

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : THE FULL COURT (WA)

**CITATION** : PRIOR -v- KEMP [2001] WASCA 363

**CORAM** : MURRAY J  
STEYTLER J  
TEMPLEMAN J

**HEARD** : 4 OCTOBER 2001

**DELIVERED** : 16 NOVEMBER 2001

**FILE NO/S** : SJA 1124 of 2000

**BETWEEN** : GRAEME BRUCE PRIOR  
Appellant

AND

WILLIAM JAMES GREGORY KEMP  
Respondent

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*Catchwords:*

Practice and procedure - Appeal from a single judge of the Supreme Court under s 199(3) of the *Justices Act 1902 (WA)* - Whether reasonable force was used to remove a trespasser - Whether the defence of provocation is available to the appellant - Turns on own facts

*Legislation:*

*Criminal Code 1913 (WA)*, s 254, s 313, s 246  
*Justices Act 1902 (WA)*, s 199(3)

*Result:*

Appeal dismissed

*Category:* B

**Representation:**

*Counsel:*

Appellant	:	Mr T F Percy QC & Mr A R Beech
Respondent	:	Ms C J Thatcher

*Solicitors:*

Appellant	:	Hylton Quail
Respondent	:	State Crown Solicitor

**Case(s) referred to in judgment(s):**

Glennon v The Queen (1994) 179 CLR 1  
Prior v Kemp [2001] WASCA 22

**Case(s) also cited:**

Betts v Hardcastle (2001) 23 WAR 559  
Kind v The Queen (1996) 88 A Crim R 150  
Masciantonio v The Queen (1995) 183 CLR 58  
Monaco v Arnedo Pty Ltd (1994) 13 WAR 522  
Pantorno v The Queen (1989) 166 CLR 466  
Stingel v The Queen (1990) 171 CLR 312  
Verhoeven v The Queen (1998) 101 A Crim R 24  
Zoccoli v McDarby [1999] WASCA 179

- 1     **MURRAY J:** In respect of this matter, which is an appeal by leave granted by a single Judge of this Court, Hasluck J, from his Honour's decision to dismiss an appeal brought by the present appellant against his conviction of an assault upon his estranged wife, I have had the advantage of reading in draft the reasons for decision to be published by Templeman J. I have arrived at the same view as his Honour that the appeal should be dismissed and I would endorse the approach that Templeman J has taken to the resolution of this appeal, it being the case that the appeal to this Court effectively renewed the arguments and allegations of error made in the appeal to Hasluck J from the Court of Petty Sessions.
- 2             Like Templeman J, I propose to devote no attention to the suggestion that in the case presented to the Court of Petty Sessions on the complaint which charged one count of assault there was latent duplicity. The whole incident of the application of force to Mrs Prior was treated as one assault, although on one view of it there were two assaults committed, one at least by slapping Mrs Prior and the other by dragging her forcefully from the place where she had been seated towards, if not out of, the front door. It is proper for this Court to consider the matter upon the basis that it was presented to the learned Magistrate at first instance and upon the basis that it was argued before Hasluck J.
- 3             Essentially, then, the defence was that the appellant was provoked into the initial assault by slapping Mrs Prior and he was excused from liability in respect of dragging Mrs Prior because he used no more force than was reasonably necessary to remove Mrs Prior from his home, the use of such force being lawful because at the relevant time she wrongfully remained in the house, having been repeatedly told to leave and failing to do so.
- 4             The case was made no easier to resolve on the appeal to Hasluck J and on the appeal to this Court by reason of the fact that the trial in respect of the alleged assault having been completed on 23 May 2000, the learned Magistrate having reserved her decision, gave it orally and relatively briefly on 12 July 2000. On appeal this Court and the parties would, in my respectful opinion, have been assisted by a more complete exposition of the learned Magistrate's reasons for decision. However, albeit with some difficulty, it does seem to me that the reasoning of the learned Magistrate can be sufficiently gleaned from her judgment to enable her reasoning to be understood.

5           More importantly perhaps, it can be discerned that the learned Magistrate accepted Mrs Prior as an accurate and truthful witness and where there was conflict between her and the appellant, she rejected the evidence of the appellant as an account which might cause her reasonable doubt about the guilt of the appellant. Further, as can be seen from the reasons of Templeman J, in some important respects a third version of the events emerged from the evidence of Mrs Gill, the witness who had been hiding at the rear of the house. The whole case was potentially fraught with difficulty because the incident in question was one which obviously, on any view of what occurred, was played out in an atmosphere of high emotion, anger and deep antipathy of the appellant and his wife one for the other. However, once it is clear that the learned Magistrate, at least in relation to the main features of her account, accepted as accurate the evidence given by Mrs Prior, much of that difficulty evaporated.

6           In relation to the defence of provocation under the *Criminal Code* (WA), s 246, the question was essentially whether the prosecution negated the availability of this "defence" on the basis that it established that the appellant did not initiate the assault as he said because he lost his power of self-control and acted suddenly upon the provocation Mrs Prior admittedly gave him by repeating, as she had apparently done many times before, the insult that the appellant had cheated his dying grandfather in some unspecified way.

7           In essence, the conclusion of the learned Magistrate, which Hasluck J found was open to her, was that the appellant had contrived the situation and the circumstances in which the interview with his wife was held, that he had behaved aggressively throughout, that the meeting soon deteriorated into a highly charged emotional slanging match between the two and that the assault was, in effect, the culmination of the appellant's hostility towards his wife, rather than being explained by loss of self-control as a result of her insult about his behaviour towards his grandfather. Templeman J has reviewed the evidence before the Court of Petty Sessions in some detail. I respectfully agree with his Honour that the Magistrate's finding was well open to her and involved, in truth, no error by way of diminution of the burden of proof or any reversal of onus. It follows that Hasluck J made no error in respect of this issue when he upheld the decision of the Court of Petty Sessions.

8           As to the availability of the *Criminal Code*, s 254 and the use of force in the attempt to remove Mrs Prior from the house, it seems to be abundantly clear that the learned Magistrate erred in the ground upon which she rejected this "defence". The issue here which the prosecution

had to negate beyond reasonable doubt was the appellant's contention that the force he used was lawful because he was in peaceable possession of the house, as he undoubtedly was, and he was entitled under s 254(2)(b), so far as material, "to use such force as is reasonably necessary ... to remove a person who wrongfully remains on or in the place ...".

9       As I understand her Worship's reasons, she considered that this provision could have no application because she held that Mrs Prior did not at the relevant time wrongfully remain in the house. In so concluding, her Worship appears to have overlooked that Mrs Prior's licence to be in the house created by the appellant's invitation that she should go there for the discussion that she wished to have with him, had been well and truly revoked by his repeated requests that she should leave. So much had been conceded by the prosecution. Hasluck J took the same view, but again there is no reference to the concession made by the prosecution which was, as we understand it, repeated to his Honour by counsel for the respondent.

10       But that, I agree, is not the end of the matter because Hasluck J went on to consider the question whether the defence would not be available to the appellant because he used more force than was reasonably necessary to remove his wife from the house. Having regard to the findings made by the learned Magistrate and the body of evidence which she did accept, Hasluck J concluded that although the Magistrate had not specifically found that the force used was excessive, it was inevitable that she would have done so. Immediately after he slapped his wife the appellant began to "drag her forcibly towards the door". The disparity in size between the appellant and the respondent and his no doubt much greater strength, has been remarked upon, as has the bruising which, on the evidence before her Worship, the dragging caused. As Hasluck J put it in his reasons in *Prior v Kemp* [2001] WASCA 22 at par [53]:

"I am obliged to take account of the learned Magistrate's finding on the evidence that the appellant assaulted Mrs Prior by slapping her face several times and forcibly dragging her from the kitchen to the front door, in the course of which the top of her clothing was removed. In my view, conduct of that kind cannot be characterised as the use of such force as is reasonably necessary to effect the removal. The force used was excessive."

11       Hasluck J, in so holding, in my respectful opinion, applied the appropriate test to arrive at the conclusion that despite the error of the learned Magistrate, the appeal should be dismissed on the ground that no

MURRAY J  
STEYTLER J

substantial miscarriage of justice had occurred pursuant to the *Justices Act 1902 (WA)*, s 199. In my view also the appeal should be dismissed.

12     **STEYTLER J:** I have arrived at a different conclusion from that reached by each of Murray and Templeman JJ.

13             The appellant was convicted, by a Magistrate, on a complaint of unlawful assault. He was alleged to have assaulted his estranged wife at his home on 22 August 1999. The case was curious in that the prosecution relied, in charging a single assault, both upon the fact that the appellant had slapped his wife and on the fact that he had dragged or attempted to carry her out of his house when she refused to leave it, albeit these appear to have been separate incidents. Moreover, the appellant raised separate defences in respect of each of these incidents. As to the slapping of his wife, he relied upon a defence of provocation under s 246 of the *Criminal Code* ("the Code"). He said that he lost the power of self-control when his wife accused him of having cheated his dying grandfather, and that he acted upon that insult immediately and before there was time for his passion to cool. As to the dragging or carrying of his wife, he relied upon a defence under s 254(2)(b) of the *Code*, asserting that he had done no more than use such force as was reasonably necessary to remove his estranged wife from wrongfully remaining in his home.

14             The Magistrate, in finding that the appellant had assaulted his wife by slapping her and by forcibly dragging her from the kitchen to the front door, rejected each of the defences which had been raised on his behalf. As to that of provocation, she said that she was "not satisfied that ... [the appellant] acted of a sudden when he assaulted ... [his wife], because his behaviour had been hostile and aggressive towards her from the time that the meeting began". As to the defence under s 245(2)(b) of the *Code*, she said that she was "not satisfied that ... [the appellant's wife] wrongfully remained in the ... [appellant's home] as the purpose of her visit was to discuss the children of the marriage" and this "had not been done".

15             Her Worship was, in my respectful opinion, in error in both respects, even leaving to one side what appears to have been a reversal of onus.

16             So far as the defence of provocation was concerned, the fact that the appellant's behaviour had been hostile and aggressive towards his wife from the outset does not mean that he could not have been provoked into an even more hostile and aggressive act, of a sudden and before his heightened passion had time to cool. However, the Magistrate made no finding as regards this last issue which was, of course, one of fact,

requiring findings in respect of the competing versions offered by the appellant and his wife respectively.

17        So far as the defence under s 254(2)(b) of the *Code* was concerned, it had been conceded that the appellant had revoked his wife's licence to be in his house by requiring her, on many occasions, to leave and that she should have left. That being so, it matters little whether or not she had achieved the purpose of her visit. The licence having been "well and truly revoked", as Murray J has put it, she wrongfully remained in the appellant's house.

18        The Judge below, on the appeal, considered that there was evidence which, as he put it, "tended to negate ... [the appellant's] contention that he lost control". He also said that the Magistrate "clearly accepted that the slapping did not follow immediately upon the reference to the grandfather, and was not persuaded that there was any loss of control as a result of the insult."

19        It seems to me, with respect, that his Honour was in error in this last respect. The Magistrate did not, on my reading of her reasons for decision, accept that the slapping did not follow immediately upon the reference to the grandfather. Rather, as I have said, she said that she was not satisfied that the appellant "acted of a sudden" when he assaulted his wife, because his behaviour had been hostile and aggressive towards her from the outset. I am not prepared to accept the contention, advanced on behalf of the respondent, that it was implicit in the Magistrate's finding that the slap, or slaps (the appellant said in evidence that he slapped his wife "either once or maybe twice", but she said that he slapped her three or four times), did not follow the insult to which I have referred.

20        The Judge below also held that it had been open to the Magistrate to conclude that no proper notice was given by the appellant so as to countermand his wife's licence to be in his house. In that he was, as Murray and Templeman JJ have said, in error, the concession which was made to the Magistrate in that respect having been made also before his Honour (rightly, in my respectful opinion) and not having been questioned in any way.

21        It is true that the Judge below went on to find that the conviction could anyway be upheld pursuant to s 199(1)(b) of the *Justices Act 1902*, which gives to the Court power, on the hearing of an appeal, to dismiss the appeal, notwithstanding that any point raised on the appeal might be decided in favour of the appellant, if it considers that no substantial miscarriage of justice has occurred. His Honour came to the view that the

evidence (which has been comprehensively referred to by Templeman J) was sufficient to establish beyond reasonable doubt that the appellant used excessive force. He said, in that respect, the following:

"Having slapped her [the appellant's wife], he [the appellant] grabbed her and dragged her through the house in a way that deprived her of all dignity. The presence of the Magistrate's finding that the appellant slapped ... [his wife] and dragged her through the house persuades me that the conviction can be upheld pursuant to the powers vested in me by s 199 of the Justices Act. Any issue concerning the credibility of the witnesses in regard to this aspect of the matter has essentially been resolved by the finding just mentioned. Further, and in any event, as I have already noted, there was evidence before the court that the appellant admitted to a third party he had hit his wife, and his own evidence is consistent with the Magistrate's finding ..."

22 I have earlier mentioned that it is at least doubtful whether the slapping and the dragging of the appellant's wife could be said to have constituted one incident. That being so, I do not consider that it was open to the Magistrate, or to his Honour, to have been satisfied that the slapping amounted to the use of excessive force for the purposes of s 254(2) of the *Code*. The evidence, on my reading of it, fell short of establishing that the slapping took place in the course of the forced removal of his wife, by the appellant, from his home. Rather, the evidence of each of the appellant and his wife was to the effect that it preceded the forced removal and was distinct from it.

23 Also, there was no finding, by the Magistrate, that the dragging of the appellant's wife constituted the use of excessive force. She found it unnecessary to consider that question, which raises issues of fact and degree, with the result that the answer to it might depend upon what evidence was accepted in that respect.

24 So far as this last issue is concerned, I am not persuaded that the Magistrate found that the appellant lacked credibility to the extent that she accepted, beyond reasonable doubt, the account of his wife or (to the extent to which it was material) that of Mrs Gill, wherever that evidence conflicted with that of the appellant. If it was her intention to make a finding of that kind, then this does not, in my respectful opinion, sufficiently appear from her reasons. It is, perhaps, noteworthy, in this respect, that, notwithstanding that the appellant's wife said, in the course



of her evidence, that the appellant had kicked her, the Magistrate made no finding in that regard and appears to have placed no reliance upon that evidence in concluding that the appellant had assaulted his wife.

25 In all of these circumstances, it seems to me that the Magistrate's decision should not have been allowed to stand and that a retrial should have been ordered. It follows that the Judge below was, in my respectful opinion, in error in not finding accordingly.

26 I would consequently have allowed the appeal, set aside the finding of the Judge below and of the Magistrate and ordered a retrial.

27 **TEMPLEMAN J:** -The appellant was convicted by a Stipendiary Magistrate in the Court of Petty Sessions on a complaint of unlawful assault contrary to s 313 of the *Criminal Code*. Having appealed unsuccessfully to a single judge of this Court, the appellant now appeals to the Full Court.

28 The appellant admits he assaulted the complainant, Sandra Ann Prior, who is his estranged wife. The assault, which took place at the appellant's house, consisted of slapping Mrs Prior and attempting to remove her from those premises.

29 The fact that there were two elements to the assault raised the immediate question whether there should have been two charges. However, that point was not raised at trial by leading counsel who then represented the appellant. It was accepted by leading counsel who represented the appellant on this appeal, that the consequence of the two-element charge was that "in order to obtain complete exculpation, (the appellant) had to successfully run two separate defences".

30 The appellant defended the first element of the complaint on the ground that he was provoked into slapping Mrs Prior. He defended the second element on the ground that he used reasonable force in attempting to remove Mrs Prior from the premises when she refused his requests to leave, and therefore became a trespasser.

31 The learned Stipendiary Magistrate held that the defence of provocation was not open and that Mrs Prior was not a trespasser at the material time. This despite a concession by the prosecution, that Mrs Prior should have left the house when asked to do so. Having held that Mrs Prior was not a trespasser, it was not necessary for the Magistrate to make any finding about the reasonableness or otherwise of the force used by the appellant in attempting to remove her.

32 On appeal, the learned Judge upheld the Magistrate's decision. In so doing, the Judge apparently overlooked the concession which was repeated by the respondent before him, to the effect that Mrs Prior had been a trespasser at the material time. However, the Judge held that the evidence was sufficient in any event to establish beyond reasonable doubt that the appellant had used excessive force in attempting to remove Mrs Prior. The Judge was therefore of the view that the conviction could be upheld pursuant to s 199(3) of the *Justices Act 1902*.

33 Although the question for this Court is whether the appellant has demonstrated error on the part of the Judge below, the principal issues arising in this appeal were:

1. whether the Magistrate misdirected herself in concluding that the defence of provocation was not open to the applicant; and
2. whether, given that Mrs Prior was a trespasser at the material time, but the question of the reasonableness of the force used against her had not been determined, it was appropriate to apply s 199(3) of the *Justices Act*.

34 It is therefore necessary to summarise the relevant evidence at the trial and to consider the findings made by the Magistrate.

### **The evidence at trial**

35 The principal witness for the prosecution was Mrs Prior. She commenced her evidence by saying that on Sunday 22 August 1999, she telephoned the appellant and asked if they could meet for the purpose of discussing their children. Mrs Prior said she asked for a meeting in a public place but the appellant required the meeting to take place at his house.

36 Mrs Prior said she went to the appellant's house and sat where she usually sat, at the dining table close to the front door. She said the appellant told her to move to the kitchen table. Mr Prior said she thought that was rather strange but did as she was asked.

37 Mrs Prior went on to say that the appellant seemed "very strange; sort of laughing, very cocky ...". She asked whether they could talk about the children but he became "very evasive and smart-alec". Mrs Prior said she became rather emotional: and that the conversation became heated because the question of the appellant's infidelity was raised.

38        Mrs Prior said she asked the appellant what was happening and why he was acting so strangely. She asked whether the discussion was being tape recorded. Mrs Prior said the appellant was laughing at her and making smart remarks: he was going up to her face and saying "idiot, idiot" and things of that nature.

39        Mrs Prior said that during the course of the heated conversation, she started crying and became emotional. She said the appellant then slapped her with the back of his hand about three or four times. Her evidence was that he stood and slapped her while she was sitting down: "it just made my head go back, and my cheek was all red and I just got hysterical. I just kept on crying and crying". At that point, Mrs Prior said the appellant told her to get out.

40        Mrs Prior then gave evidence about the appellant's attempt to remove her from the premises. She said:

"He grabbed me by my arm and started to pull me towards the kitchen ... He grabbed my arms. He was pulling me out. He accidentally pulled my jumper or my t-shirt off, and I was left on the kitchen floor with -- I had no bra on. I was half naked from the top and I had my pants on, so he just left me there and walked away, and I got myself together and put my jumper on. I was on the floor crying. I got very, very upset. I couldn't -- so I put my clothes back on and I got up to -- just got up to try to get myself together. He grabbed me again and started to drag me around the side of the hallway, and I was struggling and calling out for help. I said, 'Help me. Somebody help me. Let me go, let me go.' And he wouldn't let me go, and I was struggling along, and then he let me go and I fell backwards and he grabbed me on my ankles and started pulling me towards -- from the hallway, pulling me towards the front door. I hit my head on the side and I was -- he said, 'I'm going to call the police.' I said, 'Please do.' And I was screaming for help all the time."

41        A little later in her evidence-in-chief Mrs Prior was asked what happened after she went through the front door. That appears to have been a misunderstanding of her previous evidence on the part of counsel because Mrs Prior said that she was dragged through the hallway, not the front door. However, Mrs Prior said the appellant dragged her and dumped her "out the front" where there was a small plastic table and chair. She said she was in the foetal position and that the appellant kicked her.

Mrs Prior said she then crawled back into the house to retrieve her bag. She said that as she got to the hallway where the dining table was, the appellant pushed and kicked her. Then "within seconds" Mrs Gill was there. This is a reference to Mrs Jennifer Petula Gill, one of the appellant's employees who was called as a witness for the defence. As emerged subsequently in the trial, Mrs Gill was present at the premises at the request of the appellant.

42        To return to Mrs Prior's evidence: she said that when attempting to retrieve her handbag, she fell to the floor and was kicked again by the appellant, in the back. In addition, the appellant continued to abuse her. Mrs Prior said she asked the appellant how he could hit her and he said that she deserved worse.

43        A little later Mrs Prior used her mobile telephone to contact her friend Christine Jean Buck. Mrs Buck arrived shortly afterwards. After some conversation, the appellant and Mrs Gill left the premises leaving Mrs Buck to comfort Mrs Prior.

44        Mrs Prior was cross-examined by leading counsel for the appellant. Counsel sought to elicit from Mrs Prior that she had, on other occasions, behaved in an abusive and aggressive manner to the appellant. Mrs Prior admitted that she had pleaded guilty to a charge of disorderly conduct arising out of an incident on 22 January 2000, some five months after the events in question.

45        Counsel then asked Mrs Prior whether (on 22 August 1999) she had spoken to the appellant about his grandfather, now deceased. Mrs Prior said she had: and that she had said "If you can cheat your dying grandfather, obviously you can hurt the mother of your children".

46        Mrs Prior denied that she gave the appellant any details about the way in which he had cheated his dying grandfather because "I didn't have to. He knows what he did."

47        The following exchange then took place.

Q:      And was it then that he struck you?

A:      No. He said -- He started talking about, "I'm not having an affair." He does it so well.

Q:      I put it to you that you did speak in a hurtful way to him about cheating his dying grandfather, and at that stage he struck you?

A: No. He struck me because I said he was lying, and he said -- then he just hit me, and I said, "I suppose that made you feel very good. You'll probably do it again", and he did.

Q: Where was it that he struck you?

A: On my face. He slapped me across my face, three to four times.

48 Counsel then put to Mrs Prior that the appellant had told her again and again to leave. Mrs Prior said she was trying to leave. However, counsel put to her that she refused to move and started to shout at the appellant. Mrs Prior denied that was so.

49 It was then put to Mrs Prior that the appellant had told her that if she did not leave, he would carry her out. Mrs Prior said the appellant had not said that: or that if he had, she could not remember it.

50 It was then put to Mrs Prior that the appellant had lifted her out of the chair and started to drag or walk her down the passageway towards the door. Mrs Prior said the appellant did not walk her down: and he did not lift her off the chair. He had pulled her from the chair. Mrs Prior went on to say that she was struggling while he had his hands on her wrist and that he had then grabbed her shirt. It was then, according to Mrs Prior, that the appellant pulled her shirt and t-shirt off. Mrs Prior said that was done "definitely accidentally".

51 Mrs Prior then agreed that the appellant had left her alone to enable her to put her clothes back on. She said that while on her knees pulling her jumper back on and crying, the appellant grabbed her by her hand and started to pull her along the hallway. She was asked whether the appellant had both of his arms under her armpits as he was pulling her towards the door. Mrs Prior said "something like that ... and I was struggling like mad".

52 A little later Mrs Prior said she had been examined by a doctor. Counsel put to Mrs Prior that the doctor had reported a series of three or four bruises along the inside of her right upper arm consistent with fingers in a tight grip. Counsel suggested that was how the appellant had taken Mrs Prior's arms and attempted to pull her towards the door.

53 It was then put to Mrs Prior that the doctor had said there was bruising of the dorsal surface of her right wrist: and that the appellant had dragged or taken a firm grip of Mrs Prior by the wrist trying to pull her down to the door of the house. Mrs Prior agreed.

54           There followed some cross-examination about the way in which Mrs Prior came to be on the ground. She said the appellant had not picked her up and thrown her down: he had grabbed her and thrown her over.

55           Counsel concluded his cross-examination by having Mrs Prior confirm that she had said words to the appellant about cheating his dying grandfather. Mrs Prior said the appellant was getting her upset and that she was getting him upset "We were both heated up -- because there was a lot of pain."

56           Counsel asked Mrs Prior again how many times the appellant had slapped her. She said "Three or four times ...".

57           In re-examination Mrs Prior was asked whether she had said anything to the appellant immediately before he struck her. Mrs Prior said she had asked the appellant what was going on, why he was acting as he was and why he was so cocky. She said she asked the appellant "Can't we just sit down and talk".

58           The next prosecution witness was Mrs Buck, who gave evidence about receiving a telephone call from Mrs Prior at about 8.40 pm on 22 August 1999. Mrs Buck said that as a result of the telephone call she attended the appellant's house arriving about 10 minutes later.

59           Mrs Buck said when she entered the house she saw Mrs Prior curled up in a corner looking very upset and crying. She said Mrs Prior asked her to look at her neck because the appellant had tried to choke her. Mrs Buck said Mrs Prior's face and neck looked very flushed but that she could not see a redder mark on her neck than she could on her face.

60           Mrs Buck said Mrs Prior told her the appellant had hit and kicked her. She said she asked the appellant whether he had hit Mrs Prior: and that he replied "Yes".

61           Under cross-examination, Mrs Buck said that Mrs Prior had been sitting on the ground. She confirmed that she had not asked Mr Prior if he had kicked or attempted to choke Mrs Prior.

62           The next prosecution witness was Dianne Sansom, a long-standing friend of Mrs Prior. Ms Sansom gave evidence that she had seen Mrs Prior at the beach on the afternoon of 22 August 1999, wearing a short sleeved shirt: and that she had seen her again on 23 August. On the

latter occasion, Ms Sansom said, she noticed on Mrs Prior's upper arms, bruises which had not been present on the previous day.

63       The final prosecution witness was the police officer who had taken the statement from Mrs Prior which resulted in the complaint being laid against the appellant.

64       The appellant then gave evidence. He was asked initially about matters which were apparently intended to illustrate the nature of his relationship with Mrs Prior. These included their marriage, their separation and the arrangements for the custody of their children.

65       The appellant was then asked about the way Mrs Prior spoke to him about an affair which he had admitted in Family Court proceedings. The appellant said that Mrs Prior used "a range of language that is very derogatory and very hurtful". He said "the word 'slut' is used on very frequent occasions; has always been used on very frequent occasions for more than 10 years against myself. The 'f' word is part of colloquial language and similar such words."

66       The appellant was then asked about the day in question. He said he was prepared to talk to Mrs Prior at his house but not at her house or in a public place. The appellant said he felt, as he always did with Mrs Prior "a great sense of powerlessness".

67       The appellant went on to say that Mrs Prior had made in excess of 2,000 telephone calls to him over a period of 21 months. His evidence was that Mrs Prior had been abusive to him not only at his home and in his car but also at his place of work and in public places.

68       The appellant said he asked Mrs Gill to be available as an observer and to support him at the meeting which was to take place on 22 August. He said he felt a need of support because there had been a long series of very abusive meetings between him and Mrs Prior, who had abused him publicly, at work, in front of his staff, in front of his children at their school and in his car.

69       A plan of Mr Prior's house was then produced as the precursor to his evidence about the events of 22 August.

70       Mr Prior was then asked whether he had acted in a cocky, smug and mocking way towards Mrs Prior, as she said he did. The appellant denied he had acted in this way. He said his demeanour had been "focussed and sincere".

71 The appellant said that after Mrs Prior arrived at his house they sat down in the casual dining area and he asked her what she wanted to talk about, or words to the effect. The appellant said:

"It became extremely apparent to me in a very short period of time that she had absolutely no intention of a constructive relationship - or discussion - and became very, very abusive towards me, and I asked her to leave, almost as we began talking."

72 The appellant went on to say he "requested ... asked ... demanded ... pleaded" with Mrs Prior to leave, countless times during the course of the next hour or so. The appellant said after it became more than apparent that Mrs Prior was not going to leave, he said he would call the police. The appellant said Mrs Prior's response was to heckle him and say "Go right ahead".

73 The appellant then said Mrs Prior brought up the issue about "this other lady". The appellant said Mrs Prior brought that up in a derogatory and accusatory manner but that had not caused him to react and strike her.

74 The appellant went on to say that after he asked Mrs Prior to leave "on countless, countless times", she said he had cheated his grandfather and that it was his grandfather's wish never to see Mr Prior again. According to the appellant, Mrs Prior said, in relation to his grandfather, that the appellant had "ripped him off".

75 The appellant said when Mrs Prior said these things it caused him distress and hurt. He said he reacted by completely losing his temper and saying it was absolute nonsense. The appellant said that in the process he slapped Mrs Prior's face. This happened, according to the appellant while Mrs Prior was sitting and he was in the process of rising to his feet.

76 The appellant denied he slapped Mrs Prior three or four times. When asked if the slap was "a full-blooded swing" the appellant said it was not: it was "a sharp retort". He said he had a sudden loss of temper.

77 When asked how many times he had struck Mrs Prior the appellant said it was either once or maybe twice. The appellant said that after he had struck Mrs Prior she became "extremely focussed" and that the abuse then started again.

78 The appellant went on to say he told Mrs Prior that if she did not leave he would carry her out: and that her reaction was to heckle and goad



him. He said he asked Mrs Prior to leave his house and told her that if she did not he would carry her and drag her to the front door.

79       The appellant said he then lent forward to clasp his hands under Mrs Prior's armpits and that her reaction was to slump down. He said his hands momentarily slid up her shoulders onto her neck.

80       When asked whether he had remedied that loss of grip the appellant said he had. He said:

"I came closer to her, asking her to leave, and once again in a tighter finger grip under her shoulders and arms, said, 'You must leave', and picked her up and took her down .... And the whole time she refused to leave."

81       The appellant said that at one stage Mrs Prior's upper clothing had come off, leaving her naked from the waist up. The appellant said after Mrs Prior had dressed herself again, he gave up. He said there was nothing he could do: Mrs Prior refused to leave the house and he could not carry her to the front door.

82       A little later, the appellant said Mrs Prior's clothing was not removed completely in the incident.

83       The appellant then said he felt a sense of "powerlessness" because he did not know what to expect next. At that point, he said, Mrs Gill walked through the front door. The appellant said Mrs Gill said she had been at the back of the house, she had heard every word of the conversation and that Mrs Prior had been asked to leave several times. Mrs Gill then asked Mrs Prior to leave. The appellant said Mrs Prior's reaction was "abuse".

84       The appellant was then cross-examined by the prosecutor. He was asked first about the reasons for inviting Mrs Gill to be present on 22 August. He said although Mrs Prior did not know Mrs Gill was in the house, her presence was reassuring to him. The appellant said there had been a number of incidents when Mrs Prior had assaulted him, slapped him, spat in his face, abused him, accused him of atrocities; and had sworn at him on "countless, countless occasions".

85       The appellant went on to say that his demeanour from the outset of the conversation on 22 August was very reasonable whereas Mrs Prior became very insulting from the outset. However, according to the appellant, the conversation did not become "very uncomfortable" until at least an hour into the conversation when Mrs Prior referred to his

grandfather. Before that, the appellant said, he had asked Mrs Prior numerous times to leave the house.

86       A little later, the appellant was asked what had caused him to slap Mrs Prior. The appellant said Mrs Prior refused to leave his house and then accused him of defrauding his grandfather. He said although he could not recall the exact words, Mrs Prior used words to the effect:

"You cheated your dying grandfather, and Aunt Nancy had told her that was true, and that he didn't want to see me again."

The appellant said he could recall Mrs Prior's facial features and the anger in her eyes. The appellant said that is when he lost his temper, he "exploded" and slapped Mrs Prior with the palm of one of his hands. He said he could not recall which hand.

87       When asked why he had lost his temper at that time, the appellant said it was for a variety of emotions. He said:

"My grandfather died in 1986 with a broken heart that his children had left him. That Nancy had a range of other reasons and motives to say what she said. Nancy actually paid me the money - \$21,000 - for working for (grandfather) for 12 months. They are all a pack of lies. But the truth of why I exploded or got very upset, the sudden rush of temper, was the real truth of (grandfather), he wanted the estate to go to the children of his deaf and dumb child. That was the truth. And (Mrs Prior) when it suits her, over the last 10 years has dragged out this business of my grandfather with the intention of causing me emotional harm. That's why."

88       The prosecutor then put to the appellant that Mrs Prior had made the comment about his grandfather to him in the past. The appellant said "countless occasions". He went on to say he did not think he had lost his temper before when he had been insulted in that way.

89       The appellant was then asked about his attempts to remove Mrs Prior from the premises. In that context, the appellant was asked his height and weight. He said he was 6 foot 3 inches tall and he guessed he weighed 15 stone: he agreed that Mrs Prior was lighter and smaller.

90       The prosecutor then returned to the slapping incident. He asked the appellant what Mrs Prior actually said to constitute the heckling, taunting and abuse of which the appellant complained. The appellant said the subject ranged from "having deserted her, being a liar and cheat, someone

that wanted to "f" sluts the whole time ... the children don't like me". The appellant said Mrs Prior made those remarks while they were sitting at the table and before he slapped her. The appellant said that although Mrs Prior's remarks upset him and made him feel sorry for her, it did not make him angry.

91       The appellant was then asked how it was that when Mrs Prior accused him of defrauding his dying grandfather he became so upset as to lose control.

92       The appellant then referred to the fact that in the last two years he had had a minimum of 2,000 phone calls of a highly abusive nature. The appellant said on one occasion when he went to watch his son's baseball team, Mrs Prior spat in his face and abused him. The appellant continued:

"The landscape is abuse - personal, endless, ongoing abuse of myself and my family. It's been going on for years and years, and it's relentless and it does not stop. So I'm used to that. It has almost no effect on me, other than to want to not hear it any more. But when you raise my grandfather and you raise the issue of character of myself, that causes me to explode. It simply -- it simply is not true, and it has no relevance whatsoever to our relationship."

93       The appellant admitted that he had not lost his control when Mrs Prior spat at him, but on this occasion:

" ... after being taunted for an hour and abused for an hour, and then to raise this issue, I lost my temper, with a sudden urge, explosion of control, and I slapped my wife."

94       There was no material re-examination of the appellant.

95       The next witness was a police officer who had attended at an incident on 22 January 2000 following which Mrs Prior was charged with disorderly conduct. There was debate between leading counsel for the appellant and the learned Magistrate as to the admissibility of the evidence to be given by the police officer. The Magistrate asked counsel if he wanted the witness to give evidence about the behaviour of Mrs Prior as he observed it. Counsel said that was so. The Magistrate said that, in effect, that the evidence could be admitted and that she would attach such weight to it as might be appropriate.

96           The police officer said that on 22 January 2000, Mrs Prior's conduct was such that he had no alternative but to arrest her. He said Mrs Prior was shouting and screaming and creating a disturbance in a public place. The officer said that what Mrs Prior said was directed towards her estranged husband, the appellant.

97           There was no relevant cross-examination.

98           The final witness for the defence was Mrs Jennifer Petula Gill to whom I have referred above. Mrs Gill said that she was the executive director of risk management business development with the appellant's aged care organisation. She said she was a registered nurse, an associate fellow of the Institute of Management and a Commissioner of Declarations. In 1996, Mrs Gill was named as Woman of the Year for Western Australia for her services to the community and in particular for her services to disabled children. She said she had been working in the appellant's business for just over four years and that she had known Mrs Prior for three to three and a half years.

99           Mrs Gill said she attended at the appellant's house on the evening of 22 August 1999 at his request. She said the appellant told her that Mrs Prior wanted to talk to him on an urgent private matter. Mrs Gill said the appellant asked her to be present in the house as a witness. She said she arrived three or four minutes before Mrs Prior. Mrs Gill said she was sitting at the back of the house some seven metres from where the appellant and Mrs Prior were sitting and that she heard every word that was spoken.

100          Mrs Gill said she heard the appellant ask Mrs Prior what was the important issue she wanted to talk about. Mrs Gill said that Mrs Prior replied:

"Before we start talking about that issue, are you still seeing her?", and she used obscene language in relation to a third person."

101          Mrs Gill went on to say that the appellant asked Mrs Prior to leave and that he asked her within about two sentences, three times, to leave the house. She said the appellant asked Mrs Prior to leave more than 70 times and that for about two hours the appellant and Mrs Prior were arguing and shouting.

102 Mrs Gill said she counted the 70 times by reference to the bricks on  
the wall which she was facing. She said the conversation was "very high-  
pitched, dramatic, screaming and yelling, and very loud voices."

103 Mrs Gill was asked whether anything was said concerning the  
appellant's grandfather. She replied that Mrs Prior said to the appellant  
that he (the appellant) was a scum and was not worth anything: "Even  
your grandfather knew that on his death bed. You ripped him off."

104 At that point, Mrs Gill said the appellant responded:

"Look, if you don't leave I'm going to carry you out of this  
house. I'm not going to listen to any more of this abuse."

Mrs Gill said it was obviously at that point that the appellant tried to carry  
Mrs Prior out of the house. She said she took that view because she heard  
two chairs scraping on the floor, from which she inferred that people were  
getting off their chairs. Mrs Gill said she assumed the appellant was  
carrying Mrs Prior because she was yelling "Put me down. Put me down.  
Please stop. Help me. Put me down. Please. Help me."

105 Mrs Gill said that she had not, at any time, heard anything that  
sounded like a slap.

106 At that point, Mrs Gill said, she decided to go round to the front  
door. She said she had checked on the time it took her to walk from the  
place where she had been sitting to the front door and that it took between  
24 and 27 seconds.

107 Mrs Gill said the front door was shut, she knocked on the door and  
the appellant opened it. She said Mrs Prior was sitting just inside the door  
in the formal dining room. She said Mrs Prior told her she was very  
pleased to see her and that the appellant had been trying to kill her.  
Mrs Gill said she responded that Mr Prior had not tried to kill her: that she  
had been there for the past two hours and had heard every word that each  
of them had said.

108 After some conversation in which Mrs Gill said she suggested to the  
appellant that he should leave his house so that she (Mrs Gill) might  
attempt to talk Mrs Prior into going home, she told Mrs Prior that the  
appellant had asked her to leave over 70 times. Mrs Prior said she was  
not going to leave until the appellant had answered her questions.

109 Mrs Gill then gave evidence about Mrs Prior telephoning Mrs Buck  
and of Mrs Buck's arrival. Cross-examined, Mrs Gill confirmed that she

heard all of the conversation between the appellant and Mrs Prior but that she had not heard the appellant slap Mrs Prior.

110 Mrs Gill also confirmed that immediately after the conversation about the appellant's grandfather, the appellant said "You have to leave. If you don't leave I'm going to carry you to the front door." Mrs Gill said there was no other conversation between that part of the conversation and when the appellant carried Mrs Prior to the front door.

111 A little later, and without objection, Mrs Gill was asked about Mrs Prior's evidence that the appellant had actually dragged her right outside the front door, that she had walked back inside to get her handbag. Mrs Gill expressed the view that there could not have been time for Mrs Prior to be dragged outside the front door and gone back in again.

112 There was no other relevant cross-examination.

113 The trial took place on 23 May 2000. The Magistrate reserved her decision which she gave *extempore* on 12 July.

### **The Magistrate's decision**

114 In her reasons, the Magistrate referred to the charge and to the fact that there was no dispute that the appellant had assaulted Mrs Prior after she had gone to his house at his invitation.

115 The Magistrate then referred to the evidence about the Family Court proceedings between the parties and that Mrs Prior had telephoned the appellant earlier in the day in question to request a meeting for the purpose of discussing the children of the marriage.

116 The Magistrate then referred to the arrangements made for the meeting and the arrangements made by the appellant for Mrs Gill to be present.

117 The Magistrate said she was satisfied that the appellant asked Mrs Prior to sit in the kitchen area instead of the dining room so that their voices would be more clearly audible to Mrs Gill than they would have been had the conversation taken place in the dining room.

118 A little later, the Magistrate referred to the fact that all witnesses agreed that the conversation between the appellant and Mrs Prior became heated and that reference was made to another person with whom the appellant was having a relationship. The Magistrate said that all

witnesses testified that reference was made to a remark passed by someone called Aunty Nancy regarding the appellant's relationship with his grandfather who died in 1986.

119       The Magistrate then summarised Mrs Prior's evidence about the appellant slapping her face several times and asking her to leave.

120       The Magistrate then referred to the appellant's evidence that he had slapped Mrs Prior's face while she was seated at the kitchen table, that he had struck Mrs Prior once or maybe twice, that he had asked her to leave the house several times and that she had remained seated at the kitchen table.

121       The Magistrate then set out a passage in the transcript of the appellant's evidence. It is a passage which I have set out above in which the appellant said he leaned forward to clasp his hands under Mrs Prior's armpits and that her reaction was to slump down.

122       The Magistrate then referred to the appellant's admission that while he was attempting to eject Mrs Prior from the house her clothing "came off her upper body".

123       The Magistrate then referred to a medical certificate which had been admitted into evidence. It was a certificate given by Dr Stephen Adams who had examined Mrs Prior on the following day and observed a series of three to four bruises along the inside of her right upper arm consistent with those made by fingers in a tight grip: bruising to the dorsal surface of the right wrist and bruising at the base of her right thumb. The doctor had said that the age of the bruising was consistent with injuries sustained in the preceding 24 hours.

124       The Magistrate then made the following finding:

"I am satisfied on the evidence that the defendant assaulted Mrs Prior by slapping her face several times and forcibly dragging her from the kitchen to the front door, in the course of which the top of her clothing was removed."

125       The Magistrate then referred to submissions made by leading counsel for the appellant to the effect that the appellant was entitled to use reasonable force to eject Mrs Prior from the house pursuant to s 254 of the *Criminal Code*. The Magistrate continued:

"I refer to subsection (2) of that section which states that:

'It is lawful for a person who is in peaceable possession of any place to use such force as is reasonably necessary,

(a) to prevent a person from wrongfully entering the place',

which I am satisfied is not applicable to the present case, as Mrs Prior had entered the house at the express invitation of the defendant.

'(b) to remove a person who wrongfully remains on or in the place',

and I am not satisfied that Mrs Prior wrongfully remained in the place as the purpose of her visit was to discuss the children of the marriage. This had not been done.

'(c) to remove a person behaving in a disorderly manner on or in the place.'

There is no evidence that Mrs Prior's behaviour was disorderly at the time. The evidence is that she was sitting at the kitchen table when the defendant stood up, slapped her face and began to drag her forcibly towards the door. I am satisfied that a defence under section 254 of the *Criminal Code* is not available to the defendant."

126       The Magistrate then turned to the defence of provocation. She referred to the submission made by the appellant's counsel that the defence of provocation was available to the appellant because Mrs Prior insulted him by accusing him of "ripping off" his dying grandfather, causing him to lose control and slap Mrs Prior. The Magistrate said defence counsel referred to the appellant's evidence that when those words had been spoken by Mrs Prior he lost his temper "exploded" and struck her.

127       The Magistrate then referred to Mrs Prior's evidence about the slapping. The Magistrate said she rejected the appellant's evidence that he had approached the meeting in an attitude of sincerity.

128       The Magistrate then referred to the appellant's evidence in which he said he asked Mrs Prior to leave countless times. The Magistrate referred also to Mrs Gill's evidence that she had heard the appellant ask Mrs Prior to leave over 70 times.



129           A little later, the Magistrate set out s 246 of the *Criminal Code* as follows:

"A person is not criminally responsible for an assault upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for his passion to cool ..."

The Magistrate then said:

"On the evidence that the (appellant) ordered Mrs Prior to leave almost at the commencement of the meeting, that he subsequently ordered her to leave about 70 times within the hour or more which followed, during which the parties were arguing and shouting, in a situation devised by the (appellant) to put Mrs Prior at a disadvantage, I am not satisfied that he acted of a sudden when he assaulted Mrs Prior, because his behaviour had been hostile and aggressive towards her from the time that the meeting began.

I am satisfied that a defence of provocation is not available to the (appellant) and I find the charge proved."

### **The effect of the Magistrate's decision**

130           In my view, the finding of fact that the appellant had not "acted of a sudden when he assaulted Mrs Prior" was open to the Magistrate on the evidence as I have summarised it above. There was a conflict between the evidence of Mrs Prior and the appellant, but the Magistrate was entitled to accept Mrs Prior's evidence, as she obviously did. The effect of that evidence was that the appellant slapped Mrs Prior because she accused him of lying about his infidelity, not because of her remarks about the way in which the appellant had treated his grandfather.

131           It is true that the Magistrate made the finding "because" the appellant's behaviour had been hostile and aggressive towards Mrs Prior from the commencement of the meeting. On one view, therefore, the Magistrate did not exclude the possibility that the appellant was provoked to a higher level of violence as a result of the insult about defrauding his grandfather. However, I do not believe the Magistrate's reasons are open to that construction.

132       The Magistrate said she was not satisfied that the appellant acted of a sudden *when he assaulted Mrs Prior*. But the assault was not simply the act of slapping. As the Magistrate said in her reasons, the assault included the attempt to remove Mrs Prior forcibly from the premises. That was the basis on which the trial was conducted.

133       The Magistrate obviously had this in mind when she gave her decision. Immediately before stating her critical finding, the Magistrate referred to the fact that the appellant had asked Mrs Prior to leave about 70 times, during a period of an hour or more while the parties were arguing and shouting. The Magistrate found, as she was entitled to, that the appellant had been "hostile and aggressive" towards Mrs Prior from the commencement of the meeting: and he had so conducted himself in a situation he had devised to put Mrs Prior at a disadvantage.

134       In my view, it is clear from these findings that the Magistrate rejected the appellant's evidence - to which she had referred only seconds before - that he lost his temper and "exploded" as a result of the insult about his grandfather. The substance of the finding was that the slapping and attempted removal was a continuation of hostile and aggressive conduct: in other words, it did not result from provocation.

135       Although it was a matter for the Magistrate, who saw and heard the witnesses, to decide what evidence she would accept, the result is hardly surprising. I can well understand the Magistrate's rejection of the appellant's evidence that he was provoked to an assault by a remark about his conduct towards his grandfather. On the appellant's own evidence, that remark had been made to him on "countless occasions" but he had not lost his temper previously. Furthermore, the evidence of Mrs Gill, who was obviously a witness of good character and apparently impartial despite being an employee of the appellant, was that after the "grandfather" insult, the appellant said that if Mrs Prior did not leave he would carry her out of the house.

136       In my view, obvious rejection of the appellant's evidence about provocation, provides an answer to his contention that the Magistrate reversed the onus of proof by saying she was "not satisfied he acted of a sudden" when he assaulted Mrs Prior.

137       Once the defence of provocation had been raised, it was for the prosecution to negative it. The Magistrate had to be satisfied beyond reasonable doubt that the appellant was not provoked. In my view, the Magistrate was satisfied to that standard. She accepted Mrs Prior's

evidence about the assault: and she rejected the appellant's evidence. That being so, the defence of provocation was not open to the appellant. The prosecution had proved its case.

138        I have referred earlier to the concession made by leading counsel for the appellant that his client had to run two successful defences if he was to be acquitted. It must follow that the appellant was rightly convicted of the admitted assault if the defence of provocation was not open to him.

139        The appellant could not maintain a defence to the charge solely on the basis that he used no more than reasonable force in attempting to remove Mrs Prior from his house. The appellant raised that defence in relation to the force used to carry or drag Mrs Prior from the kitchen to the front door. The defence was not raised in relation to the slapping, which, I repeat and emphasise was a part of the overall conduct on which the complaint was based.

### **The Single Judge Appeal**

140        In his appeal to the Judge below, the appellant contended that the Magistrate had erred in law in finding that Mrs Prior was not a trespasser, it having been conceded by the prosecution that she should have left the premises on being asked to do so.

141        The appellant contended also that the Magistrate erred in law and fact in finding there was no evidence that Mrs Prior's behaviour was disorderly at the relevant time.

142        The appellant then contended that the Magistrate had not dealt properly with the defence of provocation. It was said that the Magistrate had failed to have regard to the evidence of Mrs Prior's insults and the appellant's reaction to them. It was said also that the Magistrate had reversed the onus of proof.

143        Finally, the appellant contended that the Magistrate's decision was unsafe and unsatisfactory because she had misconceived the evidence about the discussion between the appellant and Mrs Prior and had failed to have regard to the evidence about Mrs Prior's previous harassment and abuse of the appellant.

144        The Judge held it had been open to the Magistrate to conclude that no proper notice was given by the appellant so as to countermand Mrs Prior's licence to enter his house. However, in reaching that conclusion, the Judge apparently overlooked the concession, which was

repeated before him, that Mrs Prior was, in effect, a trespasser, after she had been asked to leave.

145        Nothing turns on that for present purposes. That is because the Judge went on to consider the question "whether the appellant can be said to have used such force as was reasonably necessary to remove Mrs Prior as one who had wrongfully remained on the premises".

146        In addressing that question, the Judge referred to the Magistrate's finding that the appellant had assaulted Mrs Prior by slapping her face and forcibly dragging her to the front door.

147        The Judge then referred to s 199(3) of the *Justices Act*, which provides:

"The Court is not required to set aside, quash or vary a decision of any justices because the justices omitted to make any necessary finding if the facts or evidence -

(a)        in substance support the decision; or

(b)        justify the finding,

and the Court may instead under subsection (1) either vary the decision or substitute another decision for it."

148        The Judge said that in his view, the evidence was sufficient to establish beyond reasonable doubt that the appellant used excessive force:

"Having slapped (Mrs Prior) he grabbed her and dragged her through the house in a way that deprived her of all dignity."

149        It is to be noted that the Judge was there treating the appellant's conduct in slapping Mrs Prior, and dragging her, as part of the same offending conduct. The reference to Mrs Prior being deprived of all dignity was apparently a reflection of submissions made to the Judge on behalf of the respondent. I assume it to have been a reference to the removal or displacement of Mrs Prior's upper clothing.

150        It was common ground that s 199(3) of *The Justices Act* cannot be applied unless the facts found by the Magistrate or the evidence were such as to lead inevitably to the conviction: see *Glennon v The Queen* (1994) 179 CLR 1.

151        In my view, the Judge was entitled to conclude that the evidence  
must have led inevitably to the conclusion, beyond reasonable doubt, that  
the appellant used excessive force.

152        It will be recalled that the appellant was 6 foot 3 inches (187.5 cm)  
tall and weighed 15 stone (95 kg). Mrs Prior was smaller and lighter.  
There is no doubt that Mrs Prior was being difficult and abusive. Clearly,  
the appellant was entitled to remove her by lifting her as (on both his and  
Mrs Gill's evidence) he said he would. If the lifting was attempted but  
proved too difficult, dragging may have been a reasonable option,  
although it may be doubtful whether it was reasonably necessary to cause  
the apparently substantial bruising to Mrs Prior's arms, which on the  
medical evidence, she sustained.

153        However, in my view, the appellant acted quite unreasonably in  
slapping Mrs Prior three or four times, as he did. The slapping was  
unprovoked and had nothing to do with removing her. It was an act of  
gratuitous violence.

154        This brings me again to the conclusion I reached in considering the  
effect of the Magistrate's decision: once the appellant's defence of  
provocation had been rejected in relation to the slapping, it was inevitable  
that he should be convicted of the assault.

155        It was accepted by leading counsel for the appellant during the  
hearing of this appeal, that it was open to this Court to apply s 199(3) of  
*The Justices Act* if the Court thought it appropriate to do so.

156        I agree with the conclusion reached by the Judge below that the  
appellant was rightly convicted. If I have reached my conclusion by a  
different route from the Judge, I would myself apply s 199(3) to the extent  
necessary to achieve the same result.

157        For those reasons, it is not necessary to consider in detail the way in  
which the Judge dealt with the issue of provocation. It is sufficient to note  
that he was not persuaded that the Magistrate had reversed the onus of  
proof: and he considered that the Magistrate had taken account of all  
relevant considerations in her finding to the effect that the appellant had  
not been provoked to assault Mrs Prior.

158        The Judge rejected also the contention that the verdict was unsafe  
and unsatisfactory. In my view, the Judge reached the correct conclusion:  
as did the Magistrate. I would therefore dismiss the appeal.