DISTRICT COURT OF QUEENSLAND

CITATION:	*Preston v Parker* [2010] QDC 264
PARTIES:	**JOHN GRAEME PRESTON** (appellant) v **NATHAN JAMES PARKER** (respondent)
FILE NO/S:	BD 1855/08
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Brisbane Magistrates Court
DELIVERED ON:	24 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2009
JUDGE:	Irwin DCJ
ORDER:	**Appeal against conviction is dismissed and the order of the magistrate is confirmed**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – TRESPASS – PREREQUISITE TO THE COMMISSION OF THE OFFENCE – where the appellant was convicted of one count of trespass contrary to s 11(2) of the *Summary Offences Act* 2005 (Qld) – where it was alleged that he had remained in a place used for a business purpose – where it was alleged that after being given two move on directions by a police officer he remained occupying the steps at that place – where he was arrested for contravening a direction by a police officer contrary to s 791(2) of the *Police Powers and Responsibilities Act* 2000 (Qld) because of his failure to move on – where no evidence was offered on this charge and he was charged with trespass – where under s 634(3)(b) of the *Police Powers and Responsibilities Act* before a police officer is entitled to charge a person with trespass the officer must consider the explanation given by the person for being present at the place is not reasonable – whether the observance of the s 634(3)(b) requirement is an element of the offence – whether the observance of the s 634(3)(d) requirement is a prerequisite to the commission of the offence – whether prosecution had to prove beyond reasonable doubt that the police officer formed the view required by s 634(3)(b) – whether the arresting officer considered the

explanation given and whether he considered it not to be reasonable

CRIMINAL LAW – PARTICULAR OFFENCES – PROPERTY OFFENCES – CLAIM OF RIGHT – DEFENCE OF HONEST CLAIM OF RIGHT – AVAILABILITY OF DEFENCE – where the appellant was convicted of one count of trespass contrary to s 11(2) of the *Summary Offences Act* 2005 (Qld) – where it was alleged that he remained in a place used for a business purpose – where it was alleged that he remained occupying the steps at that place – where the business at the place undertook the termination of pregnancies – where there was evidence that termination of pregnancies were scheduled to be done that day – where the appellant conceded that he entered the place and remained there – where it was submitted there was evidence of an honest belief by the appellant that he was entitled to occupy the steps to deter or prevent people from accessing termination procedures at the place – where there was evidence that he was aware he was not given any permission to occupy the steps from the time the police told him about having an official complaint from the business and he was given a move on direction – where the appellant remained in occupation of the steps after he was given two move on directions – whether the defence of honest claim of right under s 22(2) of the *Criminal Code* 1899 (Qld) was available

CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – DURESS – where the appellant was convicted of one count of trespass contrary to s 11(2) of the *Summary Offences Act* 2005 (Qld) – where it was alleged that he remained in a place used for a business purpose – where it was alleged that he remained occupying the steps at that place – where the business at the place undertook the termination of pregnancies – where there was evidence that termination of pregnancies were scheduled to be done that day – where the appellant conceded that he entered the place and remained there – where the appellant said he was occupying the steps to deter or prevent people from accessing illegal termination procedures at the place – whether there was evidence that actual and unlawful violence was threatened to any person for the purpose of the availability of a defence of compulsion or duress under s 31(1)(c) of the *Criminal Code* 1899 (Qld) – whether there was evidence that serious harm or detriment was threatened by another person in a position to carry out the threat for the purpose of the availability of a defence of compulsion or duress under s 31(1)(d) of the *Code*

CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – IGNORANCE AND MISTAKE OF FACT – where the appellant was convicted of one count of trespass contrary to

s 11(2) of the *Summary Offences Act* 2005 (Qld) – where it was alleged that he remained in a place used for a business purpose – where it was alleged that he remained occupying the steps at that place – where the business at the place undertook the termination of pregnancies – where there was evidence that termination of pregnancies were scheduled to be done that day – where the appellant conceded that he entered the place and remained there – where the appellant said he was occupying the steps to deter or prevent people from accessing illegal termination procedures at the place – where the appellant honestly believed that illegal termination procedures were carried out at the place – where there was no evidence that any termination procedure to be carried out at the place on that day would not have been lawful on therapeutic grounds in accordance with Queensland law – where there was no evidence of apparent want of good faith on the part of any medical practitioner concerned in such a procedure – whether in the circumstances there was evidence of any objective basis for the appellant to have a reasonable belief that any termination procedure being carried out at the place on that date would be in contravention of Queensland law – whether the defence of mistake of fact under s 24 of the *Criminal Code* 1899 (Qld) was available in conjunction with s 31(1)(c) and/or s 31(1)(d) of the *Code*

Acts Interpretation Act 1954 (Qld), s 14B(1(c), s 14 (4)

Criminal Code 1899 (Qld), s 22, s 23, s 24, s 31(1)(c), s 31(1)(d), s 36, s 224, s 271, s 273, s 282, s 290, s 292, s 313(2), s 408A

Criminal Code (WA), s 22

Justices Act 1886 (Qld), s 222, s 223(1), s 225(1)

Police Act 1892 (WA), s 82B(1)

Police Powers and Responsibilities Act, 2000 (Qld), s 44, s 46, s 48, s 365(1), s 633, s 634, s 791(2), s 792

Summary Offences Act 2005 (Qld), s 11(2), s 12

Attorney-General (Ex rel Kerr) v T [1983] 1 Qd R 404, cited

Bowditch v McEwan and Ors [2002] QCA 172, cited

Butera v DPP (Vic) (1987) 164 CLR 180, cited

Coleman v Greenland, Donaldson, Powers etc & The State of Queensland [2004] QSC 037, cited

Cox v Robinson [2001] 2 Qd R 261, cited

Dobbs v Ward [2003] 1 Qd R 158, applied

Ebner v Official Trustee (2000) 205 CLR 337, applied

Fox v Percy (2003) 214 CLR 118, cited

George v Rockett (1990) 170 CLR 104, cited

Graham v Queensland Nursing Council [2009] QCA 280, applied

Jones v Dunkel (1959) 101 CLR 298, cited

K v T [1983] 1 Qd R 396 at 398, applied

Keating v Morris [2005] QSC 243, cited

Mbuzi v Torcetti [2008] QCA 231, cited

Molina v Zaknich [2001] WASCA 337; (2001) 125 A Crim R 401, distinguished

Police v Preston, Unreported, IrwinCM, Bris-Mag 00028810/03; Mag 00174208/03(4), 3 March 2004, cited

Preston v Liussi, Unreported, Shanahan DCJ, Appeal No BD4101 of 2005, 19 June 2006, cited

R v Bayliss and Cullen (1986) 9 Qld Lawyer Reps 8, applied

R v Bourne [1939] 1 KB 687, cited

R v Davidson [1969] VR 607, cited

R v Jeffrey and Daley (2002) 136 A Crim R 7, cited

R v Pollard (1962) QWN 13, cited

R v Taiters, exparte Attorney-General [1997] 1 Qd R 333, cited

R v Waine [2006] 1 Qd R 458, cited

R v Williams [1988] 1 Qd R 289, cited

Re Bayliss, Unreported, Supreme Court of Queensland, McPherson J, OS No. 376 of 1985, 24 May 1985, applied

Rowe v Kemper [2008] QCA 175, applied

Stevenson v Yasso [2006] 2 Qd R 150, cited

Vievers v Roberts; exparte Vievers [1980] Qd R 226, applied

Warden v Hensler (1987) 163 CLR 561, cited

Webb v The Queen (1994) 181 CLR 41, cited

COUNSEL: C K Copley for the appellant
M J Litchen for the respondent

SOLICITORS: Conroy & Associates for the Appellant
Director of Public Prosecutions (Qld) for the Respondent

[1] Mr Preston brings this appeal under s 222 of the *Justices Act* 1886 (Qld) ("the JA") against a magistrate's decision to find him guilty of the offence of trespass contrary to s 11(2) of the *Summary Offences Act* 2005 (Qld) ("the *SOA*").[1]

[2] The charge brought by the respondent, Constable Parker, alleged that on 4 March 2008 Mr Preston unlawfully remained in a place used for a business purpose situated at 687 Logan Road, Greenslopes.

Grounds of Appeal

[3] Mr Copley argues six grounds of appeal on Mr Preston's behalf, as follows:[2]

1. The magistrate erred in finding on the evidence before her that the defendant unlawfully remained in a place at 687 Logan Road, Greenslopes on 4 March 2008.

2. The magistrate erred in not finding on the evidence before her that any proceeding for the alleged offence was invalid because no police officer complied with necessary prerequisites under s 634 of the *Police Powers and Responsibilities Act* 2000.

2B The learned magistrate erred in finding that proof of defences was required to [be] made on the balance of probabilities and/or by the appellant.

2C The learned magistrate erred by failing to find that the prosecution had not excluded the operation of s 22 of the *Criminal Code*.

2D The learned magistrate erred by failing to find that the prosecution had not excluded the operation of s 24 of the *Criminal Code.*

2E The learned magistrate erred by failing to find that the prosecution had not excluded the operation of s 31 of the *Criminal Code*.

A preliminary issue

[4] Prior to commencing to hear the appeal I disclosed in open court to both counsel that in my then capacity as Chief Magistrate I had presided over a trial of

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1 He was sentenced to 4 months imprisonment with an immediate parole release date.

2 The Notice of Appeal which was prepared by Mr Preston particularised seven grounds of appeal. In the Outline of Argument on his behalf at [2], Mr Copley said that grounds 3-6 would not be relied upon. In oral argument at T1-4 L1-4 he said he would not be arguing ground 7. Ground 2A in the Outline of Argument was abandoned in oral argument (T1-3 L8-10). With reference to [3] of this outline by which, "it is also submitted … that the learned Magistrate failed to provide sufficient assistance to the unrepresented Appellant, including identifying relevant issues and defences and evidentiary and procedural matters", in oral argument at T1-10 L8-15, Mr Copley said his point is that the magistrate didn't properly identify the issues and take them into account in the course of her decision. Therefore this submission does not take the Ground of Appeal any further, and my decision on these grounds will address this issue.

Mr Preston[3], and I maintained a social relationship with the magistrate. After taking instructions, Mr Copley said he had no application to make. Constable Parker's counsel, Ms Litchen, also said she did not wish to raise any issue about this.[4]

[5] As Mr Preston would have been aware, on 3 March 2004, I found him not guilty of contravening a move on direction by a police officer on 23 October 2003.[5] That direction related to his attending at the same premises in similar factual circumstances to the charge which is the subject of this appeal.

[6] After counsel had stated their position, I expressed my view that any lay observer or informed member of the public would not be in a position where they might consider there is any reasonable apprehension of bias on my part in continuing to deal with the matter, which involved an issue of law.[6]

[7] I remain of that view. To state the position in terms of the governing principle expressed by the High Court in *Ebner v Official Trustee*,[7] this is not a case in which a fair-minded lay observer might reasonably apprehend that I might not bring an impartial mind to bear on the resolution of the question I am required to decide. In any event, as stated by their Honours this principle is subject to qualifications relating to waiver. Given counsel's attitude to my disclosure, I consider this qualification would apply in this case.

Legal approach to this appeal

[8] This appeal proceeded under s 223(1) of the JA as a rehearing on the evidence given in the Magistrates Court.

[9] It has been held[8] that:

> "The central task of an appellate court in an appeal by way of rehearing is not to analyse the correctness or otherwise of the decision below, although an analysis may sometimes be helpful. It is to decide the case for itself. Often it will do so by considering only the evidence admitted at first instance. That is usually the position in appeals under s 222 of the *Justices Act* 1886. … That requires an appellate court to draw its own inferences from the facts established by the evidence while respecting the advantage of the court or

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3 *Police v Preston*, unreported, Irwin CM, Bris-Mag 00028810; Mag 00174208/03(4), 3 March 2004.

4 T1-2 L18-32. Neither Ms Litchen or Mr Copley appeared in the proceedings before the magistrate. Mr Preston represented himself. A representative of the Police Prosecutions Corps prosecuted.

5 This was contrary to s 445(2) of the PPRA, which has now been renumbered as s 791(2).

6 T 1-2 L34-42.

7 (2000) 205 CLR 337 at 345[6] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ, applied in *Keating v Morris* [2005] QCS 243 at [39] per Moyinhan SJA. This is in accordance with the earlier decision of the High Court in *Webb v The Queen* (1994) 181 CLR 41.

8 *Graham v Queensland Nursing Council* [2009] QCA 280 per Fryberg J at [69]-[70] (with whose reasons the Chief Justice agreed) discussing the dictum of McMurdo P in *Stevenson v Yasso* [2006] 2 Qd R 150 at [36]; [2006] QCA 40; see also *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25]; *Rowe v Kemper* [2008] QCA 175 at [5]; *Mbuzi v Torcetti* [2008] QCA 231 at [17].

tribunal at first instance in seeing and evaluating witnesses. This is particularly relevant when issues of credibility arise."

Proceedings before the magistrate

[10] The proceedings before the magistrate were conducted in two court rooms. This was because of the absence in the first court room of a facility to play a field tape of the conversation between Constable Parker and Mr Preston at 687 Logan Road, Greenslopes on the date of the alleged offence. This tape is exhibit 5. The proceedings in this court room were not transcribed by the State Reporting Bureau ("the SRB"). However the SRB were able to provide Mr Preston with copies of the recordings made in both court rooms. Consequently, Mr Preston prepared a transcript with the title "Transcript of Hearing 10th June, 2008 Part 1". This is accepted by Ms Litchen as a sufficient record of what occurred in the first court room. It is Exhibit 1.[9]

[11] Exhibit 1 has been supplemented by handwritten annotations by Mr Copley and his secretary and by documents, "A", "B" (Exhibit 2) and "C" (Exhibit 3). These were prepared by Mr Copley's secretary from listening to the recordings. The place where Exhibit 2 fits into Exhibit 1 is clearly marked with "A" and "B", respectively, on the face of Mr Preston's document. Exhibit 3 commences at the end of Exhibit 1 and immediately prior to the commencement of the SRB's official transcript. Exhibits 1-4 constitute an agreed record of the proceedings before the magistrate for the purpose of this rehearing.[10] A synopsis of the field tape was admitted as Exhibit 4. This was transcribed by Constable Parker. It has been supplemented by Mr Preston's handwriting. Ms Litchen was agreeable to it being tendered.[11] I have used this synopsis only as an aid to understanding what the conversation on the tape is.[12]

The prosecution evidence

[12] In addition to Constable Parker, evidence was given by his work partner, Constable McMeniman, and Ms Guy, the owner of the business at 687 Logan Road, Greenslopes.

Ms Guy's evidence[13]

[13] Ms Guy gave evidence that since 1999 she has been the owner of the business which undertakes terminations of pregnancy. Three doctors work there together with nursing sisters, clerical staff and sterilising staff. The patients who pay for services see the counsellor, an operating doctor and an anaesthetist.

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9 T1-5L 13-43.
10 T 1-5 L 47 – T1-8L 50.
11 T 1-23 L24 – T1-24 L 57.
12 *Butera v DPP (Vic.)* (1987) 164 CLR 180 at 188.
13 Transcript of Hearing 10th June, 2008, Part 1 (Exhibit 1) and "B" of Exhibit 2.

[14] On 4 March 2008 Ms Guy became aware patients were entering the premises by coming up the driveway to the backdoor, rather than walking up the stairs to the front entrance. She could see someone was sitting on these stairs obstructing them. Although she was unable to identify Mr Preston as the person sitting on the stairs, there is no issue that it was him, having regard to the evidence of Constables Parker and McMeniman, and to his own evidence.

[15] Ms Guy said the person was sitting in the middle of the stairs which were just inside the front gate of the property.[14] She rang for police assistance to remove the obstruction so they could get on with their normal day. Her evidence was that she gave no permission for the person to be on the steps.

[16] In cross-examination by Mr Preston, who represented himself before the magistrate, she acknowledged abortions were done at the premises and were scheduled to be done that day.

[17] It was during cross-examination that she said although she thought it was him sitting on the stairs, she couldn't see it was him. She did not approach and speak to the person. As far as she was aware no one from the business said anything to this person.

Constable Parker[15]

[18] Constable Parker testified he received information to attend the Greenslopes Day Surgery at 687 Logan Road at 7.45 am. On arriving with Constable McMeniman he activated his tape recorder at 7.58 am. He referred to seeing five anti-abortion protestors on the footpath. His evidence was he saw Mr Preston approximately four steps up in the stairwell leading to the front door. The stairwell was approximately two to three metres in from the driveway facing Logan Road. Mr Preston was in the middle of the step.

[19] Constable Parker had an initial conversation during which Mr Preston identified himself. This conversation commenced as follows:

Constable Parker:	How are you going buddy? You're not even going to let me up?
Mr Preston:	Well if you go in there and arrest them, stop them killing children, stop them doing this I would let you in for sure.
Constable Parker:	No mate I need to go in there and you're stopping everybody from going in. I need to at least go in there and talk to them.

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[14] Photos showing the stairwell and driveway which were tendered at first instance were not available to this court at the appeal. However they would not affect the outcome of the legal issues involved.

[15] Exhibit 3 and T3 L35 – T9 L16.

Mr Preston: Go in there and arrest them.

[20] Following this conversation, Constable Parker entered the premises and spoke to Ms Guy. Although this conversation, which was also recorded by the tape, is not admissible against Mr Preston, it is relevant to Mr Copley's argument in support of Ground 2 of Appeal that the requirements of s 634(3)(b) of the *Police Powers and Responsibilities Act* 2000 (Qld) ("the *PPRA*") have not been complied with. It is clear from this conversation that he intended to give Mr Preston a move on direction under s 48 of the *PPRA* if he had an official complaint. This is apparent from the following conversation with her:

Constable Parker: Basically he is stopping your customers from coming in sitting there.

Ms Guy: Yes

…

Constable Parker: Well as I see it you are having to send people out the back but he is clearly interfering with your business, is that correct?

Ms Guy Yes

Constable Parker I will go give him a move on direction and see where we go from there. I will ask you know is that an official complaint and you would like him moved on.

Ms Guy: Yah.

Constable Parker: Last one he got off on a technicality, OK, so cover all bases and make sure its all done correctly; OK.

Ms Guy indicated that although the persons who wished to enter the premises had done so via the driveway, "one of the girls" had tried to get past him on the stairs.

[21] Constable Parker then walked outside, and after confirming Mr Preston's name and obtaining personal details, had the following conversation with him, which included giving the move on direction:

Constable Parker: John I understand you have been doing this a few times. You know that you can't prevent people as far as a business goes, I mean, I'm not here to talk about what you're

protesting about and all that. As far as the business goes you can't prevent people from going in and out which is what you are doing, here on the steps.

Mr Preston: I understand but I'm not making a protest here. Under section 273 I am able to come to the defence of other persons, children [a short portion of his statement at this point is unintelligible to me]. I'm coming to their defence.[16]

Constable Parker: John, what I am talking about here is preventing people from coming in and out of the business, you can't do that. I am going to give you a move on direction; we have had an official complaint by the business say that you are preventing people from coming in and out. I have witnessed people being forced to go in other directions to come in and out of here. I am going to have to give you a move on direction, do you understand that John.

Mr Preston: I do.

Constable Parker: OK, I'm now going to direct you. I now direct you to move 100 m from this location from now, the time being 0806 hours on the 4th of the 3rd 2008, OK, and this location being 687 Logan Road, Greenslopes. So you're not to be within a 100 metres of here, so you're going to have to go 100 metres away, completely away from here, OK. Is that clear to you John?

Mr Preston: Yes.

Constable Parker: So you understand that?

Mr Preston: I understand it.

Constable Parker: You understand that. So can you just relay back to me what you understand by that?

Mr Preston: I understand what you said to me but I understand [a short portion of his statement is unintelligible to me, but it involves a reference to "children"].

Constable Parker: On this topic first. What do you understand by what I just told you?

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[16] This statement includes a reference to s 273 of the *Criminal Code* 1899 (Qld) ("the Code") which is concerned with aiding in self defence.

Mr Preston: I have to move 100 m from [unintelligible].

Constable Parker: You understand that this is an official move on direction by a police officer?

Mr Preston: [Unintelligible].

Constable Parker: Do you understand the reasons why I've given you that direction? We'll get onto your topic, but I just want to cover this one first. Do you understand the reasons why? As a business imagine.

Mr Preston: [At this point attempts to interject. This is unintelligible to me].

Constable Parker: I know what you're talking about here, but I just want to say to, as a business, anything like, just say with Coles and somebody stopping people.

Mr Preston: I wouldn't.

Constable Parker: Just think, just think about it, somebody stopping people going in the door and they won't move no matter what anybody does, that's what I'm talking about, you're preventing a business from being a business.

Mr Preston: A legitimate business, I have no problems with. I wouldn't do it. Obviously I wouldn't go and sit in front of Coles. But Coles don't do….

Constable Parker: I know. I know. Like I said we'll get on with that topic with you, if you wish. But we just got to cover this topic first.

Mr Preston: I fully understand you're position. I know what you're saying.

Constable Parker: Do you need some time to think about it?

Mr Preston: No

Constable parker: Are you going to move for me John. You're not going to move?

Mr Preston: How do you walk away from that?

Under cross-examination, Constable Parker agreed that at this point Mr Preston showed him clearly on two posters he was holding, pictures of babies that were aborted; and said "That's what's going on here."[17]

[22] Constable Parker then encouraged Mr Preston to think about the direction. Before leaving him to think about this, Constable Parker said:

> "What I'll let you know is that it is an offence to contravene that move on direction, OK. I'm now giving you a direction. You've stated that you understand it. I'm going to give you time to think about it, OK. If you choose not to obey my direction to move on here for the official reason I've given you, then you will be arrested for contravening a direction, contravening a requirement or direction by a police officer, OK. I don't want to have to do that to you, OK …..

This lead to the following conversation:

Constable Parker: Do you understand that, do you understand my position.

Mr Preston: I understand that. I realise it's not an easy position for you but, ah, that's the reality of what's going on here. 10 to 15 children are likely to be killed here today. How do you walk away from that?

Constable Parker: Unfortunately, I can't let you sit there and do this.

Mr Preston: I realise you're in a difficult position too, but I hope you can understand why I am here and why I can't leave.

Constable Parker: I understand why you are here, but I can't let you sit there and do this.

…

Constable Parker then gave Mr Preston the further time promised, although Mr Preston made it clear he would not be leaving.

[23] Constable Parker returned at 8.25 am to find Mr Preston had not moved. Having confirmed that Mr Preston understood the direction and the reason for giving it was, "interfering with a business", he gave him a second direction to move 100 metres from the location, immediately. He told Mr Preston he was giving him another 5

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[17] T7 L5-13. Although I cannot make these words out on listening to the tape, I proceed on the basis of Constable Parker's evidence that they were said.

minutes to comply, and if he did not do so he would be arrested at the expiration of this period. Before leaving on this occasion Constable Parker had the following conversation with Mr Preston:

Constable Parker:	… Look there is a lady right now, she's trying to get past.
Mr Preston:	I will let people leave, don't worry.
	…
	I want everybody to leave. They are welcome to go so I won't stop people leaving.
Constable Parker:	So what are you doing? Are you just not letting them in?
Mr Preston:	Yah, if nobody goes in nobody dies.
Constable Parker:	OK, so you are just not letting people in?
Mr Preston:	Yah, as I say I would be happy for everybody to leave this place and not come back [unintelligible].
	…
	Well it's one of those things you got to try to do, whether [unintelligible] or not. If I was driving down the road and saw a child being killed on the roadside I would stop to try and help. If the child died anyway I wouldn't regard it as a waste of time. So regardless of whether I am able to stop people or not it is still the right thing to do. You know someone's going to be killed you've got to help them.

Constable Parker left again at 8.28 am.

[24] After re-activating the tape at 8.30 am, Constable Parker told Mr Preston he could not give him any more time, and arrested him under s 791(2) of the *PPRA* for contravening a direction by police.[18]

[25] While the tape was still running as Mr Preston was transported to the watch house, Constable Parker can be heard saying:

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[18] On 20 May 2005, before a different magistrate, a police prosecutor offered no evidence on this charge. It was dismissed. The charge of trespass was presented on the same date. Mr Preston who was present pleaded not guilty to it, but observed this was the first time he had been told of the charge.

> "I hear where you're coming from Graham. But unfortunately we have to sort of enforce all the laws as well mate, and I tried to give you as much time as I could. I gave you pretty much a full half hour."

[26] Constable Parker said in his evidence-in-chief that he saw Mr Preston in the same location on each occasion they spoke. His evidence was he gave the move on direction on the basis that Ms Guy informed him she did not wish Mr Preston to be on the premises.

[27] The cross-examination of Constable Parker commenced with the following three questions and answers:[19]

> "Constable Parker, why did I say I was there? -- To protect the lives of persons that were inside the business there.
>
> Specifically who did I say? -- Children
>
> And unborn children, in particular. -- Yes"

Although on my understanding of the tape recorded conversation, in so far as it is intelligible to me, these are not the precise words used, I consider this conveys the effect of what he said to Constable Parker. It is relevant to the issue arising concerning compliance with s 634(3)(b) that this was Constable Parker's understanding about what Mr Preston was saying to him.

[28] When Mr Preston asked, "Why did you say you were going to arrest me? Constable Parker replied, "You were trespassing on the premises there who – who, after I'd entered had told me that they didn't wish you to be on those premises that they had there, as you were committing ….. an offence."[20]

[29] However, Constable Parker accepted he had never used the word "trespass" and had simply asked him to move on. He said, "I told you that I was giving you a move on direction … as I'd had an official complaint – or as I had received a complaint from the business owner."[21] This position is summarised by the following question and answer:[22]

> "So even though there was never a suggestion in words that I was trespassing I have now been charged with trespass? -- Yes."

[30] Constable Parker expressed the reason that having been arrested for contravening a direction, Mr Preston was facing a charge of trespass, …[23]

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19 T6 L30-36.
20 T7 L21-27.
21 Ibid L28-40.
22 Ibid L57-58.
23 Ibid L52-55.

> "You were initially charged with the contravene a move on direction, however, the charge has been changed in relation to facts that I wasn't aware of at the time."

[31] Mr Copley also relies on the following exchange in cross-examination in support of his submission on the issue of compliance with s 634(3)(b):[24]

> "All right. And can you tell me why you ignored my request to arrest those people who were carrying out activities as I showed you in these pictures? -- I'm not an expert in the area of foetuses, but if they're – it's a business there that's operating legally they were committing – they were – they weren't committing a crime, as far as I understand, as they were operating as a business legally.
>
> But you made no attempt to find out if that was the case or not, eh? -- What do you mean by that?
>
> Whether or not what they were doing there was, you know, that killing children was allowable or not? -- The abortion process – the – abortion clinic functions, as I understand, is entitled to operate as it is on foetuses that are under a certain month or trimester, and therefore they're operating legally."

[32] He confirmed he did not follow up arresting these people; and he had no suspicion Mr Preston would commit any offence such as burglary there.

Constable McMeniman[25]

[33] Constable McMeniman, who was a police recruit at the time, also gave evidence of seeing Mr Preston sitting on about the fourth step of the entrance of the building, and not moving from there for the period during which Constable Parker had the three conversations with him.

[34] In cross-examination he agreed Mr Preston said something to the effect of being there "to stop unborn children from being killed" and of "coming to their defence as under section 273 of the *Code* allows."[26] He also agreed Mr Preston was holding a sign and picture of aborted babies and said, "How can you walk away from this?"[27] He recalled Mr Preston encouraging him and Constable Parker to arrest the people carrying out these acts.[28] Constable McMeniman's explanation as to why Mr Preston was told he was going to be arrested was:[29]

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24 T8 L1-18.
25 T 10 L1- T12 L40.
26 T11 L56 – T12 L2.
27 T12 L7-13
28 Ibid L15-17.
29 Ibid L19-27.

> "Well Constable Nathan Parker had informed you – on – on arrival we've actually spoken to the manger of – of the building – of the – of the premises and she's actually informed that – and you actually stated to us that you were actually refusing people to get past and it was actually difficult for us to get past you and that she was – yeah, actually you were causing anxiety to people entering the place and she wanted you removed, so – and that's basically what we did, just -----"

[35] He confirmed that Mr Preston was told he would be charged with contravening a direction, and was never told by anybody he was trespassing.[30]

Mr Preston's evidence[31]

[36] Mr Preston's evidence-in-chief succinctly stated that he sat on the stairs:[32]

> "… with the intention of preventing access to that place in view of section 273 of the *Criminal Code*. I was coming to the defence of others, namely, the unborn children that were going to be killed there by abortion."

[37] During cross-examination Mr Preston agreed he was the person sitting on the steps at the Greenslopes Day Surgery on 4 March 2008, approximately in the position described by the police officers. He also agreed to remaining there from 8.05 am to 8.32 am despite receiving the direction, which he understood, to leave the premises by immediately moving 100 metres away.

[38] He accepted he did not have any permission from the owner to be on those steps.

[39] He also accepted that at one point somebody pushed past him on the stairs, and he saw people walk past him down the driveway. He conceded he did not know the people and why they were there, and he didn't ask them for their reasons. Although he did say to them abortion is wrong and children shouldn't be killed.[33] He did not think that any of the people responded to this.

[40] At the conclusion of cross-examination, Mr Preston was allowed to add that at no point did anybody from the business speak to him or come anywhere near him. He said Constable Parker was the only person who spoke to him.

Mr Preston's submissions[34]

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30 Ibid L29-35.

31 Ibid L1-T15 L52.

32 Ibid L15-19.

33 Although T15 L36 attributes the answer to him, "children shouldn't be called." in context this is logically a mishearing of "children shouldn't be killed". (My emphasis).

34 T16 L36 – T25 L5. Reference is made to his reply at T30, L34 – T31 L7 to the prosecutor's submissions.

[41] Consistent with Ground 1 of Appeal, Mr Preston submitted the prosecution had not established that he had unlawfully remained at 687 Logan Road, Greenslopes. In doing so, he conceded he did enter the place and remain there.[35]

[42] His argument in support of this conclusion demonstrates what lay behind his statements to Constable Parker that under s 273 of the *Code* he was able to come to the defence of other persons in the context of exhorting the police officers to go and arrest people within the building to stop them killing children. This is also relevant to the issue of whether Constable Parker had complied with the necessary pre-requisites under s 634 of the *PPRA* which is the subject of Ground 2 of Appeal. Although I note, Mr Preston did not refer to s 634 in his submissions to the magistrate.

[43] He submitted that by sitting on the steps in an attempt to block the entrance to what he described as "that abortion clinic", he was aiding, under s 273 of the *Code*, in the defence of unborn children who were taken to be killed there by abortion that day. He supported this with reference to Ms Guy's testimony there were going to be abortions done there that day. He did not dispute there may have been people going there who were not having abortions. His point was that it was agreed at least one unborn child was to be killed that day, and he was there to defend whoever this was, and because he knew this, the death was imminent.

[44] His argument was that s 273 and s 290 of the *Code*[36] not only entitled him, but obliged him to do this. In his submission s 290 imposed a duty on him to save human lives, including the unborn child.

[45] In his submission s 292[37] of the *Code* does not support an assumption that an unborn child is not a person. He argued it does not define when a child becomes a person; and does not exhaustively define when a child becomes a person capable of being killed, but defines one circumstance when this is the position. He also contended that the use of "person" in s 273 cannot be equated with a person capable of being killed under s 292.

[46] It was submitted that if the position of an unborn child is not covered by the *Code*, the common law is applicable. He submitted the common law has evolved to the extent of it being no longer acceptable in a civilised society that a child is not recognised as a person before birth. He contended this is particularly so because medical science may now provide competent proof as to whether the foetus was alive at the time of a defendant's conduct and whether the conduct was the cause of death. Therefore, he argued, the better rule is that infliction of pre-natal injuries resulting in the death of a viable foetus before or after it is born, is homicide.

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35 T16 L36-40.

36 Section 290 (Duty to do certain acts).

37 Section 292 (When a child becomes a human being).

[47] He also referred to s 313(2)[38] of the *Code* in support of the proposition that life begins before birth.

[48] On this basis he submitted that an assault on an unborn child is an assault on a person within s 273. He also argued it would be lawful under s 271 of the *Code* for an unborn child to resist assault. In this regard he contended the ability to defend oneself is irrelevant. Therefore, it was lawful on his part under s 273 to sit on the steps for the purpose of physically preventing an assault on the unborn children who were taken past this point on the day, and in light of Ms Guy's evidence, it was at the very least a reasonable belief that abortions were done there, and would be done on this day.

[49] Further, he submitted the essential element of the offence created by s 313(2) is the killing of an unborn child, and not the assault against the mother. He contended that because one person cannot give consent for a criminal act to be done to a second person, the section has the effect that a woman cannot give lawful consent to an abortionist to kill her baby. Therefore, s 313(2) effectively endorses the proposition that anyone should be able to be charged with homicide of an unborn child.

[50] He relied on *Bowditch v McEwan and Ors*[39] to argue it is untenable that a woman can have a duty of care to her unborn child, but could be allowed to have the child killed by abortionists.

[51] He also supported his argument he was not acting unlawfully in coming to the defence of an unborn child who is about to be killed by reference to the Universal Declaration of Human Rights and the Declaration of the Rights of the Child.

[52] With reference to his proposition that the death of pre-born children was imminent, he submitted:[40]

> "… I was not merely sitting in, but rather I was coming to the defence of others, others being pre-born children who were going to be unlawfully killed. Lord Denning stated in the case of *Southwood Londonderry Council v Williams* that, "There is authority for saying that in the case of great and imminent danger in order to preserve life the law will permit an encroachment on private property." That was the case that day. Pre-born babies were scheduled to be killed there that morning and my action of sitting on the stairs was one intended solely to try and preserve their lives."

[53] With reference to s 11(2) of the *SOA* under which he was charged he said, consistent with the Explanatory Notes to the *Summary Offences Bill* 2004, that this is essentially a trespass provision and is a pre-emptive measure against offences such as burglary. His point was there was no evidence or suggestion it was believed

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38 Section 313 (Killing unborn child).
39 [2002] QCA 172.
40 T24 L49-T25 L4.

he was going to commit such an offence. Although, as he has recognised, the explanation also states the provision does not rely on an intent to commit a crime within the property entered.

[54] He also submitted s 12 of the *SOA* was more applicable to what actually happened because, consistent with the Explanatory Notes, it is designed to apply to demonstrations or sit-ins. However, he recognised he was not charged under this provision because he was alone. He asserted this created an injustice in relation to sentencing if he was convicted because it made him liable to a maximum penalty of one year's imprisonment under s 11(2), whereas if two or more people had been involved he would only have been liable to six months imprisonment under s 12.

The prosecutor's submissions[41]

[55] The prosecutor commenced by correctly stating that the identification of Mr Preston as the person sitting on the stairs was not an issue.

[56] Having said that Constable Parker asked Mr Preston to remove himself from the stairs in the form of a direction, "which ultimately he didn't have to do,"[42] the prosecutor adverted to s 634. However, I agree with Mr Copley that the prosecutor misconstrued the effect of s 634,[43] when saying the safeguards applicable to s 11(2) of the *SOA* merely required Mr Preston to explain why he was there and be given an equal opportunity to leave the premises.

[57] The prosecutor referred to the example given for the purpose of s 792[44] of the *PPRA* that:

> "An occupier of place who may remove a trespasser from the place asks a police officer to remove the trespasser. The police officer, when removing the trespasser at the occupier's request is performing a function of the police service."

It was submitted Constable Parker had complied with all requirements, and that Mr Preston's failure to leave despite the opportunities he was given over approximately 30 minutes, involved his remaining in the place. The prosecutor also submitted there was no dispute that the place was being used for a business purpose because of the evidence it was an abortion clinic.

[58] As Mr Preston's evidence was that he had no permission to be there, it was submitted, the only question was whether he had remained there unlawfully. As to this, it was submitted there was no evidence that any of the sections under the *Code* which were relied upon by Mr Preston applied.

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41 T25 L7-T30 L26.
42 T25 L15.
43 Outline of Argument on behalf of the appellant, [20].
44 Section 792 (Performance of duty).

[59] It was submitted that s 273 of the *Code* did not apply because Mr Preston's evidence was he did not know why any of the people who walked past him down the driveway, or the person who pushed past him on the stairs, were there; and there was no evidence of an imminent danger to any people.

[60] So far as Mr Preston's submission that he at least had a reasonable belief abortions would be done there on this day, the prosecutor said this was not particularised in terms of any particular person, and in any event this abortion would be lawful.

[61] With reference to s 292 of the *Code* it was submitted there was no evidence that Mr Preston was coming to the aid of a child who had become a person under that section.

[62] It was submitted there was no evidence of any danger to human life for the purpose of s 290 of the *Code.*

[63] No submission was directed to the interpretation or application of s 313(2) of the *Code.*

[64] The prosecutor also made the obvious point that Mr Preston had not been charged under s 12 of the *SOA* because there were not two or more persons gathered.

The magistrate's decision

[65] Although the magistrate recognised the prosecution bears the burden of proof to the criminal standard she said at the outset of her decision that a defence raised by Mr Preston, if available, "would require proof on the balance."[45]

[66] Her Honour found that the steps on which Mr Preston took his position were a place used for a business purpose which was owned by Ms Guy.

[67] She found that the police, having attended by Ms Guy's authority, gave a misconceived move on direction which was not available to them, the premises being private property. However, she considered little turned on this because there was no requirement in s 11 of the *SOA* for a direction to leave to be given before the offence could be made out.

[68] She considered that "remain" has its normal meaning of "to stay" in the statute. Having also found that Mr Preston had stayed there for at least 30 minutes, she considered the issue for determination was whether his attendance at the place was unlawful for the purpose of the *SOA*, in the sense of being "without authorisation, justification, or excuse by law." Having regard to the tape, she proceeded on the

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[45] Decision, T2 L45-47.

basis he was at the premises for the purpose of "Coming to the defence of unborn children."

[69] Her Honour noted that Mr Preston informed the police he relied on s 273 of the *Code*. In relation to this provision she said that other than Ms Guy's acknowledgement the premises is a place where abortions are performed when patients come to the place, there is no evidence about the basis of any belief on his part, reasonable or otherwise, that a person was the subject of an assault. She then said:[46]

> "This is not a case where imminent danger is a relevant issue and the cases concerning that. This charge is one of trespass, not of assault. No force is alleged to have been used. Section 273 is not a relevant defence."

[70] She considered the "defence of justification", as she described it, must be considered objectively in the context of the circumstances of the case. As she put it:[47]

> "The action must be justified at law, and not simply in the mind of the actor. The issue to be determined is whether there is justification at law for Mr Preston's action in remaining at the business premises."

[71] Her Honour concluded the charge was made out in circumstances where, in her view, he provided no evidence of unlawful activity at the premises other than a general assertion he believed an offence was to be committed under s 313(2) of the *Code*, and the police declined to take any steps with regard to this; and where he had provided no reason or excuse recognised by law as justification for his conduct in remaining at the premises.

[72] Her Honour made no express reference to Mr Preston's reliance on ss 290 and 292 of the *Code* in the course of her reasons.

[73] She did not address s 634, despite the reference to it in the prosecutor's address.[48] Because compliance with this provision was at least a prerequisite to Constable Parker starting a proceeding against Mr Preston for the offence under s 11(2) of the *SOA*, I consider her Honour was in error in not doing so.

[74] I agree with Mr Copley that the reference at the outset of her decision that a defence "would require proof on the balance" is at odds with the well established principle that the Crown must negative any defence raised on the evidence beyond a reasonable doubt.[49] It is unclear whether this was intended by the magistrate to

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46 Decision, T5 L53-T6 L3.

47 Ibid, T6 L13-20.

48 Outline of Argument on the appellant, [21].

49 Ibid, [27]. See *R v Taiters, exparte Attorney-General* [1997] 1 Qd R 333 at 336, with reference to the excuse raised by s 23 of the *Code.*

refer to a requirement for Mr Preston to establish any defence relied on by him, on the balance of probabilities, or to discharge the evidential onus to this standard of proof. In either case the magistrate was in error. It cannot be excluded that by misdirecting herself in this way it affected her ultimate conclusion. It is conceded on behalf of Constable Parker that this observation by the magistrate was in error.[50] However, accepting as I do that Ground 2B of Appeal is made out, as the appeal is by way of rehearing, I proceed to decide the case for myself on the evidence admitted at first instance in accordance with the principles set out in para [9] of this judgment.

Submissions for the appellant

Compliance with section 634 of the PPRA[51]

[75] Mr Copley's argument is the prosecution failed to establish beyond reasonable doubt that police formed the view required by s 634(3)(b) of the *PPRA* and for this reason, as asserted in Ground 2 of Appeal, the proceeding for the alleged offence against s 11(2) of the *SOA* was invalid.

[76] He first refers to s 11 of the *SOA* which relevantly provides:

> "**11 Trespass**
> …
> (2) A person must not unlawfully enter, or remain in, a place used for, a business purpose.
> Maximum penalty – 20 penalty units or 1 year's imprisonment.
> *Note –*
> *See the Police Powers and Responsibilities Act 2000, section 634 for safeguards applying to starting proceedings for particular offences in this division*
> …"

[77] He then refers to s 634 of the *PPRA* which is cross-referenced in the Note to s 11 of the *SOA*, and as such is part of the latter Act.[52] It is within Chapter 20 Part 3 Division 3 of the *PPRA*. Chapter 20 and Part 3 are headed "Other Standard Safeguards" and "Other Safeguards" respectively. Section 634 which is headed "Safeguards for declared offences under the *Summary Offences Act* 2005" provides:

> "(1) This section applies to an offence under the *Summary Offences Act 2005* that is a declared offence for this Act.
> (2) A police officer who suspects a person has committed a declared offence must, if reasonably practicable, give the person a reasonable opportunity to explain –

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50 Amended Outline of Submission on behalf of the Respondent - [5.29].

51 Outline of Argument on behalf of the appellant, [6]-[22], T1-11 L1, T1-30 L 10; T1-46 L48-52; T1-47 L10-30.

52 See s 14(4) *Acts Interpretation Act* 1954 (Qld).

> (a) if the offence involves the person's presence at a place – why the person was at the place …
>
> (3) If –
>
> (a) the person fails to give an explanation; or
>
> (b) the police officer considers the explanation given is not a reasonable explanation;
>
> or
>
> (c) because of the person's conduct, it is not reasonably practicable to give the person a reasonable opportunity to give an explanation;
>
> *Example for paragraph (c) –*
>
> *It may not be reasonably practicable to give the person a reasonable opportunity to give an explanation because of the person's conduct, for example, the person may be struggling or speaking loudly without stopping.*
>
> the police officer may start a proceeding against the person for the declared offence.
>
> (4) In this section –
>
> ***declared offence*** means an offence against section 11, 12, 13(1), 14, 15, 16 or 17 of the *Summary Offences Act 2005."* (My emphasis.)

It is apparent that s 634 applies to the offence with which Mr Preston is charged under s 11(2) of the *SOA.*

[78] It is submitted the requirements of s 634(3) are "safeguards" against, or barriers to, the commencement of proceedings for any and every trespass, and therefore are a prerequisite to bringing a prosecution under s 11(2) of the *SOA.*

[79] Mr Copley submits these safeguard requirements established by Parliament must be met, and proved by the prosecution to be met. It is said that ss 5 and 7 of the *PPRA*[53] are relevant. He emphasises no exception or leeway is given to police in relation to these requirements.

[80] It is submitted that not only is s 634(3) the operative mechanism by which the "safeguard" intended by Parliament would be implemented, but the police officer's state of mind required by that provision is effectively an element of the offence under s 11 of the *SOA*, required to be proven beyond reasonable doubt.

[81] *Rowe v Kemper*[54] is relied upon to support these submissions. This case concerned the consideration of what was required to be established to entitle a police officer to

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53 Section 5(e) of the *PPRA* makes it a purpose of that Act to ensure fairness to, and protect the rights of, persons against whom police officers exercise powers under the Act. Section 7 expresses Parliament's intention that police officers comply with the Act in exercising their powers and discharging their responsibilities under it, and indicates that, an officer who contravenes it may face legal consequences: see *Rowe v Kemper* [2008] QCA 175, [75] per Holmes JA.

54 [2008] QCA 175.

give a move on direction under what was then s 39 of the *PPRA*.[55] The background to this decision was expressed by McMurdo P as follows:[56]

> "A police officer may exercise the power under s 39 of the Act to give "any direction that is reasonable in the circumstances" to a person "doing a relevant act". **A "relevant act" includes where a police officer reasonably suspects a person's behaviour falls within one of the behaviours described in s 37(1)(a) to (d)**. It follows from the clear terms of s 37(1) that, before relying on s 37(1) to exercise the "move on" power under s 39, **the police officer must personally form the suspicion that the person's behaviour is or has been within one of the categories of behaviour described in s 37(1)(a) to (d) and that suspicion must be objectively reasonable**. That is, it must be based on facts which would create a reasonable suspicion in the mind of a reasonable person: *Tucs v Manley*." (My emphasis.)

[82] McMurdo P then said with reference to the facts of that case:[57]

> "[17] The magistrate found "that there existed a foundation also for the exercise of the section 39 power by Constable Kemper pursuant to section 37(1)(c)". His Honour seems to have so concluded because Constable Kemper reasonably suspected that Mr Rowe's behaviour was disorderly to Constable Kemper and his police colleagues. **This conclusion requires findings proven beyond reasonable doubt both that Constable Kemper subjectively suspected this and that his suspicion was objectively reasonable.**
> …
> [20] **Nor did the prosecution establish on the evidence beyond reasonable doubt that Constable Kemper actually formed a suspicion that Mr Rowe's behaviour was disorderly in respect of himself and his police colleagues.** That is because Constable Kemper's evidence (that he regarded Mr Rowe's argumentativeness towards him and his police colleagues as, in his words) "no problem", at least throws real doubt on whether he actually formed the suspicion." (My emphasis.)

[83] Reference was also made to the judgment of Holmes JA as to the effect of non-compliance with what was then s 391 of the *PPRA*,[58] which set out the following steps where a s 39 direction was given:

> "**s 391 Safeguards for directions or requirements**
> (1) This section applies if a police officer gives someone a direction or makes a requirement under this Act.
> (2) If the person fails to comply with the direction or requirement, a police officer must if practicable warn the person –

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55 Renumbered as s 48.
56 [2008] QCA 175 at [6]. Section 37 is renumbered as s 46.
57 Ibid, [17] and [20].
58 Renumbered as s 633 and amended slightly. See Ibid, footnote 27.

> (a) it is an offence to fail to comply with the direction or requirement, unless the person has a reasonable excuse; and
> (b) the person may be arrested for the offence.
> (3) The police officer must give the person a reasonable opportunity to comply with the direction or requirement."

[84] Holmes JA considered that a reason for concluding that Constable Kemper could not have formed the necessary reasonable suspicion of an offence to entitle him to arrest Mr Rowe was his non-observance of the requirements of s 391 before doing so.[59]

[85] After referring to the effect of s 7 of the *PPRA* and the fact s 391 was silent as to the immediate and practical consequences of failure to comply with its requirements, her Honour said:[60]

> "… I doubt that compliance with the s 391 requirements is a necessary component to a lawful direction. I have however, come to the conclusion that those requirements, and whether they have been observed are relevant to whether any offence of contravening the direction is committed."

[86] Her Honour then referred to the purpose of the Act set out in s 5(e), and said:[61]

> "[76] … The requirements of s 391, described in the section's heading as "Safeguards", meet that purpose. **It is consistent with the notion of rights protection that an individual to whom the direction is given should not be regarded as having contravened it until those safeguard requirements have been observed.**
>
> [77] In addition the sequence in which the steps prescribed by s 391 are set out is instructive. The police officer must first give the direction, and then, if practicable, the dual warnings that it is an offence to fail to comply without a reasonable excuse and that the person may be arrested. What follows is the giving of a reasonable opportunity to comply. The section's current equivalent, s 637, refers to a "further reasonable opportunity". In my view the amendment simply makes express what was previously implicit: that where it is practicable to give warnings, the direction, warnings, and an opportunity to comply, having been warned, must be given in that order. **It is rational to suppose from the requirement of an opportunity to comply, that if the opportunity is not given, the direction has not been contravened. Since the relevant opportunity is to comply having been given the benefit of the warnings (where practicable), it follows that both warnings and opportunity must precede any contravention.**

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59 Ibid, [74].
60 Ibid, [76].
61 Ibid, [76]-[79].

> **[78] That construction, that observance of the s 391 requirements is a prerequisite to the commission of any offence, is consistent with the authorities cited by the applicant,** more particularly *Cox v Robinson**.*** *Coleman v Greenland, Donaldson, Powers, etc & the State of Queensland* was a civil action against police officers for assault and wrongful arrest. The plaintiff was arrested for failing to comply with a direction given under s 1074 of the *Local Government Act* 1993. Section 1074 which was headed "Direction, Power of Police Officers about Malls", enabled a police officer to give a direction in certain circumstances. The section provided,
>
> > "when giving the direction the police officer must warn the person that it is an offence not to comply with the direction".
>
> Cullinane J took the view that that requirement was "mandatory and a prerequisite to the commission of the offence" of non-compliance with the direction.
>
> [79] ***Cox v Robinson*** **concerned s 57 of the *Police Powers and Responsibilities Act* 1997, sub-section 1(b)(ii)** of which enabled a police officer to require a person to attend a police station to enable his or her identifying particulars to be taken. **Sub-section 3 stipulated, "a police officer must warn the person it is an offence to contravene a requirement under sub-section 1(b)(ii)". This Court held that the warning was "an essential part of a valid requirement under s 57(1)(b)(ii) and should be regarded as an ingredient of the offence" of non-compliance with the requirement."** (My emphasis.)

[87] Mr Copley does not argue that the police failed to comply with s 634(2) (a police officer who suspects a person committed a declared offence must if reasonably practicable, give the person a reasonable opportunity to explain), but directs his attention to the asserted failure to comply with s 634(3), and in particular sub-section (3)(b). He accepts s 634(3)(a) does not apply (because the applicant did not fail to give an explanation for his presence on the steps). It is also accepted that s 634(3)(c) (it is not reasonably practicable to give the person a reasonable opportunity to give an explanation) clearly does not apply.

[88] Hence it is submitted, the police may only have started a proceeding against Mr Preston under s 11(2) of the *SOA* if the requirements of s 634(3)(b) were complied with.

[89] It is asserted the requirements were not complied with because there was no direct evidence that a police officer subjectively considered Mr Preston's explanation was not reasonable.

[90] Although Mr Copley accepts that in some circumstances there will be evidence from which an inference may be drawn that a police officer had the requisite state of

mind,[62] he argues that in this case it cannot be inferred that the police turned their minds to this question.

[91] In support of this he emphasises they initially charged Mr Preston with contravening a direction because of his failure to move on. Therefore, he argues it is unlikely that any consideration was given to whether his explanation was reasonable or not.

[92] Further, he refers to Constable Parker's evidence about what he thought constituted lawful abortion in Queensland, in terms that "the abortion clinic functions, as I understand, is entitled to operate as it is on foetuses that are under a certain month or trimester, and therefore they're operating legally." Mr Copley describes this as a mistaken view that there exists in Queensland some provision for lawful abortion on demand.[63] Therefore, he argues that even as late as the trial (and so also probably prior to the hearing), Constable Parker was virtually incapable of assessing the reasonableness of Mr Preston's explanation for being on the steps because of his lack of legal knowledge.

[93] He also refers to Constable McMeniman's evidence as to why Mr Preston was told he was going to be arrested as set out at para [34] above, and in light of it submits that he perhaps had no view on what the state of the law in Queensland is.[64] He also says "one wonders what the police were thinking at all on that day."[65]

[94] It is also submitted that as the prosecutor adverted to s 634 in his closing address, but did not adduce evidence from the police on the issue, the reasonable inference which can be drawn according to the rule in *Jones v Dunkel*[66] is that they could not have given any evidence which would have assisted the prosecution case.[67]

[95] Accordingly, it is submitted the prosecution did not and could not prove beyond a reasonable doubt that the police formed the view required by s 634(3)(b) of the *PPRA.*

Section 22 - Honest claim of right[68]

[96] As a general proposition, it is submitted the magistrate failed to advert to the relevant defences raised by the evidence, and if she had done so, she would have found the defences were not excluded by the prosecution beyond reasonable doubt.[69]

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62 T1-20 L1-20 L10-38.

63 He submits this is completely at odds with ss 224 and 228 of the *Code*, and *R v Bayliss and Cullen* (1988) 9 Qld Lawyer Reps 8. Reference is also made to s 313(2) and s 292 of the *Code*, and *Bowditch v McEwan & Ors* [2002] QCA 172, esp at [12].

64 T1-27 L27-29.

65 T1-22 L50-52.

66 (1959) 101 CLR 298.

67 T1-27 L38-45.

68 Outline of Argument on behalf of the appellant, [28]-[47], T1-34 L30.

69 T1-30 L42-48.

[97] This relates to the requirement under s 11(2) of the *SOA* that "a person must not **unlawfully** … remain in …a place …" (My emphasis.) Schedule 2 of the *SOA* defines "unlawfully" to mean "without authorisation, justification or excuse by law." Therefore, the onus lies on the prosecution to exclude beyond reasonable doubt any excuse raised by the evidence.[70]

[98] The first such excuse which it is submitted was not excluded beyond reasonable doubt is provided by s 22(2) of the *Code* which states:

> " … [A] person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by the person with respect to any property in the exercise of an honest claim of right and without intention to defraud."

[99] Reference was made to *R v Pollard*[71] where the applicant was charged under s 408A of the *Code* with unlawful use of a motor vehicle without the consent of the owner, and without the consent of any person in lawful possession thereof. On the evidence the applicant knew the owner of the motor vehicle had not consented to his using it, but believed the owner would not have any objection to his doing so and would have consented to this if asked. The short point which arose for consideration was if the question of whether the applicant took the vehicle in the exercise of an honest claim of right under that section should have been left to the jury. In answering this question in the affirmative Gibbs J (with whom Stanley and Hanger JJ agreed), expressed the oft quoted dictum:[72]

> "An accused acts in the exercise of an honest claim of right, if he honestly believes himself to be entitled to do what he is doing."

[100] In *R v Pollard* Gibbs J also said:[73]

> "It is well settled that a claim of right sufficient to relieve a person of criminal responsibility need only be honest and need not be reasonable (*Clarkson v Aspinall; Ex parte Aspinall* ([1950] St R Qd 79, at 89)); "the fact that it is wrongheaded does not matter": *R v Gilson and Cohen* ([1944] 29 Cr App R 174 at 180). In *Rex v Bernhard* ([1938] 2 KB 264 at 270) the Court of Criminal Appeal said that a person has such a claim of right "if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact."

[101] Consistently with this, in *R v Jeffrey & Daley*[74] to which Mr Copley also refers, Jerrard JA (with whom McMurdo P and Atkinson J agreed) said:[75]

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70 *R v Taiters, exparte Attorney-General* [1997] 1 Qd R 333 at 336.
71 [1962] QWN 13.
72 Ibid at 29.
73 Ibid.
74 (2002) 136 A Crim R 7.
75 Ibid at 12.

> "While …[a] … claimed belief must be honestly held to raise a defence under s 22, it does not matter if the right asserted by the belief is one which is unfounded in law or fact … An honestly held belief in a claim of right … although unfounded or unreasonable, would relieve … from criminal responsibility …"

R v Williams[76] in which McCrossan CJ said[77] "an honest claim may, … stem from a belief which the law does not recognise" is also cited by Mr Copley.

[102] I was also referred to the following passages in *R v Waine*[78] where the appellant, who was convicted of wilful damage of huts owned by the Director-General of the Department of the Environment, claimed she believed she was authorised to do the damage by another person who was allowed by the trial judge to assert an honest claim of right to deal with the property on the basis of a claim of native title. In discussing whether the trial judge should also have left a defence under s 22 of the *Code* to the jury in the case of the appellant, Keane JA (with whom McMurdo P and Wilson J agreed) said:[79]

> "[23] … what is required to raise the possibility of a defence under s 22(2) of the *Criminal Code* is an honest claim by the accused to an entitlement in, or with respect to, property. It may be, although it is not entirely clear, that this claim must be one which is peculiar to the person asserting it. It is clear, however, that it is not necessary that the right claimed be one known to the law.
>
> [24] It is also clear that the defence afforded by s 22(2) is "not limited … to offences by which the offender obtains possession of property. The defence is available when the offence relates to the damaging or destroying of property …"
>
> [25] [A]n honest claim of right may be made, not only as a claim to a proprietary or possessory right **in property**, but also as a claim to be entitled to act **in respect of property.** What is important is the honest belief that one is legally entitled to do to the property that which one is doing. That belief as to entitlement may come equally from the consent of the owner, or from a person believed to be the owner, as well as from a mistaken belief as to one's own title.
> …
> [27] In the present case, the issue was whether the appellant, as a person dealing with property in a manner authorized by Aboriginal persons asserting ownership of the cabins, could raise a defence under s 22(2) of the *Criminal Code* by claiming to deal with the huts in accordance with the consent of those persons. In my respectful opinion, in such a case, the accused falls within the dictum of Gibbs J in *R v Pollard:* …

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76 [1988] 1 Qd R 289.
77 Ibid at 295.
78 [2006] 1 Qd R 458.
79 Ibid, [23]-[29] at 462-463.

> "An accused person acts in the exercise of an honest claim of right (in respect of the property the subject of the charge) if he honestly believes himself to be entitled to do what he is doing [in relation to that property]."
>
> [28] I have made the parenthetical insertions in the dictum of Gibbs J in deference to the observations of Mansfield CJ in *Olsen v Grain Sorghum Marketing Board; Ex parte Olsen* that the statement of Gibbs J must be read as speaking of **conduct in respect of the property the subject of the charge**.
>
> [29] … It was submitted on behalf of the respondent that only a claimant to a beneficial interest in property in that claimant may raise a defence under s 22(2) of the *Criminal Code.* But the language of s 22(2) does not suggest that the defence which it affords can or should be read down in this way; and to read the language of s 22(2) as if it were so confined would be inconsistent with the liberal construction of the provision supported by *R v Jeffrey & Daley."*

It was concluded in this case, that there was evidence sufficient to raise the issue of a defence under s 22(2) of the *Code.* Mr Copley adds that the list of ways in which a person can ground a defence of honest claim of right under s 22(2) identified in [25] of the judgment are non-exhaustive examples.[80]

[103] With reference to the statements made by Mr Preston to Constables Parker and McMeniman,[81] and their evidence he was holding signs depicting aborted babies, it was submitted this points to an honestly held belief on the part of Mr Preston that not only were abortions being performed, but illegal abortions were being performed at the clinic, (particularly when regard is had to his exhortation to police to "go in there and arrest them"); and as a result (and indeed whether he held a belief that the abortions were illegal or not) he held the belief he was entitled to occupy the steps to deter or prevent people accessing such abortion procedures.

[104] Mr Copley submitted that, provided Mr Preston honestly (ie subjectively) held this belief, it is irrelevant whether this belief was objectively reasonable; and nor did it matter that he believed s 273 of the *Code* applied[82] because any such mistake as to law is also irrelevant.

[105] He submits a hearing of the tape is sufficient to establish Mr Preston's belief was genuine, and therefore honestly held, and in these circumstances even if it was misguided, wrong headed, or it was based on a right the law does not recognise (eg occupying the stairs in order to defend all unborn children), s 22 would apply.

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80 T1-32 L8-15.

81 These statements are set out at [33] of the Outline of Argument on behalf of the appellant and are consistent with Constable Parker's understanding as set out at [27] above that Mr Preston said he was there to protect the lives of unborn children inside the business.

82 Mr Copley concedes at [38] of the Outline of Argument on behalf of the appellant that it probably did not because the application of force is not an element of the offence of trespass.

[106] As he correctly observed there is no issue about any attempt to defraud.

[107] He submits that trespass is an offence relating to property, and as the defence is available in respect of possessing, damaging or destroying property, it must also be available for offences such as this which relates to occupying property.

[108] With reference to *Walden v Hensler*[83] he submits it is not necessary "that the claim be one to property in the object in question or that it be a claim peculiar to the defendant."

[109] It is further submitted the defence must be available where a defendant honestly believes himself entitled to do what he is doing "in respect of the property the subject of the charge" (in this case the steps) even in the absence of a beneficial interest or agency.[84]

[110] In conclusion, it is submitted the prosecution could not (and made no attempt to) exclude the defence beyond a reasonable doubt, and accordingly, I should find the defence has not been excluded to this standard. Although Mr Copley candidly accepts he cannot point to an authority that goes as far to apply s 22(2) in circumstances such as exist in this case.

Section 31(1)(c) and (d) – Compulsion[85]

[111] It is next submitted that if illegal abortions were to be performed at the clinic on the day in question, the prosecution failed to exclude defences raised under s 31(1)(c) and (d) of the *Code*, which provide:

> "**31 Justification and excuse – compulsion**
> (1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances, that is to say –
> …
> (c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to … another person in the person's presence;
>
> (d) when –
>
> (i) the person does or omits to do the act in order to save … another person … from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat; and
>
> (ii) the person doing the act or making the omission reasonably believes … the other person is unable otherwise to escape the carrying out of the threat; and

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83 (1987) 163 CLR 561 at 600.

84 Reference is made to *R v Pollard* [1962] QWN 13.

85 Outline of argument on behalf of the appellant, [48]-[50], T1-34 L48 - T1-36 L10.

(iii) doing the act or making the omission is reasonably proportionate to the harm or detriment threatened."

[112] The submission is that the prosecution has not excluded the defence under s 31(1)(c) for the following reasons:

(a) relevant mothers and/or foetuses were sufficiently proximate to the Appellant to have been "in his presence";
(b) a pending illegal abortion is actual and unlawful violence threatened to a relevant mother and/or foetus; and
(c) the Appellant's occupation of the steps was (at least) reasonably necessary to resist that actual and unlawful violence.

[113] In relation to para [112](a) it is argued that "threatened" could be used expansively, and that actual and unlawful violence was threatened to the persons coming into the facility at the time he was on the steps. Reference was made to the evidence that at least one woman walked past him on the steps.

When I put to Mr Copley that there is no evidence as to why people were entering the premises, so that this woman or any of the other women who entered the premises via the driveway may not have been attending for terminations as opposed to some other form of business, it was conceded this may be so.[86]

However, the alternative submission was advanced, that as there was evidence at least one abortion was to be performed that day, the violence threatened was sufficiently proximate to have been in his presence notwithstanding he was out on the steps.

[114] In relation to para [112](c) it was argued his actions were clearly designed to prevent or deter the abortion which was to happen that day.

[115] It is submitted that, similarly, s 31(1)(d) applies in the circumstances.

Section 24 – Mistake of fact [87]

[116] However, Mr Copley accepts there is no evidence illegal abortions were to be performed that day.[88]

[117] For this reason he submits in the alternative that even if the abortions to be performed that day were legal, a defence arises on the evidence as a result of a combination of ss 24 and 31 of the *Code.*

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86 T1-35 L35-41.
87 Outline of Argument on behalf of the appellant, [51]-[54], T1-36 L10, T1-38 L26.
88 T1-34 L44-47; T1-36 L1-4.

[118] Section 24 of the *Code* relevantly provides:

> "**24 Mistake of fact**
> (1) A person who does … an act under an honest and reasonable, but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
> …"

It is submitted that the same evidence which is said to raise "a defence under s 22 also raised a defence under s 24", the relevant mistake being a belief by Mr Preston that illegal abortions were to be carried out.

[119] Ms Litchen conceded during oral argument that it was apparent he had an honest belief that terminations were being carried out on the premises. However, she argued it doesn't follow this belief was reasonable.[89]

[120] As to the objective reasonableness of the belief, Mr Copley particularly relies on:

(a) Ms Guy's evidence that abortions were planned on the day;

(b) there being no evidence those abortions were legal in accordance with Queensland law as expressed in *R v Bayliss and Cullen*;[90]

(c) on the basis of *Jones v Dunkel*[91] the inference should be drawn that nothing that Ms Guy (nor any other prosecution witness) could have said would have assisted the Crown in showing that the abortions which were scheduled for the day in question were lawful;

(d) if there was a mistaken belief that illegal abortions were to be performed, the simple means by which the prosecution could have been expected to exclude the reasonableness of it, as raised on the evidence, was to positively adduce evidence (eg from Ms Guy) that abortions that were to have been performed were <u>lawful</u>. Despite the obvious opportunity to lead such evidence from Ms Guy, the prosecution failed to do so.

[121] Therefore it is submitted, even if abortions to be performed that day were legal, mistake of fact was not excluded and Mr Preston was entitled to rely on s 31, as though "the real state of things had been such as (he) believed to exist" – namely that illegal abortions were to be carried out.

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89 T1-45 L33-48. Although she put this in terms of a concession that s 24 was raised by the evidence, in light of her submission on the issue of the reasonableness of that belief, this was really a concession as to the honesty of that belief.

90 (1986) 9 Qld Lawyer Reps 8.

91 (1959) 101 CLR 298.

Submissions for the respondent

Whether elements of charge were proved [92]

[122] Although Mr Copley did not specifically address Ground 1 of Appeal in his written or oral submissions, except to the extent of seeking orders that Mr Preston's conviction be set aside and a verdict of not guilty ordered,[93] the thrust of his argument was that I would find the magistrate erred in finding on the evidence before her that Mr Preston unlawfully remained in a place at 687 Logan Road, Greenslopes on 4 March 2008 in accordance with this ground.

[123] It is submitted on behalf of Constable Parker that it was open to the magistrate to make this finding, as the elements of the charge were proven on the evidence, and s 273 of the *Code* had been negatived. It is said that the charge of trespass arose when the appellant remained at a place belonging to the owner of the business, on the steps forming the entrance to the premises.

Compliance with s 634 of the PPRA

[124] It is submitted Constable Parker gave Mr Preston an opportunity to explain his presence, although he was not contemplating the charge of trespass at the time; he informed Mr Preston his presence was not welcomed there by the owner;[94] listened to his reasons for being there; and gave him a number of opportunities to move on.

[125] Ms Litchen argued there was a reasonable inference Constable Parker did not consider this explanation reasonable because he charged Mr Preston with contravening a direction rather than finding another solution; and that Constable Parker considered this explanation, which he must have thought would be no different, when deciding to charge him with trespass.[95]

[126] The point is made that Constable Parker was not investigating the clinic's activities, and in the circumstances it may be assumed the terminations were legal unless proven otherwise. Therefore, it was open to the officer to conclude Mr Preston's argument that unlawful abortions were taking place in the premises, was not a reasonable explanation.

[127] It is also submitted Mr Preston was not treated unfairly; and Constable Parker had a discretion to decide if the explanation was reasonable under s 634(3)(b) of the *PPRA*.[96] However, I agree with Mr Copley's reply that whether or not Mr Preston was treated fairly is irrelevant as to whether s 634(3)(b) is satisfied; and in

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92 Amended Outline of Submissions on behalf of the Respondent, [5.1]-[5.3].
93 Outline of Argument on behalf of the appellant, [55].
94 T1-41 L42-43.
95 Ibid L25-32; Section 791(2) of the *PPRA* states, "A person must not contravene a … direction by a police officer … under this Act, unless the person has a **reasonable excuse**". (My emphasis).
96 Amended Outline of Submissions on behalf of the respondent, [5.15] and [5.16].

determining this issue it is a question of whether or not Constable Parker had the requisite mental state, rather than a question of discretion.[97]

Section 22 – Honest claim of right

[128] It is submitted this excuse was not raised on the evidence. It is argued it relates only to claims over entitlements to property or with respect to property, and not to a claim of freedom to act in a particular way.

[129] *R v Williams*[98] was distinguished because in the present case the owner of the business had never invited Mr Preston's presence there and she complained to police about his occupation of the steps. It is submitted he was aware he was not given any permission to occupy the premises as soon as the police told him of the complaint. An associated submission was that Mr Preston argued that the police officer could not order him off the premises but the owner could. This may be a reference to his evidence immediately following his cross-examination that at no point did any one from the business speak to him or come anywhere near him, and Constable Parker was the only person who spoke to him.

[130] A submission is also made that Mr Preston demonstrated he knew he was breaching the law by obstructing the steps because he stated to police he had a defence under s 273 of the *Code* to avoid criminal responsibility. Therefore, it is submitted that no such honest belief was held by him; but rather a belief he could rely on one or more excuses to justify or excuse his occupation of the premises.

Section 24 – Mistake of fact

[131] It is observed the appeal is premised on Mr Preston's assertion the terminations of pregnancy were unlawful. It is submitted the magistrate was not compelled to determine whether or not the terminations were lawful, so as to exclude that Mr Preston was under a misapprehension about the true state of things.

[132] It is submitted that even if the appellant's mistaken belief that unlawful terminations were being conducted was honest and reasonable, he is relying on a mistake of law.

Section 31(1)(c) and (d) – Compulsion

[133] It is further submitted that even if the appellant's belief was honest and reasonable, it does not follow he could then rely on an excuse of compulsion under s 31 of the *Code*, or that s 31 is raised on the evidence that he believed unlawful terminations were being conducted.

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97 T1-46 L48 - T1-47 L20.

98 [1988] 1 Qd R 289.

[134] It is submitted that s 31 operates in a similar way to ss 271, 272 and 273 of the *Code*, but also extends to excuse acts in relation to property.

[135] Reference is made to the annotations to *Carter's Criminal Law of Queensland* which describes the scope of s 31 as covering acts done "in circumstances which overbear the ordinary human willpower to resist the act …" It is submitted that Mr Preston's act, while obstructive, and motivated by strongly held values, was not committed in circumstances of duress.

[136] It is submitted that as this act did not, and could not realistically stop anyone from entering the clinic, as they were able to use another entrance, and there is no evidence any female decided against a pregnancy termination as a result, it was not an act which was "reasonable and necessary in order to resist actual and unlawful violence threatened to any person".

[137] It is submitted Mr Preston had not discharged the evidential onus to raise the excuses under s 31(1)(c) and (d) because of the absence of evidence that there was a reasonable possibility he was compelled by anything or anybody, other than his own beliefs, to occupy the premises.

Discussion

Compliance with s 634 of the PPRA

[138] To adopt the language of Holmes JA in *Rowe v Kemper*[99] concerning what is now s 633 of the *PPRA*, the observance of the s 634(3)(b) requirement is a prerequisite to the commission of an offence against s 11(2) of the *SOA.*

[139] As Mackenzie AJA also said in that case the *PPRA*, in giving powers to the police for the purpose of carrying out their functions, also casts duties on them to exercise those powers in a way that observes the safeguards provided.[100]

[140] Section 634 provides safeguards where a police officer suspects a person has committed an offence against, inter alia, s 11(2) of the *SOA*. It was originally inserted as s 391A of the *PPRA* when the *SOA* commenced on 21 March 2005.

[141] The interpretation conveyed by the ordinary words of s 634 is confirmed by the Explanatory Notes to the *Summary Offences Bill* 2004[101] which state:

> "This provision outlines the steps that a police officer, who reasonably suspects a person has committed a declared offence, **must**

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99 [2008] QCA 175, [78].

100 Ibid, [85].

101 Queensland Acts, 2005, Volume 1, Explanatory Notes, Act Nos. 1-42 at 68; under s 14B(1)(c), subject to s 14B(2) in the interpretation of a provision of an Act, consideration may be given to extrinsic material for this purpose.

take **before charging a person** with that declared offence. The police officer must give the person the opportunity to explain –

- If the offence involves the person's presence at a place (clause 11) – why the person was at the relevant place; or

…

Should the person –

- fail to give an explanation; or

- **give an explanation the police officer is not satisfied is a reasonable explanation**, e.g. stating that a thing was purchased at a pub from an unknown person; or

- behave in a manner that an opportunity can not be given for the person to give an explanation, e.g., the person runs when confronted by the police officer.

the police officer is entitled to start a proceeding against a person for the declared offence." (my emphasis)

Clause 11 is s 11 of the *SOA.*

[142] The purpose of s 634(3)(b) is to ensure that a person is not charged with trespass on the basis of his presence at a relevant place if he gives an explanation that the police officer believes to be reasonable.

[143] Just as Holmes JA considered it consistent with the notion of rights protection that an individual to whom a direction is given under s 48 of the *PPRA* should not be regarded as having contravened it until the safeguard requirements of s 633 have been observed, it is also consistent with this notion that an individual who is given a reasonable opportunity to explain why he is at a place should not be regarded as committing an offence by remaining at that place until the safeguard requirements of s 634(3)(b) have been observed.[102]

[144] Holmes JA considered this construction to be consistent with *Cox v Robinson*[103] and *Coleman v Greenland, Donaldson, Powers etc v The State of Queensland.*[104] These decisions are discussed in her judgment as quoted at [86] above.[105]

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[102] *Rowe v Kemper* [2008] QCA 175, [76]; see also McMurdo P at [24] where she considered proof of compliance with s 633(2) and (3), if practicable, was necessary for the prosecution to establish an offence against s 791(2) and McKenzie AJA at [120] where he considered that failure to comply with what is now s 633(3) "bears on whether an offence has been committed".

[103] [2001] 2 Qd R 261.

[104] [2004] QSC 037.

[105] See *Rowe v Kemper* [2008] QCA 175, [78], [79].

[145] Although I proceed on the basis of this construction I do not consider that observance of the requirement under s 634(3)(b) is an ingredient of the offence of trespass contrary to s 11(2) of the *SOA*. Unlike the situation in *Cox v Robinson*[106] this was not an offence of non compliance with a requirement, an essential part of which was the taking of a step, in that case the giving of a warning, for that requirement to be valid. The statements in *Rowe v Kemper*[107] by McMurdo P that it was necessary to prove beyond reasonable doubt that Constable Kemper subjectively suspected Mr Rowe's behaviour was disorderly to him and his police colleagues, and that his suspicion was objectively reasonable, were made in the context of the purported exercise of what is now the s 48 power under s 46 and the consequent charge of contravening a direction under the *PPRA*.

[146] Although I do not accept Mr Copley's argument in this regard, because it makes no difference to my decision, I will proceed on the basis that the prosecution must establish the observance of the s 634(3)(b) requirement beyond reasonable doubt, i.e. the prosecution must prove to this standard that Constable Parker held the requisite state of mind.

[147] Section 634(3)(b) has to be considered in the context of the mandatory requirement under s 634(2)(a) that a police officer who suspects a person has committed a declared offence, such as an offence against s 11(2) of the *SOA*, must if reasonably practicable, give the person a reasonable opportunity to explain, in circumstances such as exist in the present case, why the person was present at the place. Mr Copley does not suggest Constable Parker failed to comply with the s 634(2)(a) requirement. His argument is that the requirements of s 634(3)(b) were not complied with. Therefore, I proceed to consider this argument on the basis Constable Parker, suspecting Mr Preston had committed an offence against s 11(2) of the *SOA*, gave him a reasonable opportunity to explain why he was on the steps at 687 Logan Road, Greenslopes on 4 March 2008.

[148] Therefore, the question is whether the prosecution have established beyond reasonable doubt as required by s 634(3)(b) that Constable Parker considered Mr Preston's explanation to be unreasonable. Although the provision invests a police officer with discretion as to whether to start a prosecution where he considers the explanation given is not reasonable, this requirement is mandatory. As stated in the Explanatory Note this provision outlines the steps a police officer "must" take before charging the person with the offence.

[149] In this case it is Constable Parker's state of mind that is relevant because he was the police officer who charged him with the offence.

[150] With reference to the reasonable suspicion which a police officer is required to form in terms of s 46(1), before exercising the move on power under s 48 of the *PPRA*, McMurdo P said in *Rowe v Kemper*,[108] the police officer "must personally form the

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106 [2001] 2 Qd R 261.
107 [2008] QCA 175, [17].
108 [2008] QCA 175, [6].

suspicion". Holmes JA said in that case the suspicion "had to be held" by the police officer.[109]

[151] Accordingly the prosecution are required to prove that Constable Parker personally considered Mr Preston's explanation and having done so held the view it was not a reasonable explanation. However, unlike the requirement under s 46 that the police officer reasonably suspects, there is no requirement under s 634(3)(b) for the police officer to form this view on reasonable grounds. As such there is no requirement that the police officer's explanation is reasonably based on facts which could create this view in the mind of a reasonable person.

[152] In *Rowe v Kemper* Mackenzie AJA said with reference to the reasonable suspicion which must be held under s 46(1), it "is a state of mind which can be inferred from circumstantial evidence in the absence of any direct evidence from the person concerned".[110] As indicated, although Mr Copley accepts that in some circumstances there will be evidence from which an inference can be drawn that a police officer had the requisite state of mind for the purpose of s 634(3)(b), he argued it cannot be inferred the police turned their minds to the question in this case.

[153] One of the arguments advanced in support of the proposition this cannot be inferred is that the initial charge against Mr Preston was of contravening a direction because of his failure to move on.

[154] It is true Constable Parker approached the situation which confronted him when he arrived at 687 Logan Road, Greenslopes on 4 March 2008 in terms of the move on power under s 48 of the *PPRA*. This is apparent from his initial conversation with Ms Guy soon after his arrival at this place. Both in this conversation and his subsequent conversations with Mr Preston he was clearly proceeding on the basis that by sitting on the steps, Mr Preston was "interfering with trade or business at the place by unnecessarily obstructing, hindering or impeding someone entering, at or leaving the place." This is one of the categories of behaviour described in s 46(1),[111] about which he was required to form a reasonable suspicion that Mr Preston's behaviour was within, before exercising the move on power. Consistent with this he said to Ms Guy "… but he is clearly interfering with your business, is that correct?" After receiving confirmation from her that this was an official complaint and she would like him moved on, he returned to Mr Preston and said to him "As far as the business goes you can't prevent people from going in and out which is what you are doing, here on the steps …. we have had an official complaint by the business saying that you are preventing people from coming in and out. I have witnessed people being forced to go in other directions to come in and out of here. I am going to give you a move on direction …". He then gave Mr Preston the first of two move on directions at 8.06 am. Having done so he said "If you choose not to obey my direction to move on here for the official reason I've given you, then you will be arrested for contravening a direction." Upon finding that Mr Preston

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109 Ibid, [70]; See also McKenzie AJA at [90] where he said the question is whether the suspicion "was in fact held by the person".

110 Ibid, [91].

111 See in particular s 46(1)(b).

had not moved at 8.25 am he confirmed the reasons for giving the direction was "interfering with business" and gave a second move on direction. Mr Preston was arrested under s 791(2) of the *PPRA* for contravening a direction by the police when he had not moved by 8.30 am.

[155] Constable McMeniman also appears to have proceeded on the basis of s 46(1)(b) because of his evidence that Mr Preston "actually stated to us that [he was] actually refusing people to get past". In addition, he appears to have also proceeded on the basis of the category in s 46(1)(a) by saying Mr Preston was "causing anxiety to people entering the place". However, as I have stated, it is Constable Parker's state of mind that is relevant.

[156] The issue of whether it can be inferred that Constable Parker had the requisite state of mind for the purpose of s 634(3)(b) must be approached on the basis that Mr Preston did give an explanation for his presence on the steps. This is because Mr Copley accepts s 634(3)(a) does not apply because as he puts it, Mr Preston "did not fail to give an explanation" for this.

[157] Mr Preston clearly explained the reason for his presence by his first words to Constable Parker which were:

> "Well if you go in there and arrest them, stop them killing children, stop them doing this I would let you in for sure."

This was expanded upon after Constable Parker had spoken to Ms Guy by Mr Preston saying:

> "… I'm not making a protest here. Under s 273 I am able to come to the defence of other persons, children …"

After Constable Parker gave him the first move on direction, Mr Preston also reinforced his explanation by showing Constable Parker pictures of babies that were being aborted on two posters he was holding and saying "That's what's going on here." Although saying he understood the direction, Mr Preston also said:

> "… that's the reality of what's going on here. 10 to 15 children are likely to be killed here today. How do you walk away from that?"

Following the second move on direction Mr Preston said "if nobody goes in nobody dies" and "you know someone's going to be killed you've got to help them."

[158] The evidence also shows that Constable Parker clearly understood Mr Preston's explanation. Although he told Mr Preston he was not there to talk about what Mr Preston was protesting about, he also said "I know what you're talking about here." When Mr Preston said in the context of being given the first move on direction "A legitimate business, I have no problems with. I wouldn't do it. Obviously I wouldn't go and sit in front of Coles. But Coles don't do...", Constable Parker responded "I know, I know. Like I said we'll get on with that topic with you, if you

wish." After Mr Preston had referred to the likelihood of 10 or 15 children being killed on this date, Constable Parker replied:

> "I understand why you are here, but I can't let you sit here and do this."

As Mr Preston was being transported to the Watchhouse after his arrest Constable Parker said:

> "I hear where you're coming from Graham. But unfortunately we have to sort of enforce all the laws as well mate, and I tried to give you as much time as I could. I gave you pretty much a full half hour."

[159] The fact that Constable Parker clearly understood Mr Preston's explanation for his presence is demonstrated by his response to Mr Preston's cross-examination as set out at para [27] above. His understanding about what Mr Preston was saying to him, was that he was there to protect the lives of unborn children.

[160] In addition, the effect of Constable Parker's evidence was that despite having given Mr Preston two move on directions he remained at the place. As set out above he observed to Mr Preston shortly after the arrest that "I tried to give you as much time as I could. I gave you pretty much a full half hour." This is consistent with Constable Parker's evidence that it was 7.58 am when he arrived at the place, he gave the first move on direction at 8.06 am, finding that Mr Preston had not moved at 8.25 am he gave the second move on direction, and he arrested him at 8.30 am. Constable Parker's evidence was that Mr Preston was in the same position on each occasion they spoke. In other words, the unchallenged evidence is that Mr Preston was in the same position for 32 minutes from Constable Parker's arrival at the premises until the time of arrest. This involved him remaining at the place within the ordinary meaning of that term. The word "remain" is defined as "to stay in the same place".[112]

[161] Therefore, I find that on 4 March 2008 Mr Preston remained in a place used for business purposes at 687 Logan Road, Greenslopes for reasons which were understood by Constable Parker.

[162] When Constable Parker arrested Mr Preston without a warrant for contravening a direction contrary to s 181(2) he was purporting to act under s 365(1) of the *PPRA* which provides:

> "It is lawful for a police officer without a warrant to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons –

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[112] Cambridge Advanced Learner's Dictionary. It is defined by the Macquarie Dictionary, 2nd revised edition, 1990 reprint as "to stay in a place". "To stay" was also the meaning adopted by the magistrate based on the Concise Oxford Dictionary. Her Honour also found he stayed there for at least 30 minutes.

…

(i) because the offence is an offence against section … 791".

[163] Section 791(2) provides:

> "A person must not contravene a requirement or direction given by a police officer … under this Act, unless the person had a reasonable excuse."

[164] Therefore, in order to have arrested Mr Preston without a warrant for this offence, Constable Parker must have reasonably suspected that, without a reasonable excuse, Mr Preston had contravened a direction given by him under the Act.

[165] The law on the statutory requirement of "reasonable grounds" for suspicion is conveniently summarised by Holmes J (as she then was) in *Dobbs v Ward*[113] where citing *George v Rockett*[114] her Honour said:[115]

> "[it] is the requirement of "the existence of facts which are sufficient to induce that state of mind in a reasonable person". Suspicion itself is a state of conjecture or surmise where proof is lacking."

[166] Accordingly Constable Parker must have personally formed the suspicion in this sense, that Mr Preston's behaviour involved, without reasonable excuse contravening the move on direction given by him; and to have done so on the basis of facts which would create a reasonable suspicion in the mind of a reasonable person. In addition to his suspicion incorporating the absence of a reasonable excuse for contravening the move on direction, in the circumstances it must have extended to the contravention of that direction by remaining in the same position at the place for 32 minutes.

[167] Constable Parker's evidence was that the initial charge of contravention of a direction was changed "in relation to facts that I wasn't aware of at the time." Although he did not identify these facts, the magistrate said in her decision with reference to the move on direction:[116]

> "They did this in the context of a misconceived move on direction, which direction was not available to them, the premises being private property."

By virtue of s 46(1) a police officer may only exercise the move on power under s 4B in relation to a person "at or near a regulated place". Section 44 defines "regulated places" as:

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113 [2003] 1 Qd R 158.
114 (1990) 170 CLR 104.
115 [2003] 1 Qd R 158 at 163.
116 Decision, T3 L43-46.

(a) public place;
(b) prescribed places that are not also public places."

[168] The term "prescribed place" is defined in Schedule 6. Ms Litchen conceded in her submissions that the place at 687 Logan Road, Greenslopes to which the direction related, and which she described as a medical clinic, was not within the definition of "regulated places".[117] This is consistent with my decision of 3 March 2004 that the premises was not a "shop", and accordingly Mr Preston was not at or near a prescribed place when the move on direction was given on 23 October 2003.[118] Although the definition of "regulated places" was inserted by the *Police Powers and Responsibilities and Other Acts Amendment Act* 2006 to apply the move on provisions to all public places as well as prescribed places that are not public places, this did not alter the position in relation to 687 Logan Road, Greenslopes.

[169] Although as a result, as Ms Litchen concedes, the move on direction given by Constable Parker on 4 March 2008 was not lawful and could not form the basis for the charge under s 791(2), the fact remains that in order to have charged Mr Preston with this offence, Constable Parker's state of mind must have been that he held a reasonable suspicion Mr Preston had contravened his directions by remaining in the place, and to have done so in the absence of a reasonable excuse.

[170] I am satisfied beyond reasonable doubt that Mr Preston remained at the premises[119] and this was also Constable Parker's state of mind in circumstances where the unchallenged evidence is that he saw Mr Preston in the same position for 32 minutes from his time of arrival until the time of arrest, and consistently with this following the arrest he said to Mr Preston,

> "I tried to give you as much time as I could. I gave you pretty much a full half hour."

[171] Further, I am satisfied beyond reasonable doubt that in arresting Mr Preston, not only did Constable Parker have a reasonable suspicion that Mr Preston did not have a reasonable excuse to remain at the premises in contravention of his direction, but his state of mind was that having considered his explanation he did not regard it as reasonable. As I have observed Constable Parker has demonstrated he clearly understood what Mr Preston was saying to him. By arresting him he clearly considered this was not a reasonable excuse.[120]

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117 Amended Outline of Submissions on behalf of the Respondent, [5.17] – [5.19].

118 *Police v John Graham Preston*, unreported, Irwin CM, Bris Mag 00028810/03; Mag 00174208/03(4), 3 March 2004.

119 As I have stated at para [41] above, Mr Preston conceded in his submissions to the magistrate that he did enter the place and remain there.

120 As I have also stated at para [147] above, Mr Copley does not suggest Constable Parker failed to comply with s 634(2)(a), and therefore I have proceeded on the basis that he suspected Mr Preston committed an offence against s 11(2) and gave him a reasonable opportunity to explain why he was on the steps. However, I am independently satisfied that this is established, in the context of considering the argument that it cannot be inferred the police turned their mind to the question under s 634(3)(b) because the initial charge against Mr Preston was of contravening a direction because of his failure to move on.

[172] Accordingly when it became necessary to change the charge from contravening a direction to trespass because the move on direction was unlawful, it can be inferred beyond reasonable doubt that Constable Parker's state of mind was that Mr Preston had remained at the premises, he had considered his explanation for being there, and just as he considered that it was not a reasonable excuse for the purpose of contravention of his direction he concluded it was not a reasonable explanation for the purposes of the charge of trespass.

[173] In circumstances where it can be inferred that Constable Parker's state of mind was that Mr Preston had remained at the premises, it is irrelevant that he never used the word "trespass" and only told him to move on. Although the charge is one of trespass by virtue of the heading to s 11(2), it is a charge, an element of which is to "remain" in a place used for a business purpose.

[174] I have considered Mr Copley's submission that because no evidence was adduced from the police on the issue, the reasonable inference which can be drawn according to the rule in *Jones v Dunkel*[121] is that they could not have given any evidence which would have assisted the prosecution case. For the reasons I have given the inference which can be drawn from the evidence is to the contrary. A similar argument was advanced without success on behalf of Mr Preston in *Preston v Liussi*[122] which was referred to before the magistrate during submissions on sentence. That was an unsuccessful appeal against a conviction for trespass. A police officer approached Mr Preston and said "You are trespassing right now. Are you going to leave?" Mr Preston replied "When they stop killing children". The police officer then placed the appellant and two people who were described as "the other two protestors" under arrest. In responding to the submissions that no police officer gave evidence that the police officer considered the explanation was not a reasonable one, Shanahan DCJ said:

> "In my view, that is not the case. The police officer was entitled in all the circumstances confronting him to consider it was not a reasonable explanation. The accused clearly indicated to the police officer that that he was going to continue with his protest by remaining at the scene."

In my view this reasoning is applicable in the present case, although at the time of the discussion Constable Parker was addressing Mr Preston in terms of the move on power. In each case Mr Preston chose not to leave but to remain there for this purpose. Therefore, just as the police officer in *Preston v Liussi* was entitled in all the circumstances confronting him to consider this was not a reasonable explanation, Constable Parker was entitled to conclude in all the circumstances confronting him that Mr Preston's explanation for remaining in the place was not a reasonable excuse for the charge of contravention of his direction, and was not a reasonable explanation for the purpose of the subsequent trespass charge.

[175] The fact that Constable Parker was mistaken in his understanding of the abortion law in Queensland does not alter the position. As indicated his evidence was that

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121 (1959) 101 CLR 298

122 *Preston v Liussi*, unreported, Shanahan DCJ, Appeal No BD 4101 of 2005, 19 June 2006.

although he was not an expert in the area of foetuses, as far as he understood it the business at 687 Logan Road, Greenslopes was operating legally because "the abortion clinic functions, as I understand, is entitled to operate as it is on foetuses that are under a certain month or trimester, and therefore they're operating legally."

[176] It can be readily accepted that abortion on demand is illegal in Queensland. This is derived from the continued effect of ss 224 and 282 of the *Code*. Section 224 makes it an offence for a person to unlawfully administer any poison or noxious thing or use force to procure the miscarriage of a woman. To establish unlawfulness of any of the acts the prosecution must negative the provisions of s 282. In *R v Bayliss and Cullen* [123] McGuire DCJ concluded that *R v Davidson,*[124] as approved in *K v T*[125] and *Re Bayliss,*[126] represented the law in Queensland.[127] Consequently, as stated in the head note, McGuire DCJ held that the jury would be instructed that for the use of an instrument with intent to procure a miscarriage to be lawful on therapeutic grounds, the accused person must honestly believe on reasonable grounds that the act done by him was:

(a) necessary to preserve the woman from serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and child birth) which the continuance of her pregnancy would entail; and

(b) in the circumstances not out of proportion to the danger to be averted.

This language is taken from the judgment of GN Williams J in *K v T,*[128] with reference to such an instruction being in accordance with *R v Bourne*[129] and *R v Davidson.*[130] In *Re Bayliss,*[131] McPherson J expressly accepted the passage from the judgment of GN Williams J as representing the law in Queensland. As GN Williams J also observed:[132]

> "…a doctor performing a surgical operation on a woman who is with child is not criminally responsible for the death of the embryo child pursuant to s 224 if the operation is within the purview of s 282 of the *Code*…
>
> …

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123 (1986) 9 Qld Lawyer Reps 8. I rely on this decision in preference to *Bowditch v McEwan & Ors* [2002] QCA 172 especially at [12] which is also referred to on this point because the decision is in the context of the criminal law and with direct reference to these provisions, whereas *Bowditch* is a case on the extent of the duty of care owed by the driver to others within a vehicle, including any foetus within a passenger, and including where the foetus is within the driver.

124 [1968] VR 667.

125 [1983] 1 Qd R 396.

126 Unreported, Supreme Court of Queensland, McPherson J, OS No. 376 of 1985, 24 May 1985.

127 (1988) 9 Qld Lawyer Reps 8 at 45.

128 [1983] 1 Qd R 396 at 398. This decision was upheld by the Full Court in *Attorney-General (Ex rel Kerr) v T* [1983] 1 Qd R 404 at 405.

129 [1939] 1 KB 687.

130 [1968] VR 667.

131 Unreported Supreme Court of Queensland, McPherson J, OS No. 376 of 1985, 24 May 1985.

132 [1983] 1 Qd R 396 at 398.

> … it is only if there is an apparent want of good faith on the part of the practitioner concerned in deciding on the operation of the type in question that a prosecution would follow."

[177] Whether or not Constable Parker's view of the law is to be equated with a belief that there exists in Queensland some provision for lawful abortion on demand, as suggested by Mr Copley, I accept that his view of the law as expressed in his evidence was mistaken.

[178] In *Veivers v Roberts*; *ex parte Vievers*[133]it was held that even where a person was arrested but later acquitted of an offence against the provisions of the *Vagrants, Gaming & Other Offences Act 1931-1937*(Qld) of being found in an enclosed yard without lawful excuse, the person could still be convicted of the reactive offence of resisting the arresting officer in the execution of his duty under s 59 of the *Police Acts 1937-1978* (Qld) if, at the time of the arrest the police officer had reasonable grounds for believing that the offences had been committed. In this case the police officer had charged the person with the offence against the *Vagrants, Gaming and Other Offences Act* under the misapprehension that the portion of the premises in which he found the person was an enclosed yard. DM Campbell J with whom WB Campbell J and Andrews J agreed said:[134]

> **"A constable may have reasonable grounds for believing that an offence has been committed although he is under a misapprehension as to the law**. In this case the respondent was on private property. He was in an area which was fenced in. He was committing a trespass and the constable had reasonable grounds for believing that he found him offending against s. 4(1)(viii)(a) of the *Vagrants, Gaming and Other Offences Act*. I therefore think that the magistrate was in error on the findings he made in dismissing the charge brought under s. 59 of the *Police Act.* (My emphasis)

[179] Campbell J added:

> "In relation to the second appeal I also consider that the magistrate erred in holding that the defendant could not be said to have entertained a belief on reasonable grounds because that belief was based by him on an erroneous view of the law. The magistrate had earlier said that he had no doubt that at the time of arrest the constable had an honest belief that the defendant committed the offence, and when this is allied with the circumstances of the case to which my brother has referred it seems to me to be inconsistent for the magistrate to express the view that the belief could not have been entertained on reasonable grounds. It appears that apart from taking that view, the magistrate would have concluded that the constable had acted not only with an honest belief but with such belief being based on reasonable grounds."

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133 [1980] Qd R 226; see *Rowe v Kemp* [2008] QCA 175, [24] per McMurdo J.

134 [1980] Qd R 226 at 228-229.

[180] By analogy I consider that a police officer may still consider that an explanation is not reasonable although he is under a misapprehension of the law. This is particularly so when s 634(3)(b) simply requires the police officer to consider whether or not the explanation given is reasonable, and does not require the police officer to have reasonable grounds for considering it is not reasonable before being able to start a proceeding against the person for an offence against s 11(2) of the *SOA*. Once the police officer has met the requirements under s 634(3)(b) of having considered the explanation and having concluded it is not reasonable, it is then for the court to consider that explanation in determining whether the prosecution has established beyond reasonable doubt that not only did the person remain in the place used for a business purpose but also that the person did so "unlawfully."

[181] Further, to adopt the language of GN Williams J in *K v T*,[135] in circumstances where a doctor performing a surgical operation on a woman who is with child is not criminally responsible for the death of the embryo child pursuant to s 224 if the operation is within the purview of s 282 of the *Code*, Constable Parker had no evidence of an apparent want of good faith on the part of any doctor performing an operation of this nature at 687 Logan Road, Greenslopes on 4 March 2008, such that a prosecution would follow.

[182] Therefore I do not consider Constable Parker was incapable of assessing the reasonableness of Mr Preston's explanation for being on the steps because of his lack of legal knowledge.

[183] To conclude otherwise would lead to an absurd result in the circumstances of this case when the explanation given by Mr Preston at the time for remaining at the premises is conceded by Mr Copley to probably not be applicable. The explanation given to Constable Parker at an early stage was, "under s 273 I am able to come to the defence of other persons, children". As stated above Mr Copley concludes at [38] of the Outline of Argument on behalf of the appellant that s 273 of the *Code* probably did not apply because the application of force is not an element of the offence of trespass.

[184] Further section 273 provides:

> "**Aiding in self-defence**
> In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself or herself against an assault, it is lawful for any other person acting in good faith in the first person's aid to use a like degree of force for the purpose of defending the first person."

This provision requires as a condition precedent to aiding another person in self-defence, that it is lawful for the person aided to use force for the purpose of defending himself or herself against an assault. As a matter of commonsense an unborn child is not able to use force for this purpose. Accordingly Mr Preston's explanation to Constable Parker that he was at the place aiding in the defence of an

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135 [1983] 1 Qd R 396 at 398.

unborn child under s 273 (a position he maintained before the magistrate) was without foundation.

[185] In these circumstances not only am I satisfied that Constable Parker had the requisite state of mind for the purposes of s 634(3)(b) but also, not withstanding that his view of the law concerning abortion in Queensland was mistaken, he was entitled to consider that the actual explanation given by the applicant for his presence at the place was not reasonable.

[186] For the reasons that I have given, Constable McMenimen's explanation as to why Constable Parker told Mr Preston he was going to be arrested is not relevant to the determination of this issue. Unlike Constable Parker, he did not express his view on the law concerning abortion in Queensland.

[187] On the basis of this analysis I answer the question of whether the prosecution has established beyond reasonable doubt as required by s 634(3)(b) that Constable Parker considered Mr Preston's explanation, and considered it to be unreasonable, in the affirmative.

[188] Therefore I am satisfied to this standard that the s 634(3)(b) requirement has been observed by Constable Parker, and as such the prerequisite to the commission of an offence against s 11(2) of the *SOA* has been established.

[189] Accordingly I reject the proposition that the magistrate erred in not finding on the evidence before her that the proceeding for the alleged offence was invalid because no police officer complied with necessary prerequisites under s 634 of the *PPRA*. I therefore reject Ground 2B of Appeal.

Section 22 – Honest Claim of right

[190] Ground 2C of Appeal is that the magistrate erred by failing to find that the prosecution had not excluded the operation of s 22 of the *Code*.

[191] This is part of a submission that as a general proposition the magistrate failed to advert to the relevant defences raised by the evidence, and if she had done so, she would have found the defences were not excluded by the prosecution beyond reasonable doubt.

[192] The issue of whether Mr Preston was protected by s 22(2) of the *Code* was not expressly raised by him or the prosecutor in the Magistrates Court. Given the thrust of Mr Preston's detailed submissions,[136] it is not surprising that it was overlooked

[136] Sections 24 and 31 of the *Code* which are relied on in support of Grounds 2D and 2E of Appeal were also not raised by either party in the Magistrates Court. Instead Mr Preston relied on ss 273, 290, 292 and 313(2) of the *Code* and the Universal Declaration of Human Rights and the Declaration of the Rights of the Child. He also argued that s 11(2) of the *SOA* was a pre-emptive measure against offences such as burglary, and s 12 was more applicable to the circumstances.

by the magistrate. There are consequently no direct findings of fact relevant to this issue.

[193] In proceeding to decide the case for myself on the evidence admitted at first instance in accordance with the principle set out in para [9] of this judgment, I apply the well established principle that the prosecution must negative any defence raised on the evidence beyond reasonable doubt.

[194] Because Mr Preston conceded during his submissions to the magistrate that he did enter the place and remain there, the real issue is whether the prosecution has proved beyond reasonable doubt that in remaining there he did so "unlawfully." Schedule 2 of the *SOA* defines "unlawfully" to mean "without authorisation, justification or excuse by law". Therefore the onus lies on the prosecution to exclude beyond reasonable doubt any such excuse raised by the evidence.

[195] The excuse provided by s 22(2) applies by virtue of s 36 of the *Code* to "all persons charged with any offence against the Statute Law of Queensland". Therefore where a person is charged with an offence under a statute, such as s 11(2) of the *SOA*, the person is entitled to rely on s 22(2) if, in the particular circumstances, the person can bring himself or herself within the language of the section.[137]

[196] Section 22(2) as set out at para [98] of this judgment, only applies to "an offence relating to property". It is "not limited … to offences by which the offender obtains possession of property. The defence is available when the offence relates to the damaging or destroying of property …".[138] I agree with Mr Copley that trespass is an offence relating to property, and therefore s 22(2) must also be available for such an offence against s 11(2) of the *SOA* which relates to a person remaining in a place, or as Mr Copley puts it, occupying property. This is confirmed by the Full Court of Western Australia, which in *Molina v Zaknich*[139] held that the equivalent provision of the *Criminal Code* (WA) was applicable to an offence of remaining on premises without lawful authority contrary to s 82B(1) of the *Police Act* 1892 (WA).

[197] I am also satisfied that Mr Preston's act of remaining on the steps at 687 Logan Road, Greenslopes by continuing to occupy them for 32 minutes from Constable Parker's arrival there until the time, of his arrest, including 24 minutes from the first move on direction, was an "act done by … [him] with respect to … property" for the purpose of s 22(2).

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137 *Walden v Hensler* (1987) 163 CLR 561 at 598 per Toohey J.

138 *Ibid* at 571 per Brennan J, applied to in *R v Waine* [2006] 1 Qd R 458, [24] at 462.

139 (2001) 125 A Crim R 401; [2001] WASCA 337. The equivalent provision is also s 22. I note that in that case McKechnie J (with whom Malcolm CJ and Templeman J agreed) said s 82B was not concerned with trespass. He said at 414, [78]:

"An offence of trespassing on enclosed land is created by the *Police Act* s 82A. Section 82B presupposes that a person may enter land lawfully. An offence is only committed if a person remains on premises without lawful authority after being warned to leave. The words "lawful authority" are not to be equated with "honest claim of right". They involve different concepts. A person may not have lawful authority to remain, but nevertheless honestly claim to have a right to remain."

[198] Accepting, as I do that Mr Preston had no intention to defraud, the issue for determination becomes whether there is evidence raising for consideration that he remained on the steps in the exercise of an honest claim of right, and if there is, whether the prosecution has negatived this beyond reasonable doubt.

[199] What is required to raise the possibility of a defence under s 22(2) of the *Code* is an honest claim by Mr Preston "to an entitlement, in, or with respect to property".[140] Mr Preston was not claiming a proprietary or possessory right in property, but to be entitled to act in respect of property.[141] This is a reference to the property the subject of the charge.[142] To adopt the language of Gibbs J in *R v Pollard*[143] with the parenthetical insertions made in *R v Waine*: [144]

> "An accused person acts in the exercise of an honest claim of right (in respect of the property the subject of the charge) if he honestly believed himself to be entitled to do what he is doing [in relation to that property]."

[200] In the present case, Mr Preston could raise the defence under s 22(2) of the *Code* in respect of the steps at 687 Logan Road, Greenslopes if there is evidence that he honestly believed himself to be entitled to remain in occupation of those steps.

[201] I agree with Mr Copley that this belief as to an entitlement is not limited to the examples identified in [25] of *R v Waine*[145] where reference is made to the belief coming from the consent of the owner, or from a person believed to be the owner, as well as a mistaken belief as to one's own title. However, as emphasised in that case:[146]

> "What is important is the honest belief that one is legally entitled to do to the property that which one is doing."

[202] What is relied on by Mr Preston is a belief he was entitled to occupy the steps to deter or prevent people accessing abortion procedures. However, even if he honestly believed that he was achieving this by remaining in occupation of the steps, the evidence contradicts that he had an honest belief that he was legally entitled to do so, at least from the time he was given the first move on direction. From this point of time he knew he had no permission to occupy the premises. As the magistrate said, "Mr Preston knew that his presence was unwelcome." I agree with this assessment on the basis of the facts established by the evidence.

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140 *R v Waine* [2006] 1 Qd R 458, [23] at 462.

141 *Ibid*, [25] at 462. I agree with Mr Copley's submission that it is not necessary that the claim be one to the property in the object in questions or that it be a claim peculiar to the defendant. As stated in *R v Waine*, [29] at 463, the defence is not read down to limit it to only a claimant to a beneficial interest in property. Therefore, I accept his submission that it is available in the absence of a beneficial interest or agency.

142 *Ibid*, [28] at 462.

143 (1962) QWN 13.

144 [2006] 1 Qd R 458, [27] at 462.

145 *Ibid*, [25] at 462.

146 *Ibid.*

[203] This first move on direction was given in circumstances that Constable Parker told Mr Preston:

> "We have had an official complaint by the business."

At this time Mr Preston knew, Constables Parker and McMeniman had talked to the person in authority at the premises immediately before this conversation. He accepted in cross-examination that he did not have any permission from the owner or occupier to be on the steps. It was not necessary for the owner or occupier to convey this to him personally. Section 792 of the *PPRA* provides that a police officer performing a function of the police service is performing a duty of a police officer even if the function could be performed by someone other than a police officer. The example given is that "An occupier of a place who may remove a trespasser from the place asks a police officer to remove the trespasser. The police officer when removing the trespasser is performing a function of the police service." It follows that a police officer is performing a function of the police service in telling a person to move from a place on behalf of the owner or occupier, who has to the knowledge of the police officer not given the person permission to be there and has made an official complaint to the police officer about the person's presence.

[204] Mr Preston was in a different position to *R v Pollard* where the claim was that although he had not asked the owner for his consent, he did not think the owner would have any objections to his taking the vehicle and he took it because he believed that if he had asked, the owner would have consented. In that case Gibbs J said:[147]

> "If he honestly believed that he was entitled to take the vehicle without obtaining the owner's consent, either because he thought that the owner would not object, or because he thought the owner would have given his consent if he had been asked for it, or for any other reason, the taking would have been in the exercise of an honest claim of right."

Mr Preston could not have any such belief in relation to his entitlement to remain in occupation of the steps, including for any other reason, because he not only did not have any permission from the owner to do so, but also because he knew that an official complaint had been made by the business about his doing so, and therefore that his presence was unwelcome.

[205] In *Walden v Hensler*[148] which involved a charge of keeping protected fauna, the appellant's claim was based on his belief in his entitlement to do so according to Aboriginal law and tradition, Gaudron J said:[149]

> "… he sought and obtained permission to hunt from the manager of Carlton Hill station, within the boundaries of which was situated the

147 *Ibid* at 29.
148 (1987) 163 CLR 561.
149 *Ibid* at 609.

> land where the birds were taken. It may be that Mr. Walden thought that his claim derived immediately from the permission granted; alternatively, he may have thought that such permission was a condition precedent to the exercise of a right recognized by law. On either view, the right he claimed was claimed by virtue of the supposed operation of law, and not merely by virtue of the custom of his community."

The fact this was a dissenting judgment does not affect the proposition that unlike those circumstances in which her Honour found the claim of right fell within s 22 of the *Code*, Mr Preston had not sought permission and also knew that his presence on the steps was unwelcome.

[206] As I have observed in *Molina v Zaknich*[150] the Full Court of Western Australia held that s 22 of the *Criminal Code* (WA) was applicable to an offence of remaining on premises without lawful authority contrary to s 82B(1) of the *Police Act* 1892 (WA). In that case the applicant was a duly accredited union official who entered a construction site. He remained on the premises, after being warned to leave by the person in charge. It was an element of the offence that he remained on the premises after receiving such a warning. His claim was that under an industrial award, made pursuant to the Industrial Relations legislation, he had a right to enter and to remain on the property notwithstanding the warning. The existence of this award which the court held was applicable to premises of the nature on which the applicant remained, distinguishes that case from the present, where there was nothing of a similar nature to expressly override the clear statement by Constable Parker to Mr Preston that he was not to remain on the premises following an official complaint by the business, in circumstances where he had no permission from the owner or occupier to be on the steps. Further, a warning to leave the premises is not an element of the offence against s 11(2) of the *SOA.*

[207] As I have noted Mr Copley concedes that he cannot point to an authority which goes so far as to apply s 22(2) in circumstances such as exist in this case.

[208] In circumstances in which I find that Mr Preston did not have an honest belief that he was legally entitled to remain in occupation of the steps, at least from the time of the first move on direction when he knew he had no permission to occupy the premises, the second limb of s 22(2) is inapplicable. There is no evidence raising it for consideration. Even if there is such evidence, I would be satisfied for the same reasons that the prosecution has negatived this beyond reasonable doubt.

[209] In reality Mr Preston's occupation of the steps was not pursuant to any such belief, but a belief that illegal abortions were to be carried out at the premises, and that he could deter or prevent these by his presence. Therefore the unlawfulness of his conduct is to be judged with reference to s 31, either alone or in conjunction with s 24 of the *Code*, and not s 22(2).

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150 (2001) 125 A Crim R 401; [2001] WASCA 337.

[210] I therefore reject Ground 2C of Appeal.

[211] In coming to this conclusion I have decided the case for myself based on the facts established by the evidence before the magistrate. I have disregarded any facts established by the evidence in the earlier trial involving Mr Preston over which I presided[151] or in the previous appeal heard by Shanahan DCJ.[152]

Section 31(1)(c) and (d) – Compulsion

[212] Ground 2E of Appeal is that the magistrate erred by failing to find the prosecution had not excluded s 31 of the *Code*.

[213] As with s 22(2), the issue of whether Mr Preston was protected by s 31 was not expressly raised by him or the prosecutor before the magistrate. Consequently there are again no direct findings of fact relevant to this issue.

[214] As with s 22(2), by application of s 36 of the *Code* when a person is charged with an offence against s 11(2) of the *SOA* the person is entitled to rely on s 31 if, in the particular circumstances, the person can bring himself or herself within the words of the section.

[215] The applicability of s 31 is also relevant to the issue of whether the prosecution has proved beyond reasonable doubt that in remaining in occupation of the steps, he did so "unlawfully." Therefore, the onus lies on the prosecution to exclude beyond reasonable doubt any excuse under s 31 that is raised by the evidence.

[216] In this case Mr Copley specifically relies on the defences raised under s 31(1)(c) and (d) which are set out in para [111] of this judgment.

s 31(1)(c)

[217] By virtue of s 31(1)(c) a person is not criminally responsible for an act if the person does the act when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person, or to another person in the person's presence.

[218] Therefore in order to raise s 31(1)(c) for consideration, there must be some evidence that:

(a) violence was threatened to Mr Preston (or another person in his presence);
(b) the violence threatened was unlawful; and

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151 *Police v Preston*, unreported, Irwin CM, Bris Mag 00028810; Mag 00174208/03(4), 3 March 2004.
152 *Preston v Liussi*, unreported, Shanahan DCJ, Appeal No D4101 of 2005, 19 June 2006.

(c) Mr Preston did an act which was reasonably necessary in order to resist the threatened violence.

If the defence under s 31(1)(c) is thereby raised, in order to exclude it, the prosecution bears the onus of satisfying the court beyond reasonable doubt of any one of the following things:

(a) that violence was not threatened to Mr Preston (or another person in his presence);

(b) that the violence threatened was not unlawful; or

(c) that the act done by Mr Preston was not reasonably

necessary in order to resist the threatened violence.

[219] In the present case "the act done" by Mr Preston was remaining in occupation of the stairs at 687 Logan Road, Greenslopes.

[220] Mr Copley submits that the "unlawful" violence threatened was a pending illegal abortion, and this violence was threatened to a relevant mother and/or foetus. He submits that relevant mothers and/or foetus were sufficiently proximate to Mr Preston to have been "in his presence" because it was threatened at the time he was on the steps. He also submits that Mr Preston's occupation of the steps was (at least) reasonably necessary to resist that actual and unlawful violence. He relies on Mr Guy's evidence that abortions were scheduled to be done that day. Therefore he submits that at least one abortion was to be performed that day and the violence threatened was sufficiently proximate to have been in his presence notwithstanding he was out sitting on the steps.

[221] However, the threshold question is whether there is some evidence that there was a pending illegal abortion threatened to a relevant mother and/or foetus, so as to constitute actual and unlawful violence.

[222] I proceed to consider this issue on the basis that the business owned by Ms Guy and operated since 1999 at the premises at 687 Logan Road, Greenslopes where Mr Preston remained in occupation of the steps at the relevant time, undertakes termination of pregnancies. I also proceed on the basis of her evidence that abortions were scheduled to be done that day.

[223] As I stated at para [176] of this judgment it can be readily accepted that abortion on demand is illegal in Queensland. However, it does not follow from the fact the business operated at 687 Logan Road, Greenslopes undertakes the termination of pregnancies, that the abortions to be undertaken on the day Mr Preston was occupying the steps were abortions on demand or were otherwise illegal.

[224] According to Ms Guy's evidence, in addition to the operating doctor and the anaesthetist, the patients who pay for the services see a counsellor. It can be

expected that the medical practitioner, who on that date was responsible for the welfare of those pregnant women, would know, consider and comply with the law in determining whether to perform an abortion on them, and as such would not conduct such a procedure unless honestly believing on reasonable grounds that each of the criteria identified in para [176] of this judgment, on the basis of the established law in Queensland, were satisfied. It is to be expected the counsellor would play a role in ensuring this is the case.

[225] Mr Copley accepts there is no evidence illegal abortions were to be performed on that day, but submits there is no evidence that any abortions were legal in accordance with the law of Queensland as expressed in that decision. He also argues that on the basis of *Jones v Dunkel*[153] the inference should be drawn that nothing Ms Guy (nor any other prosecution witness) could have said would have assisted the Crown in showing that the abortions which were scheduled for that day were lawful. He contends the prosecution could simply have adduced evidence (eg from Ms Guy) that abortions that were to have been performed were lawful.

[226] However, to establish that a medical practitioner has unlawfully procured a miscarriage in breach of s 224, the prosecution must negative the provisions of s 282. This requires they prove beyond reasonable doubt that the practitioner did not honestly believe each of the criteria identified in para [176] were satisfied. It should not be assumed that medical practitioners who perform abortions do so in contravention of the law, in the absence of evidence to the contrary. This is emphasised in the statement by GN Williams J in *K v T* that a doctor performing a surgical operation on a woman who is with child is not criminally responsible for the death of that embryo child pursuant to s 224 if the operation is within the purview of s 282 of the *Code*; and it is only if there is an apparent want of good faith on the part of the practitioner concerned in deciding upon an operation of this type that a prosecution should follow.[154]

[227] In the present case Mr Preston was required to point to some evidence which raised s 31(1)(c) for consideration. Unless he did so there was no onus on the prosecution to exclude this defence beyond reasonable doubt. Therefore it was necessary for Mr Preston to be able to point to some evidence that illegal abortions were scheduled on the day he remained in occupation of the steps at 687 Logan Road, Greenslopes; or as Mr Copley put it, there were to be "pending illegal abortions." Only by doing so could he raise evidence that actual and unlawful violence was threatened to a mother and/or a foetus at those premises on that date. If he did not do so, the prosecution was not required to prove beyond reasonable doubt that any abortions scheduled for that date were not unlawful. Accordingly the rule in *Jones v Dunkel*[155] had no application.

[228] I conclude that s 31(1)(c) of the *Code* is inapplicable because there is no evidence illegal abortions were scheduled at 687 Logan Road, Greenslopes on the date Mr Preston remained in occupation of the steps, such as to amount to actual and

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153 (1959) 101 CLR 298.
154 [1983] 1 Qd R 396 at 398.
155 (1959) 101 CLR 298.

unlawful violence threatened to him or any other person in his presence, so as to raise it for consideration. There is no evidence that any abortion to be conducted at the premises on that date would not have been lawful on therapeutic grounds in terms of the decisions representing Queensland law; and there was no evidence of apparent want of good faith on the part of the medical practitioner concerned in deciding upon such an operation at that time and place. As I have noted, Mr Copley accepts there is no evidence that illegal abortions were performed on that day.

[229] This conclusion is not affected by s 313(2) which was not relied on by Mr Copley, but was the subject of Mr Preston's submissions to the magistrate. Section 313(2) provides:

> ***"Killing unborn child***
>
> **…**
>
> (2) Any person who unlawfully assaults a female pregnant with a child and destroys the life of, or does grievous bodily harm to …, the child before its birth commits a crime.
>
> Maximum penalty – imprisonment for life."

[230] Mr Preston submitted this provision effectively endorses the proposition that anyone should be able to be charged with homicide of an unborn child and also that life begins before birth.

[231] Although it is a constituent part of an assault for the purpose of the criminal law that it be without the other person's consent,[156] and the women who attended the premises for the purpose of a termination of pregnancy on the relevant date were consenting to the procedure, he submitted the essential element of the offence created by s 313(2) is the killing of an unborn child, and not the assault against the mother. He contended that because one person cannot give consent to a criminal act against a second person, the section has the effect that a woman cannot give lawful consent to an abortionist to kill her baby.

[232] However the offence created by s 313(2) has as an essential element the unlawful assault of a pregnant female. As such, lack of consent of the female is an element of this offence.

[233] In any event, whether or not this offence can be committed when a female consents to an assault which has this consequence, Mr Preston's argument ignores the fact that, where as in this case, the alleged unlawful assault is an abortion, it must be considered in the context of s 282 of the *Code* which provides the circumstances in which a surgical operation may be lawfully performed on an unborn child for the benefit of its mother's life. In accordance with what I have previously said, the

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[156] See s 245 of the *Code.*

assault involved in the abortion will not be unlawful if the medical practitioner has an honest belief on reasonable grounds that each of the criteria identified in para [176] of this judgment are satisfied.

[234] Therefore, even having regard to s 313(2) the application of s 31(1)(c) falls to be determined with reference to the same issues which I have already addressed, and therefore does not affect my conclusion.

[235] I reject Mr Preston's argument that s 313(2) supports the proposition that life begins before birth, because the provision is not concerned with this issue but is limited to creating an offence in circumstances where there is an unlawful assault on a pregnant female with the consequence of destroying the life of, or doing grievous bodily harm to, an unborn child.

[236] If, as Mr Preston submitted to the magistrate, s 292 of the *Code* does not define when an unborn child becomes a person, neither does s 313(2).

[237] Section 292 provides:

> "A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother …"

Mr Copley's argument is that for the purpose of s 31(1)(c) the pending illegal abortion is actual and unlawful violence threatened to a relevant mother and/or foetus. As a matter of commonsense, and in the context of Mr Preston's statements to Constable Parker that "10 to 15 children are likely to be killed here today" the violence threatened to a relevant foetus involves the killing of the foetus, so far as Mr Preston is concerned. Because the surgical operation which would have this result can be expected to be done with the relevant mother's consent, s 313(2) would not apply. On this basis s 292 is the relevant provision, and the foetus does not become a person capable of being killed until it has completely proceeded in a living state from the body of its mother. Therefore in the context of this case a foetus is not a person for the purpose of s 31(1)(c) .

[238] I do not consider that *Bowditch v McEwen & Ors*[157] requires any different conclusion. This is not a decision in the context of the criminal law, but is a decision about the extent of the duty of care owed by the driver to others in a vehicle, including any foetus within a passenger and extending to where the foetus is within the driver.

[239] Even if I am wrong about the proposition that a foetus is not a person for the purpose of s 31(1)(c) in this case, for the reasons I have previously given this section is inapplicable because there is no evidence that actual and unlawful violence was threatened to a foetus, a mother, Mr Preston, or for that matter, to any other person. As such there is no evidence raising s 31(1)(c) for consideration.

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[157] [2002] QCA 172 especially [12].

s 31(1)(d)

[240] It was submitted that similarly, s 31(1)(d) applies in the circumstances.

[241] By virtue of s 31(1)(d) a person is not criminally responsible for an act if the person does the act in order to save another person from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat and reasonably believes the other person is unable to otherwise escape the carrying out of the threat, provided the act is reasonably proportionate to the harm or detriment threatened.

[242] Therefore, in order to raise s 31(1)(d) for consideration, there must be some evidence of these elements, including that Mr Preston remained in occupation of the steps in order to save another person from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat.

[243] On the basis of Mr Copley's submissions supporting the application of s 31(1)(c), the "serious harm or detriment" threatened must be a pending illegal abortion threatened to a relevant mother and/or foetus. A legal abortion cannot be "serious harm or detriment" entitling a person to do an act in order to resist it, and therefore provide a justification or excuse so as to render the person not criminally responsible for that act.

[244] For the same reasons as I have concluded in relation to s 31(1)(c), that there is no evidence illegal abortions were scheduled at 687 Logan Road, Greenslopes on the date Mr Preston remained in occupation of the steps there, I come to the same conclusion in relation to s 31(1)(d). Consequently s 31(1)(d) is also inapplicable because there is no evidence a person other than Mr Preston was threatened with serious harm or detriment, by another person in a position to carry out the threat, and which therefore required him to remain there in order to save that person. As such there is also no evidence raising s 31(1)(d) for consideration.

Conclusion – s 31(1(c) and (d)

[245] I therefore reject Ground 2E of Appeal

Section 24 – Mistake of fact

[246] However because Mr Copley accepts there is no evidence illegal abortions were to be performed that day, he submits in the alternative that even if the abortions to be performed that day were legal, a defence arises on the evidence as a result of a combination of ss 24 and 31 of the Code.

[247] Section 24 of the *Code* is set out in para [118] of this judgment. It was submitted, even if abortions to be performed that day were legal, mistake of fact was not

excluded and Mr Preston was entitled to rely on s 31 as though "the real state of things had been such as (he) believed to exist" – namely that illegal abortions were to be carried out. Therefore Ground 2D is that the magistrate erred by failing to find that the prosecution had not excluded the operation of s 24 of the *Code*.

[248] As with the other defences relied on, s 24 was not expressly raised by Mr Preston or the prosecutor before the magistrate. Again by virtue of s 36 of the *Code* Mr Preston is entitled to rely on s 24 in combination with s 31 if, in the particular circumstances of this case, he can bring himself within the words of the section.

[249] Although like Ms Litchen I accept that Mr Preston honestly believed that illegal abortions were being carried out at the premises, I am not satisfied there is any evidence the belief was reasonable as required by s 24.

[250] As I have stated in the discussion of the application of s 31(1)(c), it can be expected the medical practitioner who on 4 March 2008 was responsible for the welfare of the pregnant women who attended at 687 Logan Road, Greenslopes, would know, consider, and comply with the law in determining whether to perform an abortion on them, and as such would not conduct the procedure unless honestly believing on reasonable grounds that each of the criteria identified in para [176] of this judgment on the basis of the established Queensland law, were satisfied. As I also stated it is to be expected the counsellor would play a role in ensuring this is the case.

[251] Despite Mr Copley's submissions set out at para [225], to the effect that the prosecution have adduced no evidence abortions that were to be performed were lawful, as stated in para [226] it should not be assumed that medical practitioners who perform abortions do so in contravention of the law in the absence of evidence to the contrary.

[252] In these circumstances despite the honesty of Mr Preston's belief that illegal abortions were being carried out at the premises, that belief was purely speculative. There was no objective basis for him to have a reasonable belief abortions were being carried out at the premises by medical practitioners in contravention of Queensland law. In particular there was no such basis for him to believe there was any want of good faith on the part of the practitioner concerned in deciding upon such an operation at that place and time.

[253] The absence of any evidence that Mr Preston had actual knowledge of the activities inside the premises on that date in relation to the individual terminations of pregnancy emphasises that his belief was speculative and not reasonable.

[254] For these reasons there is no evidence raising s 24 for consideration in conjunction with s 31 of the *Code*. Even if there is such evidence, I would be satisfied for the same reasons already expressed that the prosecution has negatived its operation beyond reasonable doubt.

[255] I therefore reject Ground 2D of Appeal.

Whether elements were proved

[256] Ground 1 of Appeal is that the magistrate erred in finding on the evidence before her that the defendant unlawfully remained in a place at 687 Logan Road, Greenslopes on 4 March 2008.

[257] As I have observed Mr Copley did not specifically address this ground in his written or oral submissions except to the extent of seeking orders that Mr Preston's conviction be set aside and a verdict of not guilty ordered. However the thrust of his argument was that the magistrate erred in finding on the evidence that Mr Preston unlawfully remained at that place as charged.

[258] In deciding the case for myself based on the facts established by the evidence, consistently with my finding at para [170], I am satisfied beyond reasonable doubt that on 4 March 2008 Mr Preston remained in a place used for business at 687 Logan Road, Greenslopes.[158]

[259] As stated in para [188] I am also satisfied beyond reasonable doubt that the s 634(3)(b) requirement was observed by Constable Parker, and as such the prerequisite to the commission of an offence against s 11(2) of the *SOA* has been established.

[260] Therefore as identified at para [194] the real issue is whether the prosecution has proved beyond reasonable doubt that in remaining there, Mr Preston did so "unlawfully" in the sense that he was there "without authorisation, justification or excuse by law". The onus lies on the prosecution to exclude beyond reasonable doubt any such excuse raised by the evidence.

[261] For the reasons I have given, with reference to the excuses advanced by Mr Copley, these either have not been raised for consideration on the evidence or, if raised, I would be satisfied that the prosecution has excluded their operation beyond reasonable doubt.

[262] In addition I have concluded that arguments raised before the magistrate on the basis of ss 273 and 313(2) are without foundation.

[263] I am satisfied beyond reasonable doubt that the element of unlawfulness has been established.

[264] Therefore I am satisfied beyond reasonable doubt that on 4 March 2008 Mr Preston unlawfully remained in a place used for a business purpose at 687 Logan Road, Greenslopes.

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[158] In addition Mr Preston conceded in his submissions to the magistrate that he did enter and remain on the premises.

[265] Accordingly, I reject Ground 1 of Appeal.

Conclusion

[266] Accordingly, the appeal against conviction is dismissed. The order of the magistrate is confirmed under s 225(1) of the *JA*.

Order

[267] The order of the court is that the appeal against conviction is dismissed and the order of the magistrate is confirmed.

[268] I will hear the parties in respect of the costs of the appeal.