.33A). He heard Dahiana and Hannah screaming to Dylan [Stephenson] to stop kicking him (p.33B). In cross-examination it was suggested to him that Mr McKay was not actually there, that he was not one of the individuals pursuing him, and that Mr McKay was in fact on the floor outside the Trough at the time. He was asked if this was possible to which he replied, "No" (p. 71H-72A) but confirmed that he did not see Mr McKay kicking or assaulting him (p. 73G).

48. In relation to the ground of appeal based on no case to answer, the Appellant submits (as the Crown had submitted) that Dahiana Burucua was in the best possible place to see events, that her evidence was that whilst Mr Toolan was on the ground, she "noticed that Arthur [Turner] and Dylan [Stephenson] had

approached us and whilst he was down they kicked him." (transcript 10 April p. 78G-H). In relation to Mr McKay's involvement her evidence in chief was that, "It had ended by that point. I remember Lauren coming, looking for Bono, but they didn't do anything, they just looked at the situation and then they walked off, they walked away from there." The next questions and answers were as follows:

"Q. Let's just be clear about that then. Lauren comes looking for Bono. You said they didn't do anything?

A. No. For what I can remember. Bono was just stood there for a bit, and Lauren came and took him away.

Q. I see. So "they" is Bono and Lauren? They didn't do anything?

A. Not at that stage, that I can remember. They were certainly not involved in the kicking"

49. When cross-examined by Mr Teate for Mr.McKay about the incident by the boat, there was the following series of questions and answers:

"Q. You could see the individuals who were there.

A. Yeah.

Q. Bono McKay was not there at that time?

A. Not when the kicking was taking place.

Q. And you're quite sure?

A. Not within…not within that…area. If …

Q. Yeah

A. If he was … if he was closer at the time. I didn't see him, but my attention was not focussed on what was going on around, if you know what I mean.

Q. So you are saying he could have been there …

A. Watching, or …

Q. … you didn't say as a bystander, but he certainly wasn't close to George Toolan?

A. Not that I remember at that point.

Q. And I think when you were asked about the kicking you said that he was not involved in the kicking, certainly not?

A. I don't remember seeing him kick George."

50. It is convenient at this point also to refer to the matters relied upon in support of ground 7 of the appeal, namely the submission that insufficient weight was placed on the prosecution witnesses especially Dahiana Burucua in respect of incident 3 while placing too much weight on the testimony of Paige Mitchell. After referring to the Senior Magistrate's finding of fact that Mr McKay was egging others on during the course of incident 3 (based on the witness evidence of Ryan Watson as referred to above and in paragraph 50 of the Written Judgment), and referring to Ryan Watson's other evidence in this regards (as also referred to above) the Grounds of Appeal continue:

"It is submitted that insufficient weight is given to the following witnesses' testimony regarding Mr McKays involvement in incident 3:

Dahiana Burucua who denies the Appellant was involved in any way

Ryan Watson who sees the Appellant close to Mr Toolan but not attacking him

Melvyn Clifton at page 91 (13th April transcript) who confirms that Bono had not chased George Toolan round the corner.

Hannah Collier at page [25B] (14th April transcript) when asked did she see Bono do anything round the side of the Trough responds "No.""

51. In relation to the second ground of appeal, and applying the Galbraith test (as further examined and clarified in the subsequent cases to which I have referred to above and have had full regard to), and having regard to the evidence as a whole concerning incident 3 (which I have done) I consider there was prosecution evidence which, taken at its highest, would allow a properly directed tribunal of fact (here the Senior Magistrate) to conclude that Mr McKay was guilty of charge 3.

52. As identified above, it was the evidence of Paige Mitchell that she saw Mr McKay kick Mr Toolan twice, evidence that she maintained when pressed in cross-examination. Whilst there was evidence of other witnesses who did not see any such kicking and evidence from Dahiana Burucua, based on her recollection, that Mr McKay was not present at the scene until after the kicking had ceased if the tribunal of fact accepted Miss Paige's evidence (as it was open for it to do) it

could properly convict the Appellant on Charge 3. What the tribunal of fact made of the evidence was classically a matter for it. I do not accept the suggestion that the Senior Magistrate took the plums and rejected the duff – she clearly had regard to the evidence as a whole when ruling on the submission of no case, and was alive to the submissions made to her in relation to R v Shippey which she expressly referred to. What findings of fact were to be made on the evidence as a whole was a matter, in due course, for the Senior Magistrate as the tribunal of fact.

53. Miss Paige's evidence (in terms of the presence of Mr McKay at the site of incident 3) was also consistent with the evidence (if accepted) of Mr Toolan that Mr McKay ran together with Mr Turner and Mr Stephenson towards him, and that he was then kicked by three people (albeit he did not actually see who was doing the kicking) and with Mr Watson's evidence that he saw Mr McKay, Mr Stephenson and Mr Turner surrounding Mr Toolan whilst he was on the ground, that they were "quite angry" and that they were "threatening George" (Transcript 13 April page 45A-B and H) (albeit that he could only remember hearing the words uttered by Mr Turner). Couple this with the evidence that Mr Stephenson and Mr Turner did kick Mr Toolan, and a tribunal of fact of fact, properly directed in terms of joint enterprise, could find Mr McKay, as well as Mr Stephenson and Mr Turner, guilty of the offence of ABH even if not satisfied, so that it was sure, that Mr McKay actually kicked Mr Toolan. Whether there was a joint enterprise depended on the tribunal of fact's application of the law in this regard to its view of the evidence as a whole which again, was classically a matter to be left to the tribunal of fact.

54. In the above circumstances I reject the submission that the Senior Magistrate erred in law in ruling against the submission of no case to answer in relation to the charges against Bono McKay.

(7) The Learned Judge has place (sic) insufficient weight on the prosecution witnesses especially Dahiana Burucua in respect of incident 3 while placing too much weight on the uncorroborated testimony of Paige Mitchell.

55. It is convenient to address the other grounds of appeal in relation to incident 3 at this stage, namely grounds 1 and 7 (essentially that the Senior Magistrate's

finding of guilt in respect of charge 3 was against the weight of the evidence as identified by the Appellant).

56. I would repeat the preliminary observations I made at paragraph 30 above. In the absence of any alleged misdirection on the law, or as to the application of the burden or standard of proof, the "safety" test stands to be considered by reference to the principles that I have identified above. It is not for me to consider the matter de novo or make my own findings of fact, or to substitute my views on questions of fact for those of the Senior Magistrate. The question is whether I consider the conviction on charge 3 to be unsafe. In this regard I bear well in mind, and am alive to the fact, that the Senior Magistrate heard all the evidence, observed the witnesses giving evidence, and was best placed to reach conclusions on demeanour and credibility, and make findings based on her view as to the evidence as a whole. In my view these points are of particular force in relation to incident 3 which involved evidence from a number of witnesses in relation to a chaotic and rapidly developing situation, and in the context of which it would be surprising if all witness accounts were identical in terms of who and what they observed.

57. Against that backdrop it stands for me to consider whether the conviction in respect of charge 3 is unsafe. Is there a lurking doubt which makes me wonder if there has been an injustice done – which will involve a consideration of all the facts and circumstances of the case before me to reach a conclusion as to whether I entertain real doubts whether the Appellant was guilty of charge 3? As was stated by Lord Judge in R v Pope, where it arises for consideration at all, the application of the "lurking doubt" concept requires reasoned analysis of the evidence which leads to the inexorable conclusion that the conviction is unsafe. For that reason, as Lord Judge noted, it can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the fact finding tribunal (as in this case).

58. The Learned Judge had the burden and standard of proof well in mind (as addressed at paragraphs 3 and 4 of the Written Judgment), and it is clear that she

took a great deal of care in assessing the evidence (as she expressly stated she had done at paragraph 16 of her written judgment) continuing:-

"I have listened carefully to the witnesses and all that has been said in court. I have read the transcript of the defendants' interviews and the agreed evidence in the form of statements plans and photographs. I have also made my own notes during the trial and I have referred to the recording of the proceedings."

59. Set against that background, the Senior Magistrate addressed the third incident at paragraphs 43 to 55 of the Written Judgment in which she addressed the evidence in detail, and made findings of fact, that led her to find all three defendants guilty of the joint charge of assault on Mr Toolan thereby causing him actual bodily harm.

60. The Senior Magistrate concluded in relation to Mr McKay that Mr McKay kicked Mr Toolan on the chest. This was based on an acceptance of the evidence of Paige Mitchell. As to this evidence the Senior Magistrate stated as follows (at paragraph 52 of the Written Judgment):-

"Paige Mitchell gave evidence and I wish particularly to comment on her evidence. She knew all three defendants and Miss McKay and Mr Toolan. She said she could clearly see the faces of all three defendants. I have noted the area was illuminated by street lighting. Miss Mitchell said that she saw Bono McKay kick Mr Toolan twice. She was cross-examined quite specifically as to whether she could have been mistaken about the kicking and it was put to her that she had not seen it. She stuck to her guns and I was persuaded by her evidence that Mr McKay's kicks struck Mr Toolans' chest. Miss Mitchell said that Mr Stephenson was threatening to kick at Mr Toolan. She said he was moving his foot but she was very fair and did not say that she saw Mr Stephenson's feet make contact. I accept her evidence that she saw Mr Stephenson threatening to kick Mr Toolan."

61. The Senior Magistrate's summary of Paige Mitchel's evidence is accurate (see paragraph 45 above), and it was open to her to accept Paige Mitchell's evidence, evidence that Miss Mitchell persisted in when pressed in cross-examination. Whilst it is correct, as Mr Teate pointed out before me, that Miss Mitchell was unable to remember much about many of the events on the night in question, the Senior Magistrate was best placed to assess Miss Mitchell's evidence as a whole and her credibility and clearly found her to be an impressive witness. I have heard

nothing that persuades me that the Senior Magistrate was wrong to accept her evidence.

62. The Senior Magistrate was well aware of the evidence of Miss Burucua (she expressly refers to her evidence at paragraph 51 of the Written Judgment in the context of Miss Burucua's evidence that Mr Turner and Mr Stephenson used their feet on Mr Toolan). Miss Burucua did not see Mr McKay kick Mr Toolan, and believed that Mr McKay did not come over until after the kicking was over. Whilst she was well placed to see who was present and who was kicking Mr Toolan it is clear that the scene was a chaotic one, and also her evidence is not consistent with the evidence of other witnesses. I also note that her evidence in cross-examination (as quoted above) left open the possibility of either a failure to remember, or a failure to see any kick by Mr McKay (as appears from the questions and answers quoted at paragraph 49 above). Importantly her recollection in relation to the lack of presence of Mr McKay is inconsistent with the evidence of both Mr Toolan (as to Mr McKay being one of the three men running over), and Ryan Watson whose evidence was that he saw Mr McKay, Mr Stephenson and Mr Turner surrounding Mr Toolan whilst he was on the ground, that they were "quite angry" and that they were "threatening George" (Transcript 13 April page 45A-B and H) (albeit the only words he heard were those uttered by Mr Turner). In relation to the criticisms that Mr Teate was able to make about the evidence of Mr Toolan and Mr Watson, the assessment of that evidence, and what the Learned Judge made of the similar criticisms made by Mr Teate before her, was classically a matter for the Senior Magistrate as the fact finding tribunal.

63. The Senior Magistrate was alive to the evidence in relation to the presence of Mr McKay – she addresses this expressly at paragraph 45 of her Written Judgment noting (as was the case) that there was conflicting evidence as to the order in which Mr Turner, Mr Stephenson and McKay reached Mr Toolan. In this regard at paragraph 50 the Senior Magistrate stated, "I also accept the evidence given by Mr Watson that Mr McKay was actually egging Mr Toolan and on and trying to get him to fight back". This accurately reflects the evidence that was given by Mr Watson (as already quoted above) and was a finding that the Senior Magistrate was entitled to make. She had heard the evidence of Mr Watson and the other

witnesses and she was best placed to decide what evidence to accept in relation to what was clearly a chaotic situation.

64. The Grounds of Appeal refer to the evidence of Mr Clifton (at page 91 of the 13 April transcript), but it is clear from a consideration of pages 91 to 93 of the transcript that whilst he was initially with Mr McKay, he saw Mr McKay running towards Mr Toolan (p. 92E-F), and that Mr McKay got right up to Mr Toolan (p. 93E) though Mr Clifton did not see Mr McKay doing anything (p.93E), Mr Clifton accepting that "for the distance where you were you couldn't actually see what was going on there" (to which he answered "no" – p. 93B). In such circumstances I do not consider that his evidence takes matters a great deal further, albeit that the Senior Magistrate does address his evidence at paragraph 44 of the Written Judgment. The Appellant also relies upon the evidence of Hannah Collier (at page 25B of the 14 April transcript) who, when cross-examined, answered "no" to the question, "And you did not see Bono McKay do anything after people came round the side of the Trough." However she did not witness the third incident, and she was vague in her recollection as to the movements of Mr McKay as evidenced by her answers to the following questions (p.25B-C):

"Q. If I was to suggest to you that Bono McKay did not go round the side of The Trough, but was with Melvyn Clifton, does that assist you in your recollection?
A. No.
Q. No. You just simply cannot say?
A. No."

Her recollection was better as to the movements of Mr Stephenson, and the Senior Magistrate accepted her evidence in that regard (Written Judgment para 48).

65. In addition to her finding that Mr McKay did kick Mr Toolan, the Senior Magistrate also found in relation to incident 3 that Mr Turner had become involved in a joint enterprise with Mr Stephenson and Mr McKay to force Mr Toolan, if necessary by violent means, to leave the area (Written Judgment paragraph 47). In that context she accepted Miss Burucua's evidence that Mr Turner and Mr Stephenson used their feet on Mr Toolan (Written Judgment para 51), and Mr Watson's evidence that Mr McKay was actually egging Mr Toolan on

and trying to get him to fight back (Written Judgment para 50). At paragraph 54 the Senior Magistrate set out her conclusions as to joint enterprise:

"I have not heard any evidence of any actions by any of the defendants to indicate that any one of them tried to withdraw or disassociate from the hostile activity shown by the others to Mr Toolan. They had all been involved in one way or another in Incident Two, a few minutes ago and the evidence shows that they were still sticking together in their shared hostile attitude to Mr Toolan and were willing to use violence against him. I find as a fact that they acted together with the common design or purpose of assaulting Mr Toolan. They were all involved in a joint enterprise in Incident Three when he was seriously assaulted. As parties to a joint enterprise they all have to take responsibility with and for the others taking part in that joint enterprise. There is ample evidence in the accounts of the witnesses to Incident Three, Dr Edwards' report and the photographs to satisfy me beyond any doubt that Mr Toolan suffered physical injuries as a result of Incident Three."

66. It is not suggested that the Senior Magistrate misdirected herself in relation to the law as to joint enterprise (which she addressed at paragraphs 13 to 15 of her Written Judgment). The Senior Magistrate was the tribunal of fact as to whether there was, on the facts, a joint enterprise. I consider that she was entitled to express the conclusions she did in that regard having regard to her findings as to the evidence as a whole including, in particular, her acceptance of the evidence of Mr Watson in relation to Mr McKay's involvement, as quoted at paragraph 46above.

67. In such circumstances, and having regard to the evidence as a whole in relation to incident three (including all the evidence on which the Appellant places reliance), I am not left with a lurking doubt as to whether an injustice has been done, and my analysis of the evidence does not lead me to the conclusion, still less an inexorable conclusion, that the conviction is unsafe. I consider that the Senior Magistrate was entitled to make the findings of fact she did, and find Mr McKay guilty on charge 3. Accordingly, I dismiss Mr McKay's appeal in relation to charge 3.

68. I will now turn to Grounds of Appeal 3, 4 and 5 which all concern incident 1. The three grounds are:

(3) The Honourable Court has misinterpreted the Appellant's interview and used it incorrectly as evidence of his guilt in respect of incident 1.

(4) The Honourable Court has placed insufficient weight on the aggressive behaviour of Mr Toolan when rejected the defence of self-defence.

(5) The learned Judge has erred in not recognising the Appellant had raised the defence of self-defence in interview.

69. In relation to Charge 1 the issues that arose were whether Mr McKay hit Mr Toolan, and if he did so whether in doing so he was acting in lawful self-defence.

70. As to the former Mr Toolan was clear in his evidence that Mr McKay hit him, and the Senior Magistrate was entitled to accept that evidence (as she did at paragraph 30 of the Written Judgment on the basis of Mr Toolan's evidence as summarized at paragraph 28 of the Written Judgment). Mr Toolan's evidence was also consistent with the evidence of Mr Watson that he could see across the carpark through the Land Rover window where Mr McKay and Mr Toolan had gone, and that he saw Mr McKay was punching someone or something. It was also the belief of Mr Turner that Mr McKay had hit Mr Toolan, not because he had seen it but because he heard that from Mr McKay himself. I am satisfied, on the evidence as a whole, that the Senior Magistrate was entitled to find as a fact that Mr McKay struck Mr Toolan.

71. The next issue was whether Mr McKay was acting in lawful self-defence when he struck Mr Toolan. A person is entitled to use reasonable force to defend himself from an attack or anticipated attack. The questions that arose on the latter were (1) did Mr McKay honestly believe it was necessary to defend himself against an attack or anticipated attack? If the Senior Magistrate was satisfied so that she was sure that Mr McKay did not honestly believe that, then self-defence did not arise. However if she thought that Mr McKay did or may have so believed then the next question (2) was whether the force used was reasonable in all the circumstances, and particularly the nature of the attack? If she was sure that the amount of force used was not reasonable then self-defence was not available to Mr McKay and he was guilty of the offence.

72. The Senior Magistrate did consider the issue of self-defence, as she was required to do whether or not Mr McKay raised a defence of self-defence, and concluded (in both her Oral Reasons and Written Judgment) that Mr McKay was the aggressor at the moment of the punches (that she found Mr McKay struck). However even if Mr McKay had not been the aggressor and had honestly believed it was necessary to defend himself, the Senior Magistrate found that Mr McKay punched beyond what was reasonable force (see page 10A of the Oral Reasons and para 30 pf the Written Judgment). Whether force used was reasonable in all the circumstances was pre-eminently a matter for the tribunal of fact. Based on that finding of fact, self-defence did not arise. I have seen no error of law in the Senior Magistrate's approach to the issue of self-defence, and her findings of fact in that regard (as to the striking of a punch and as to the use of excessive force) are ones that she was entitled to make on the evidence before her.

73. The Senior Magistrate's conclusions in respect of incident 1 are set out at paragraph 30 of the Written Judgment (and see page 9G to 10C of the Oral Reasons):

> "On the evidence, not only am I satisfied that Mr McKay was the aggressor in Incident One but I am also satisfied that he punched Mr Toolan, going beyond using reasonable force against Mr Toolan even if Mr Toolan went to "grab" him, as Mr McKay alleges, but which I doubt. Mr McKay was at liberty to turn and walk away if Mr Toolan had shown any kind of adverse reaction to being confronted by Mr McKay. I accept Mr Toolan's evidence that he was struck twice by Mr McKay and have noted the corroboration provided by Mr Watson's evidence and Mr Turner's evidence as to what Mr McKay said he had done. I find the prosecution has proved its case and I reject the self-defence raise. In relation to Incident One I, therefore, convict Mr McKay for striking two blows, which I find as a fact were punches to Mr Toolan's head."

74. The findings of fact in relation to Mr McKay striking Mr Toolan and using force beyond reasonable force were justified on the evidence, and justify the finding of guilt. As appears below I do not consider any of the points made in grounds 3 to 5 give rise to a "lurking doubt" or call into question the safety of the conviction. I will, however, address each of them in turn.

75. Ground 3 is that the Senior Magistrate is alleged to have misinterpreted what the Appellant stated in interview, and wrongly thought an admission made by Mr McKay that he hit Mr Toolan was made in respect of incident 1 rather than incident 2 (see page 7C to 8A and 10B of the Oral Reasons). The same point is not made in the Written Judgment. What Mr McKay said in his interview the same day as the incident (when he was unrepresented) was as follows:

> "AND START FROM THE BEGINNING, OBVIOUSLY GEORGE TOOLAN WAS SEEING LAURA MINTO AGES AGO, LAUREN AND LAURA, I DON'T KNOW WHAT HAPPENED. I DIDN'T EVEN SEE ALL THIS BUT HE PUT ON FACEBOOK THAT MY SISTER SHOULD BE SHOT IN THE HEAD, WEVE GOT COPIES OF ALL OF THIS, OBVIOUSLY BEING HER BIG BROTHER I DIDN'T TAKE THIS VERY WELL, AND I HAVENT REALLY SEEN HIM SINCE, I THINK HE KNOWS THAT I WAS READY TO HAVE WORDS WITH HIM AND I HAVENT SEN HIM IN THE PUBS SO I SEEN HIM LAST NIGHT. I WENT UP AND CONFRONTED HIM I WONT TELL YOU EXACTLY WHAT I SAID THERE WAS A LOT OF SWEAR WORDS ASKED HIM WHAT HE WAS THINKING AND HE SAID HE KNEW HE WAS [STUPID] AND ALL THIS AND HE WENT TO GRAB ME AND I WAS ALREADY WOUND UP AND I SAID NO DON'T DO THAT AND I PUSHED HIM . I WARNED HIM, I SAID ITS BETTER IF YOU JUST LEAVE COS ITS ALL WOUND ME UP AND I SAID GO HOME LEAVE ME ALONE, <u>I WENT BACK INSIDE COME BACK OUTSIDE HE PROVOKED ME SO I HIT HIM TWICE</u>."
>
> (underlining added)

76. It does seem likely that the words underlined relate to incident 2 and to that extent it appears that the Senior Magistrate may potentially have been mistaken in this regard in her Oral Reasons (if by the reference to the "admitted punches" she is referring to the interview rather than the admissions made by Mr McKay back in the Trough to others). However, I do not consider any such mistake affects the factual finding that Mr McKay did hit Mr Toolan in relation to incident 1 given the other evidence that existed which itself justified that conclusion (as addressed above), nor does it affect the safety of the conviction for the very same reason.

77. It is convenient to address ground 5, that the Senior Magistrate erred in not recognising that Mr McKay raised the issue of self-defence in interview (see paragraph 27 of the Written Judgment, "I have noted that Mr McKay said nothing in his interview about acting in self defence"). The words in interview were: "he said he knew he was [stupid] and all this and he went to grab me and I was already

wound up and I said no don't do that and I pushed him". It is correct, as Mr Teate pointed out to me, that Mr McKay was unrepresented, and so did not have the benefit of legal advice (when considering the words he used). However, ultimately, it was a matter for the Senior Magistrate to interpret what was meant by what Mr McKay said – it could be an assertion of self-defence, but given that Mr Toolan was saying he was stupid (effectively apologising) even if he went to grab Mr McKay, Mr McKay's response of pushing him could be seen as an act of retaliation or unreasonable force (as indeed the Senior Magistrate found). In any event I do not consider that this point takes the Appellant anywhere. The Senior Magistrate clearly did consider the potential defence of self-defence, and rejected it on the facts, as addressed above, as she was entitled to do. The alleged assault itself related, of course, to two punches, not any pushing by Mr McKay.

78. Ground 4 is that it is alleged that the Senior Magistrate placed insufficient weight on the allegedly aggressive behaviour of Mr Toolan when rejecting the defence of self-defence. I have considered the matters raised on behalf of Mr McKay at pages 8 and 9 of the Grounds of Appeal with care, and re-read all the evidence that is referred to. The difficulty for Mr McKay is that there is no evidence from any witness, who was a bystander (leaving aside Mr McKay's evidence in interview that Mr Toolan went to grab him), to suggest that Mr Toolan was aggressive **at the time of the incident**. Indeed there was evidence to the contrary, and also that Mr McKay was the aggressor at the time of the incident. For example, Mr Turner described Mr Toolan as saying "I'm sorry, I'm really sorry" to Mr McKay when they were by the Land Rover and Mr Turner did not describe Mr Toolan as aggressive or threatening to Mr McKay. Equally Mr Watson recounted seeing Mr McKay with Mr Toolan by the Land Rover and described Mr McKay's behaviour as aggressive and confrontational, and he did not think any aggressive action had been taken by Mr Toolan. There is also Mr Toolan's evidence which is consistent with such accounts (even bearing in mind Mr Teate's criticism of the evidence of Mr Toolan). I consider that the Senior Magistrate was entitled to make the findings she did at page 9G to 10B of the Oral Reasons and paragraphs 29 and 30 of the Written Judgment that Mr McKay was the aggressor and that Mr McKay punched beyond what was reasonable force in any event. This latter finding is fatal to any defence of self-defence, and is one that I consider the

Senior Magistrate was entitled to make on the evidence even if (contrary to her findings) Mr Toolan had been acting in an aggressive manner.

79. In all the circumstances I do not consider that the conviction in respect of Charge 1 is unsafe – the Senior Magistrate was entitled to find that Mr McKay struck Mr Toolan and to reject the defence of lawful self-defence. There is no "lurking doubt" as to the safety of that conviction on an analysis of all the evidence and the matters raised by the Appellant. I dismiss the appeal in relation to Charge 1.

(6) With regard incident 2 the Learned Judge has erred in using the interview of Dylan Stephenson as evidence of a joint enterprise taking place.

80. The Appellant pleaded guilty to Charge 2. Accordingly, the fact finding exercise in relation to Charge 2 was effectively a Newton hearing. Any findings that were made, and are challenged, cannot go to the safety of the conviction, but at most would be relevant to sentence, although I doubt whether the finding of joint enterprise added materially to the gravamen of the offending behaviour namely the striking of two punches to the head by Mr McKay himself.

81. The Senior Magistrate found (as Mr McKay admitted) that he punched Mr Toolan twice. There was evidence that corroborated that (including the evidence of Mr Clifton and Mr Toolan himself). The Senior Magistrate rejected the Crown assertion that Mr McKay had kicked Mr Toolan (Written Judgment para 40), consistent with the basis of plea but found that a joint enterprise (with Mr Stephenson) had developed by this point.

82. At paragraph 41 of the Written Judgment the Senior Magistrate made the following finding:

> "I am satisfied that a joint enterprise had developed by this point. Mr Stephenson had waded in when he saw that Mr McKay was fighting with Mr Toolan. I am certain that he chose to involve himself with Mr McKay's assault on Mr Toolan and he, too, became a perpetrator of violence on Mr Toolan. I am satisfied that he became fully involved in the assault and when it comes to the matter of joint enterprise in respect of Incident Two, I am satisfied that Mr Stephenson had a joint intent with Mr McKay to assault Mr Toolan by beating him."

83. It is said in the Grounds of Appeal that Mr Stephenson appears to have been placed in the joint enterprise to a great extent because of his interview. There is certainly material in that interview which supports the finding of joint enterprise. However even if one puts that interview to one side, there is not only the fact of Mr Stephenson's conviction (which has not been appealed) which would support two individuals being involved in a joint enterprise, but also the evidence of Miss Burucua and Mrs King that incident number two involved a number of individuals, which was also consistent with the evidence of Jake Buckett (10 April page 50). If and to the extent that the same is of any relevance on this appeal, I do not consider that the Senior Magistrate erred in her findings in relation to joint enterprise and Charge 2, and consider that the findings she made were ones that were open to her.

84. In the above circumstances the appeal against conviction in relation to Charges 1 and 3 is dismissed. If any appeals against sentence are pursued in relation to any of the Charges, I will hear submissions on that following the handing down of this judgment.

Simon Bryan QC
Chief Justice
13 January 2016