

23 May 2024. Andrew Jones, the defendant, has been found guilty by a jury of one count of committing an unlawful act intended to cause bodily harm. The particulars of the crime are that at Glenorchy, on about 14 January 2022, with intent to disfigure, maim, disable or to do grievous bodily harm to David Bond, he wounded or caused actual bodily harm to Mr Bond by striking him to the head and face with a glass bottle. Self-defence was left to the jury. The verdict simply means that the jury was satisfied that the essential ingredients of the crime had been made out. However, there were various pathways by which the verdict could have been arrived at, and unanimity was not required in that sense. Some jurors may have thought self-defence was negated beyond reasonable doubt. Some may have thought the prosecution had not established beyond reasonable doubt that the accused did not genuinely believe he needed to act in defence of himself in the circumstances as the accused believed them to have been, but were satisfied beyond reasonable doubt that the response was unreasonable in those circumstances. I need to establish the factual basis for sentencing. Primarily that needs to be consistent with the jury's verdicts but, given what I have just observed, that provides some scope. There is no requirement that a sentencing judge sentences an offender on the view of the facts most favourable to the offender; *Cheung v The Queen* [2001] HCA 67, 209 CLR 1. I need to be satisfied beyond reasonable doubt of the facts adverse to the accused. The *practical* effect of that however, is that because a court is required to resolve any reasonable doubt in favour of an accused, then it becomes obliged for that reason to sentence on a view of the facts favourable to that accused: *Cheung* at [14], [15], [165]. To sentence on a factual basis arrived at by that process does not mean the court is satisfied on the balance of probabilities of the existence of those favourable facts: *Weininger v The Queen* [2003] HCA 14, 212 CLR 629 at [25]-[26]. From the whole of the evidence I am satisfied that the accused was walking downhill past Ms Longey's house. A number of adults including Mr Bond were in the garage. A number of children were upstairs. The accused was very drunk, and generally abusive and aggressive. He was carrying the 700ml Jim Beam bottle and a bottle of Coke but at some early point he put them down. He engaged first with a member of Ms Longey's group. No one in that group knew him. No one called out his name. There was a verbal confrontation with Ms Longey and she told him to move on. Mr Bond then intervened. I am satisfied that the physical engagement between Mr Bond and the accused started with Mr Bond pushing him. On the evidence of Mr Bond, Mr Farrar, Ms Longey and Ms Prestage, one way or another the two ended up on the ground. Ms Longey describes the two rolling around ending up on the roadway but did not see anything after that. Ms Prestage also described the two "rolling around" on the front lawn; she left and quickly returned when the two were still fighting further down the street. I am satisfied there was holding and wrestling, and that the two rolled down the hill while so engaged, to a point on the footpath a distance away from the driveway. What happened after that is really dependent on the evidence of Mr Bond and Mr Farrar between whom there are some differences. But also to be taken into account is Mr Armstrong's evidence as to what he told police that night, and what Mr Bond told ambulance personnel and the examining doctor. I am satisfied that Mr Bond and the accused ended up close to where the accused had left the Jim Beam bottle. He was not carrying it during the scuffle, so neither was "armed" if I can use that expression. The precise position of the two men at the time the accused grabbed the bottle is not at all clear. Mr Bond said that he was trying to get up when felt the blow to the back of his head, when the accused was "sort of" on top of him. Mr Farrar said that the two fell over got up starting punching each other, fell over again with Mr Bond "sort of" landing on top of the accused. In all of that, I am satisfied that after the two had rolled for a distance while grappling, they were engaged in grabbing or holding each other immediately before the bottle was used.

Neither was in a fully standing position at that time. As counsel for the State submitted, it is really not necessary to go beyond that beyond that. On the whole of the evidence I am satisfied that there were two blows with the bottle; the first when it was intact, the second immediately after it was broken. The first involved hitting Mr Bond on the head, the second being the stabbing motion to the face. I note that strikes to both the head and face are in the particulars of the charge, but on the evidence, and the way in which the trial was conducted, the focus must be on the second.

As to self-defence, when the accused was apprehended by police very shortly afterwards he complained of being attacked and hit to the head. A police officer noted a cut above the accused's right eye and grazing to the knees. He was later found to have a small fracture to the back of his skull, an abrasion behind the right ear and tenderness in the neck. In assessing whether a person genuinely believed they needed to act in self-defence in the circumstances as they perceive them to be, intoxication is relevant to an assessment of the perceptions of that person. Clearly, the accused was significantly affected by alcohol. I am not able to exclude the reasonable possibility that the accused's injuries were caused during the process of the two falling over, scuffling together and rolling down the road. I am not able to exclude the reasonable possibility that at the point the bottle was first used, the accused genuinely believed he needed to defend himself.

The more difficult question is whether I can be satisfied beyond reasonable doubt that stabbing Mr Bond in the face occurred when the accused was *not* then still of the belief he needed to defend himself in the circumstances as he perceived them to be. The nature of the blow needs to be considered. All of the relevant evidence shows that the two blows came in very quick succession. Mr Bond had hold of the accused just before the first blow was struck. It may well be that the two then disengaged to a minor extent but as I have said, the evidence shows that neither man had regained their feet. The law recognises that a person defending themselves cannot weigh to a nicety the exact measure of defensive action. The circumstances which entitle a person to act in self-defence are not conducive to the making of a cool, considered assessment of the amount of force which is appropriate. In short, action or behaviour often precedes full cognition. I cannot be satisfied beyond reasonable doubt that at the time of the use of the broken bottle the accused, in his drunken state, was not then still acting in the belief that he needed to defend himself. I repeat that this does not mean I am satisfied of that fact on the balance of probabilities. On that basis it would be difficult to make a finding other than the specific intention required for the crime to be made out was an intention to disable. That leaves the issue of an unreasonable level of force. The first blow with the bottle is relevant in assessing the response. Consistent with one pathway open to the jury, I am satisfied beyond reasonable doubt that the stabbing to the face was an unreasonable amount of force. In fact, I take the view it was a grossly disproportionate and dangerous response involving a high degree of culpability, even in the circumstances as the accused perceived them to be.

22 August 2024. On 23 May 2024 I set out the background and my findings of fact. I now proceed to sentence. I have a victim impact statement from Mr Bond. He describes going into shock immediately after the incident, with a lot of blood oozing from his face. He felt nauseous and dizzy. When first at the hospital he had a lot of glass removed from his face which was a painful exercise. He required surgery and stitches in his mouth as well as on his cheek. He has a large scar on his left cheek of which he is quite conscious. He is weary of having to explain its origin. The whole left side of his cheek is numb both on the inside and outside and movement of his cheek is restricted. He feels he was quite a social person before the incident but now

avoids crowds and only goes to a limited number of events and only to do with his children's activities.

The defendant is now 32 years old. He has a lengthy record of offending starting in 2006. Up until 2016, the pattern of offending was fairly regular. In the main, it involved dishonesty, drug offending, driving and anti-authority type offences. Offences of aggravated burglary and stealing are prominent throughout the record. On my reading he has four convictions for assault, the most recent one was committed in August 2015. He was made the subject of a six week term of imprisonment wholly suspended on conditions. About 18 months later that sentence was varied by way of an extension of the period of suspension. Since late 2016 a marked improvement in behaviour is apparent from the record. Apart from five traffic infringement notices there is a breach of bail and a driving while an illicit drug is present in the system both in 2020. I have the benefit of a home detention assessment report and a detailed psychological report from Dr Grant Baker dated 6 August 2024. I am satisfied that the defendant suffered a very traumatic and disadvantaged upbringing in a seriously adverse developmental environment. His mother was chronically alcohol dependent and was unable to care for him, leading to his neglect. His father is anti-social and unable to safely care for him. He was taken into foster care at a young age but frequently absconded and fought with others. There were various traumatic experiences throughout his childhood, primarily physical violence by foster carers in addition to the parental neglect. There is a strong suggestion that one beating he received during his time in foster care gave rise to a brain injury. He was moved between placements almost weekly due to unmanageable behaviour. He eventually went to live with his father and took on a criminal lifestyle. He started using cannabis when 12 years old and has a lengthy history of polysubstance abuse. That has led to multiple attempts at rehabilitation for methamphetamine use. He has stopped using cannabis and seems to be drinking less alcohol than at the time of this offence, although the situation with other substances is unclear.

The defendant had very little formal education and he is unable to read, write and do mental arithmetic. It is unclear if he did much high school, if any. In fact, the defendant has done well to get where he is. To his great credit he has been the primary carer for his 14 year old brother for the last five years and helped to raise a sister to adulthood in recent years. He has intense pride in the facts that his sister has a job and is not a criminal, and that his younger brother attends school and is opposed to crime. Despite the defendant's limitations, he has obtained various certifications in construction and land management with the assistance of the Tasmanian Aboriginal Centre. A TAC doctor has been treating the defendant for PTSD, a major depressive disorder and anxiety. Dr Blake speaks of diagnoses of ADHD, PTSD, and depression. In Dr Blake's view, the clinical history would suggest the presence of personality disorder with prominent anti-social and borderline traits. He says the defendant's criminal history is unsurprising when one considers that he had an undiagnosed intellectual disability and a severely prejudicial childhood having been raised in a notoriously anti-social family. Testing revealed a significant intellectual impairment. Dr Blake says the defendant is a medium risk of violent offending within the next 12 months or so, and at high risk of violent reoffending in his lifetime. In Dr Grant's view, any home detention sentence is going to be very difficult for the defendant given his severe proneness to boredom impulsivity and opposition to feeling controlled. It is Dr Grant's hope that with assistance of the TAC and his report, the defendant may be able to get support under the NDIS. I note that the home detention assessment report has him as requiring medium level of intervention with a consequence, at least on an isolated view, of being unsuitable for a period of supervision but suitable for both home detention and community service. I say that because supervision is suggested as a special condition of any

home detention order. The probation office has noted the concerns about the defendant's mental health in relation to home detention but says they are lessened because the defendant is medicated for anxiety and depression.

The crime of committing an act intended to cause bodily harm is at a high level of general seriousness in the hierarchy of violent crimes. It is made up of an unlawful act with an intention to do serious harm; in this case disablement. It has been said many times that ordinarily a period in goal between three and seven years is appropriate but there are a few cases outside the ordinary class in which wholly suspended terms of imprisonment and home detention have been imposed, some coupled with community service. As I have commented, the defendant's acts were a grossly disproportionate and dangerous response involving a high degree of culpability. Stabbing a person in the face with a broken bottle is a wicked thing to do. It is very fortunate that Mr Bond was not more seriously injured; he could easily have lost an eye. That said, having regard to all of the circumstances, I do not regard this case as in the ordinary class. Although it was the defendant's general drunken aggression that led to the altercation with Mr Bond, he did not engage in the first physical and the unlawfulness of the conduct is made out by a disproportionate response when acting in self-defence. His criminal conduct was not premeditated. Further, the State does not take any issue with the contents of Dr Blake's report and accepts the background circumstances of the defendant and all of his present circumstances, and I take full account of those matters. However, the State's submission is that even accepting all of that, there should be a sentence that reflects the serious nature of the form of crime and of this crime and the factors of denunciation and general deterrence. In my view that can be achieved at the same time as adopting an individualised approach which I think is warranted in this case. The law requires a degree of leniency for someone with his background and there is also his intellectual disability and the state of his mental health. There is demonstrated rehabilitation and I think the prospects of further rehabilitation are good.

Mr Jones, I have previously set out the facts of the case and you are familiar with them. I have also now set out what I see to be the relevant features and considerations to be taken into account. I note that you spent five days in custody in relation to this matter and I take that into account. As I have said, ordinarily this crime results in a period of actual imprisonment in gaol but in your case, I am satisfied that an alternative course is appropriate, although it will still involve severe restrictions on your freedom in the form of a home detention order and community service. I take into account that home detention may be onerous for you than for someone without your disabilities. There should also be a lengthy period of supervision. You are convicted of the crime. Subject to your consent, I make a home detention order, the operational period of which is 15 months. The statutory core conditions are those contained in s 42AD(1) of the *Sentencing Act*, and they will include electronic monitoring under par (g), and accordingly subss (1)(h) and (5) apply. All conditions will be set out in writing for you. I specify the home detention premises as [address]. The first special condition of the order is that you attend Community Corrections at 75 Liverpool St Hobart by 10.00am tomorrow for induction. Further special conditions are as follows and apply to the operational period of the order:

- 1 In addition to the core conditions relating to electronic monitoring you are not to allow anyone else to tamper with, or damage or disable, the device used for the purpose of electronic monitoring.
- 2 You must not:
 - (a) take any controlled drugs or substances within the meaning of the *Misuse of Drugs Act 2001*;

- (b) any medication containing an opiate, benzodiazepine, bupropion or pseudoephedrine without such medication having been prescribed or recommended in writing by a pharmacist, and you must on request provide written evidence of such prescription or recommendation.
- 3 You must not consume alcohol and must submit to testing for alcohol use as directed by a probation officer.
- 4 You must remain at [address] at all times unless otherwise approved by a probation officer.
- 5 You must maintain in operating condition an active mobile phone service, provide the details of that to a probation officer or prescribed officer, and be accessible for phone contact at all times.

[The defendant then consented to the making of the order.] I make the home detention order in those terms. I also make a community corrections order. That will be for a period of 18 months from today. The conditions of that order as applied by law will be put in writing. Special conditions of that order are that you perform 175 hours of community service in that period and submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer. I have to order that you report to a probation officer for the purposes of that order; and so the date, time and place are the same as for the detention order.