

**Judgment Number : S3549**

**PARTIES**

GRANT ALAN HUDSON (APPELLANT)  
v  
DEBRA JANE OWEN (RESPONDENT)

**TITLE OF COURT : SUPREME COURT OF SOUTH AUSTRALIA**  
**JURISDICTION : JUSTICES APPEALS**  
**ON APPEAL FROM : MR R D BROWN SM, SITTING AS A COURT OF  
SUMMARY JURISDICTION AT MOUNT BARKER**  
**FILE NO/S : SCGRG-92-1401**  
**DELIVERED : ADELAIDE  
30-JUL-92**  
**HEARING DATE/S : 17-JUL-92**

**JUDGMENT OF THE HONOURABLE JUSTICE OLSSON**

**CATCHWORDS**

CRIMINAL LAW AND PROCEDURE --- GENERAL PRINCIPLES ---  
CRIMINAL LIABILITY AND CAPACITY

Appellant pleaded not guilty to two counts of assault -  
magistrate found appellant guilty on one count on  
grounds he had used excessive self-defence - concept of  
defence of self-defence - whether magistrate adopted the  
correct approach - whether appellant genuinely believed  
on reasonable grounds that his actions were necessary in  
self defence - onus on prosecution to prove actions were  
not in self-defence - whether onus discharged - appeal  
allowed and finding of guilt set aside.

ZECEVIC V DPP (1987) 162 CLR 645; PALMER V THE QUEEN  
[1971] AC 814 and MORGAN V COLMAN (1981) 27 SASR 334,  
applied.

R V FALLA [1964] VR 78, discussed.

**REPRESENTATION**

**APPELLANT GRANT ALAN HUDSON**

Counsel : MR P CUTHERTSON  
Solicitors : DOUGLAS WARDLE

**RESPONDENT DEBRA JANE OWEN**

Counsel : MS M GUY  
Solicitors : CROWN SOLICITOR

**Judgment Category : A**

**Number of Pages : 8**

HUDSON v OWEN

Justices Appeal

Olsson J

This is an appeal against a finding, by a stipendiary magistrate, that the appellant had been guilty of an offence of common assault. It was the outcome of two separate charges alleging that, on 6 December 1991 at Strathalbyn, the appellant assaulted one Keith Handley.

After a trial on oral evidence the learned magistrate dismissed the first charge, but found the second proved, on the footing that, in the relevant circumstances, the appellant had employed excessive force in what was otherwise a self defence situation. Without proceeding to record a conviction, the learned magistrate released the appellant upon him entering into a bond in the sum of \$100 to be of good behaviour for a period of 4 months.

The appellant complains that, having rejected Handley, and a witness called to support him, as credible witnesses, and having essentially accepted the version of fact deposed to by the appellant, the ultimate conclusion of the learned magistrate was unsafe and unsatisfactory.

The charges brought against the appellant arose from incidents said to have occurred at the Victoria Hotel in Strathalbyn on the date in question.

It was Handley's evidence that, at about 10.30 pm on that evening, he was in the male toilet of the hotel. He heard the door slam behind him whilst he was at the urinal. A voice then said "What the fuck is going on?" When he turned around toward the voice he observed the presence of the appellant, who was known to him. The latter thereupon hit him in the head several times with his closed fist, without further ado.

Handley asserted that this stunned him to some extent, but he grabbed the appellant by the shirt and pushed him against the wall saying "What's going on here? What's this all about?" He deposed that the appellant responded "Don't interfere between me and Julie, keep pissing her off. I'm going to marry her" and then grabbed the back of his hair and punched him several more times, this time in the face, also with a clenched fist. He told the learned magistrate that the person Julie was his ex-girlfriend.

According to Handley the punches sustained caused him to bleed from the eye, the top of the nose and the mouth. He also claimed that earrings had been pulled out of one or more of his ears.

On Handley's version he eventually said to the appellant "That's enough. You've had your fun. Just leave it at that". The appellant thereupon let go of him and walked out, after which Handley cleaned himself up. The appellant was said not to have sustained any injuries.

Handley then proceeded to narrate how, a short time later, he walked past the appellant, who was then standing with a group of friends in an area between the front and lounge bars of the hotel. He said to the appellant "You're going to go a row, you arsehole", to which the latter replied "Let's finish it here and now" and lunged at Handley.

It was Handley's evidence that the appellant thereafter grabbed him by the throat with one hand and dug his fingers in, thereby grazing his neck and leaving scars. He further alleged that, during a resultant melee, when other hotel patrons endeavoured to separate the two parties, the appellant bit him between the thumb and forefinger of one hand. Handley then left with his girlfriend.

Handley contended that, prior to the incident in the toilet, he had not spoken to the appellant that evening, although he was aware of his presence at the hotel. He conceded, however, that, earlier in the day, he had been speaking to the person Julie on the telephone and had had an argument with her.

On the prosecution case no further blows were struck between the two parties that evening, although a verbal altercation did take place between them in front of the hotel when, some 15 or 20 minutes after the second alleged physical encounter, Handley went to leave the hotel.

In response to a question posed by the learned magistrate, the prosecutor intimated that count 1 focused on the incident in the toilet, whilst count 2 was based on the incident when Handley was allegedly seized by the neck and, at some point, bitten on his hand.

The appellant gave evidence on oath in which he denied that any scuffle took place, or blows were struck, in the toilet, although he agreed that there had been some verbal exchanges concerning what the appellant perceived as Handley's harassment of the person Julie.

The appellant further deposed that, after he had returned to the bar area and resumed drinking, he observed Handley coming towards him holding a pool cue, with the thick end forward, saying something to the effect that he (Handley) was going to "get" the appellant. At that point Handley was

restrained by others present, who took the cue from him, after which he returned to the pool room.

On the appellant's version Handley re-emerged from that room shortly thereafter, approached the former and knocked the beer out of his hand. The appellant thereupon seized him by the throat and held him against the stairwell to restrain him. A scuffle then ensued, as a result of which the appellant ended up on the floor on his back. Other persons intervened and Handley then retired to the pool room.

A good deal of cross-examination took place as to what was the state of the appellant's mind when he seized the appellant by the throat. The true inferences to be drawn from the evidence bearing on this topic (some of which was rather equivocal in its expression) critically depended on his demeanour as a witness and the nuances to be derived from his manner of giving evidence. It is important that, at one point, he said "Well, he was going to try and get me with the pool cue so I didn't know what he was going to do next".

The prosecution called limited evidence from Handley's female companion that evening. She deposed that, on his return from the toilet that evening, Handley had evidence of blood on him, a cut across his nose and other marks; and that he had lost his ear rings.

Significantly the prosecution made no attempt to call any other persons present at the hotel that evening.

Both Handley and his female companion were subjected to searching cross-examinations. In the course of reasons for decision given by him the learned magistrate said that he was not prepared to accept Handley as a credible and reliable witness. He commented:-

*"He ... [Mr Wardle of counsel for the appellant] ... submits that significantly Handley has been discredited. I agree with that. I questioned Handley about two aspects of his evidence. There were clear inconsistencies. Giving him an opportunity to resolve those conflicts Handley was unable to do so."*

He went on to make the point *"It is clear that the defendant has not been discredited."*

The learned magistrate concluded that:-

*"On the state of the evidence I am not able to be satisfied beyond reasonable doubt that the evidence of Handley is correct"*

as to what transpired in the hotel toilet. He thereupon dismissed the first count.

His process of reasoning, in relation to the second count, is, with respect, not entirely easy to follow. As to this he said:-

*"For similar reasons I take a similar view on the second count. I would believe that the probabilities are that Handley was in a most aggressive mood prior to the confrontation with the Defendant at the bar. Handley's evidence concedes that, and I accept that it was necessary for Handley to be restrained. I accept that he lay down the billiard cue as a result of advice and persuasion from friends. I find the probabilities are that Handley did knock the defendant's drink. That is the defendant's version, and I think that is a very plausible scenario. I am not able to make a positive finding. On the defendant's admission, he says that following that, he immediately reacted and restrained Handley by the neck against a wall.*

*For the reasons I have indicated I am not able to be satisfied that Handley's version of that second incident is an accurate one.*

*On that basis I find that that second charge is not proved.*

*What has concerned me is the apparent admission by Hudson that he had restrained Handley in the way that I've mentioned. Mr Wardle submits that on the defendant's evidence there would be room for a finding of reasonableness. He says that Mr Hudson would have had every justification for fearing that Handley was likely to attack him, because of the general mood and his observations in relation to the billiard cue.*

*Mr Wardle submits that the defendant's actions in restraining Handley are not unreasonable.*

*I have considered that at great length. I do not accept that submission. I view that evidence as an admission by Hudson that he did use excessive force toward Handley in restraining him. I think at that time there were other options open to the defendant and I think that to restrain Handley in the way admitted to be excessive in the circumstances. So whilst I am not able to be satisfied of the charge as laid by the prosecutor I am faced with a situation where I have an admission by the defendant of an assault against Handley. I would therefore find the defendant guilty of assault on the basis that he used excessive force in restraining Handley in the bar of the Victoria Hotel. As a result of that restraint I find that Handley suffered scratching to his neck."*

Read literally, there seems to be an internal inconsistency in his reasoning. On the one hand he found the second charge not proved, but on the other held that it had been proved. This is, I think, explicable by construing his reasons as indicating that he did not find the second count proven on the basis of Handley's evidence or that the appellant bit his hand as alleged, but that the accused's own evidence indicated the use of

excessive force in what was accepted by the learned magistrate to be a self defence situation.

But, even accepting that interpretation of the reasons, there remain substantial problems.

The law related to self defence applicable to the charges against the appellant was that which antedated the recent amendment to section 15 of the Criminal Law Consolidation Act 1935 (SA). That amendment came into force on 12 December 1991. The test to be applied was, accordingly, as enunciated by the High Court in *Zecevic v DPP* (1987) 162 CLR 645.

The relevant principle to be applied by the learned magistrate was that a person who is attacked, or who reasonably fears an attack, may use force to defend himself. In defending himself he may do (but may only do) what, at the time of his action, he believed, on reasonable grounds, it was necessary for that purpose, having regard to all the circumstances as they appeared to him.

In applying that test it was necessary to remember that a person threatened with what appears to be an imminent attack (as must have been considered by the learned magistrate to be the case) is not necessarily obliged to wait until the attack actually matures. However, to justify the application of force the likely aggression must have been immediately imminent and the pre-empting action appropriate in nature to the apparent threat, as the person in question perceived it to be at the time. Moreover, the law recognised that, as a matter of common sense, a person cannot be expected to weigh to a nicety the exact measure of necessary defensive action in the heat of the moment, when in a situation of imminent attack. If, at the moment, he did what he genuinely and instinctively believed to be necessary, judged from his point of view, that would constitute cogent evidence of an acting in self defence (*Zecevic v DPP* (supra) p653, *Palmer v The Queen* [1971] AC 814 at 832, and *Morgan v Colman* (1981) 27 SASR 334 at 337).

Of critical importance in the instant case was that it must also have been borne firmly in mind that, where there is evidence in a case suggesting that an accused person may have been acting in reasonable self defence of himself, the onus remains fairly and squarely on the prosecution to prove beyond reasonable doubt that the accused person was not acting in self defence.

What the learned magistrate was specifically required to consider was the actual appellant in this matter, with his particular make up and personality - and, amongst other things, taking into account the amount of any alcohol which he may have consumed - and what he might genuinely have believed at the time in relation to any danger or threat which he faced, given all of the circumstances in which he found himself. The law was that, if it remained a reasonable possibility, given his actual condition and situation, that the appellant genuinely believed, on reasonable grounds, that he did no more than was necessary to defend himself, then he was entitled to an acquittal.

As the law stood at the relevant time, once it was considered that a self defence situation arose, and that it remained a reasonable possibility that the appellant had believed, on reasonable grounds, that he did no more than was necessary in his self defence, then it was not simply a question of whether, viewed objectively, his response at the time was, to some degree, disproportionate to the gravity of the threat with which he was confronted.

If, in fact, the response was markedly disproportionate to the threat, then that might be powerful evidence of the non-existence of the necessary genuine belief. Be that as it may, at the very least, if proportionality was in issue, it was incumbent on the prosecution to prove beyond reasonable doubt that, in the circumstances, the appellant could not genuinely have regarded what was done as being an appropriate response to the threat to be met (cf *R v Falla* [1964] VR 78. See the discussion of this type of issue in Yeo, "Proportionality in Criminal Defences" (1988) 12 Crim LJ 211 at 217-8).

It is stating the obvious to say that, in this case, there was a need to address the evidence, in the light of the foregoing principles, with great care. With all due respect to him, I am unable to divine, from the reasons expressed by the learned magistrate, the precise route by which he came to his final conclusion. I am left in the situation that he appears to have posed the incorrect question to himself.

It was not enough for him simply to make an objective assessment that the appellant used excessive force. Even if he felt that the appellant had done so, this, on the reasoning of the High Court in *Zecevic*, was no more than an evidentiary aspect. The real issue to be determined was, given the

situation in which the appellant found himself, did he genuinely believe, on reasonable grounds, that he did no more than was necessary to meet the impending threat with which he was confronted. In such a connection due regard had to be given, in relation to any belief formed, to the learned magistrate's earlier finding that the appellant had consumed a significant quantity of alcohol and "*must have been affected to some extent by that alcohol*". (See, for example, the basis of reasoning in *Herold v Saunders* (1992) 12 ACLR 23.)

It seems to me that the learned magistrate did not ever approach his task from that point of view. He seems to have assumed that, once it be accepted that, as an objective fact, force used was excessive, then, *ipso facto*, no question of self defence remained. In my opinion he fell into error in so doing.

At the end of the day, and on his own findings as to relative credibility, I have enormous difficulty in perceiving how it could ever be said that the prosecution had discharged the onus of proof which it bore in relation to the second count. It clearly remained a reasonable possibility that the appellant met the *Zecevic* self defence test. His actions were in no sense so extreme - bearing in mind the earlier history of aggression on the part of Handley - that, as a matter of evidence, they clearly negated the existence of a genuine belief based on reasonable grounds.

In so concluding I by no means ignore Ms Guy's contentions that there are excerpts of the transcript which, if taken literally, could support a conclusion that the appellant was not of the belief that he was confronted with any significant threat at the relevant time. However, such an analysis is of very dubious validity. The real question is what was the net conclusion came to by the finder of fact, given the clear issues of credibility and the atmosphere of the trial before him. If her contentions were to be accepted it would be difficult to perceive how any self defence situation could sensibly have been established. Those contentions merely exemplify the grave difficulties of reviewing disputed evidence in an appellate environment on the mere printed transcript. They also tend to ignore the fundamental commencement point - that the learned magistrate was positively satisfied that a self defence situation actually arose.

At the very least the finding of guilt in this matter is unsafe and unsatisfactory, although I am of the positive opinion that the only



reasonable inference on the evidence, as obviously accepted by the learned magistrate, was that the actions of the appellant fell fairly and squarely within the *Zecevic* principle. The prosecution simply did not negative the reasonable possibility of self defence.

The finding of guilt as to the second count cannot stand. I allow the appeal and set aside that finding and the orders based upon it.