EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

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IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2020-016-000821
[2021] NZDC 7322

NEW ZEALAND POLICE
Prosecutor

v

[THOMAS SUMMERS]
Defendant

Hearing:	17 March 2021
Appearances:	Sergeant M Nikora for the Prosecutor D Rishworth for the Defendant
Judgment:	14 May 2021

JUDGMENT OF JUDGE W P CATHCART

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[1] At his trial on 22 April 2021, Mr [Summers] faced two charges under the Arms Act 1983. Both relate to a single incident at Gisborne on 16 April 2020. He was charged under s 52(1) alleging that without a lawful and sufficient purpose he presented a .308 rifle at [name deleted – the complainant]. Also, he was charged under s 48 alleging that without reasonable excuse he discharged that firearm near a dwelling house so as to frighten [the complainant].

[2] Having considered the trial evidence and relevant law, I **dismissed** the charge under s 52 because I was not satisfied beyond reasonable doubt Mr [Summers] had presented the firearm at [the complainant]. In contrast, I found all essential elements of the charge under s 48 were **proved** to the required standard.

[3] My reasons follow.

Relevant factual findings

The lead-up to Mr [Summers] discharging the firearm

[4] On 16 April 2020, New Zealand was under alert level 4 lockdown as a consequence of the Covid-19 pandemic. Notwithstanding that overarching public safety consideration, [the complainant], an employee of the Gisborne District Council, went hunting with two colleagues looking for piglets. [The complainant] told me he was at the time operating in his capacity as an animal control officer. He has held that position for about [number of years deleted].

[5] He said that he was undertaking culling of wild pigs in the area in his capacity as an animal control officer. And that he had permission from his overseer at the Council to do so. It was never explained to me why [the complainant] considered, or was given permission, to carry out animal culling on that day. Only essential services could be carried out. No explanation was given as to whether this activity had been approved by the Council as an essential service on 16 April 2020.

[6] Be that as it may, the manner in which [the complainant] carried out his purported duties was utterly unprofessional and cavalier. To any reasonable onlooker [the complainant] and his group may have appeared as nothing more than poachers. More about that later.

[7] [The complainant] testified his duty in tracking two small piglets took him along [name of road deleted], Gisborne. He sighted the piglets at the address of [address 1]. He drove there in his own vehicle, brought with him two rifles and three knives. The rifles were a .308 and a .22. [The complainant] was not alone. He had two hunting friends with him. They were not fellow Council employees let alone

designated animal control officers. They were friends in relation to whom he said joined him in Gisborne before alert level 4 lockdown occurred. And [the complainant] and his hunting mates wore civilian clothes. They were unwilling to make police statements, never testified and no effort was made to summons them.

[8] Back to the narrative. [The complainant] got out of his vehicle along a fence-line bordering the public road end of [address 1]. As noted above, he was not dressed in any uniform that could have identified him as an animal control officer.

[9] [The complainant] described his army experience and familiarity with firearms. He sighted one of the small piglets in the "kill zone" which he described as a "firing tunnel" from the fence-line onto the property at [address 1].

[10] [The complainant] discharged a shot into his chosen "firing tunnel" and thought he had killed one of the piglets. That belief proved to be incorrect as [witness A] later testified that neither piglet had been shot dead and needed to be put down later for humane reasons. [The complainant]'s unnamed hunting colleague fired the .22 but missed and dazed the piglet.

[11] All three men got back into [the complainant]'s vehicle. He then drove his vehicle onto the property at [address 1] to locate the piglets.

[12] His lawfulness in doing so was questionable. [The complainant] claimed he had permission from his boss at the Council to shoot the piglets from the roadside and to enter that property to recover them. In contrast, the owner of the property, [witness A], gave evidence he had given no-one approval to cull piglets on this land let alone enter his property. And [witness A] had ongoing issues with Council representatives as to whether it was even lawful for them to carry out such tasks on his land. [The complainant] placed his purported authority on claimed verbal consent from his overseer.

[13] These matters were not traversed in great detail in the hearing. And determination of the case did not require findings on the point. Needless to say the lawfulness of the pig shooting and entry onto private land was, without more information, questionable.

[14] And the entire 'operation' conducted by [the complainant] was wholly unprofessional and cavalier. To all appearances the shooting of two piglets from the side of a public road in the absence of a designated Council vehicle and uniform and duly designated team members, looked little more than an illegal hunting operation on a Covid-19 lockdown day. Understandably, it would cause concern, as it did, to nearby residents[1] and in particular to Mr [Summers] and his family. In short, [the complainant] piglet-culling group was little more in appearance than a 'cowboy' outfit.

Mr [Summers] discharges a shot

[15] There was no dispute Mr [Summers] discharged his .308 firearm near a dwelling house situated at [address 2], Gisborne—his family home.

[16] Once on [witness A]'s land, [the complainant] and his friends got out the of vehicle parked near a bulldozer near to one of the piglets. As he was walking up to the piglet, [the complainant] said he was "shot at". He heard a "crack" and a "bang". The crack from behind and the bang from in front. According to [the complainant], that told him the bullet had gone past him. He pointed to his previous experience as a soldier and as a "shooting coach". As noted below, I considered his evidence on the trajectory pathway was inaccurate.

[17] [The complainant] reacted to the shot and turned around. He said that he could see a person on the property opposite the road area "still pointing" the firearm at him. [The complainant] told the individual to "fuck off". He said the person—admittedly Mr [Summers]—was about 50 metres away and on higher ground. Mr [Summers]'s location was not contested. [The complainant] went further. He asserted he could even see the shooter's eye through the scope. [The complainant] said the shooter then put the firearm up in the air and yelled he was sorry and walked out of view.

Defence evidence on presentation of firearm issue

[18] Mr [Summers] elected to give evidence. He had no obligation to do so or call evidence in support of his case. He said he was alerted to the presence of [the

[1] This included [witness A] and [another person] who lived on land in the general area of the [incident].

complainant] and the other men when [witness B] came up to the house from the front area screaming there was stock being shot at across the road. Mr [Summers] said [witness B] told him there were people shooting stock across the road on [witness A]'s property.[2]

[19] Mr [Summers] said he formed the view it was an incredibly dangerous paddock or area to shoot in. And in his mind, it set off "a number of alarm bells". Without going outside first, he retrieved his .308 firearm from the locked safe at the dwelling house, loaded one round into the rifle, and went out to the front section of the property onto a grassed area. At that point he could see [the complainant]'s white utility vehicle passing through the gate at the front of [witness A]'s property.[3]

[20] Mr [Summers] and [witness B] ventured down the bank at the front of the property hiding behind bushes and trees watching [the complainant] and the others. Mr [Summers] remarked to [witness C]: "These guys are getting brave". By that he said he meant they were brave in poaching animals in broad daylight. And I found this was an honest belief in the circumstances as presented then to him. In fact, it would have appeared so to any reasonable observer.

[21] Mr [Summers] went further. He said he realised when he was outside he had forgotten the bolt for the rifle. He said he ran back into the house, retrieved the bolt from a safe storage location, loaded it and went back out to the front of the house.

[22] I found this aspect of Mr [Summers]'s evidence troubling. The notion he would load the .308 but forget the bolt was implausible. He had considerable experience with this .308. He would have known he needed to retrieve the bolt from a different safety zone in the home. And he had intentions in mind when he first went outside with the firearm.

[23] And his explanation aligned too neatly with his later assertion he could not clearly see whether the men outside the suspect vehicle parked next to the bulldozer were carrying firearms. The men were in fact not carrying firearms at that point.

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[2] Notes of Evidence (NOE) at 3.
[3] NOE at 3.

However, Mr [Summers] told me he saw the men "undertaking their operations outside of the vehicle behind it"; he "could see them but not see parts of them below that vehicle or behind the bulldozer".[4] If Mr [Summers] had remained outside—the more plausible explanation—it would have been obvious, as it was to [witness C], that when the men got of the vehicle they were not in possession of firearms.

[24] Whilst troubled by his explanation, I gave Mr [Summers] the benefit of the doubt and accepted albeit with reservation his account he had to retrieve the bolt before he came outside a second time and fired the shot. That does not however end the inquiry into the circumstances as Mr [Summers] believed them to be at the material moment. More about that later.

More likely than not Mr [Summers] did not present the firearm towards [the complainant] nor "shot at" him

[25] Mr [Summers] said he discharged one round in the air over the back of his property and brought his rifle to rest, pointing it at the ground. He demonstrated that movement in the witness box. He said he fired the shot over his shoulder backwards towards the hill, thus away from the road. Mr [Summers] selected the .308 because it had "quite a loud noise" which he said was "really the purpose of that round being let off".[5]

[26] When asked in evidence-in-chief what his intention was when he fired the gun in the air, Mr [Summers] said it was "to get these individuals who were acting incredibly dangerous to stop because he believed someone probably a neighbour was going to get killed."[6]

[27] More particularly on the present issue, Mr [Summers] testified he never pointed or presented the firearm to any of the men in the paddock. And that he would never do so to anyone.[7] And the manner in which he discharged that shot was supported by [witnesses B and C].

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[4] NOE at 14.
[5] NOE at 5.
[6] NOE at 6.
[7] NOE at 6.

[28] [Witness B] was standing next to [the defendant] at the time he discharged the shot. She said she got "a hell of a fright". And when she turned towards him he had the firearm "back over" pointed away from the road and then saw him drop it straight beside him afterwards. And in that very quick timeframe she never saw Mr [Summers] point the gun at the men over the road.

[29] [Witness C] said much the same, although there were variations in his narrative when compared to [the defendant]'s testimony. Initially, [witness C] said that both of them watched [the complainant] and his friends for a couple of seconds and saw the men get into their truck. At that point, Mr [Summers] ran back inside, [witness C] said. And "a minute later" came back out with his gun. [Witness C] said at that point the vehicle was reversing up towards the gate to the paddock. Someone got out of the vehicle, opened the gate and the vehicle was driven onto the land and stopped about 10 metres inside the paddock next to the bulldozer.

[30] However, on the circumstances surrounding the discharge of the .308, [witness C] said he watched [Mr Summers] do it.[8] And that [Mr Summers] pointed the firearm over the back of their house into the hill area behind. And that [Mr Summers] never pointed the firearm towards the group over the road.[9]

[31] I found no reason to doubt Mr [Summers]'s testimony as to how he discharged the firearm and then immediately placed it down by his side. It was supported by [witnesses B and C]. Whilst such corroboration ordinarily raises the need to inquire about collaboration, I did not discern anything in that body of evidence which caused me to doubt the credibility of those witnesses. And the finding it was an air shot was also supported by [witness A]'s opinion evidence which I accepted.

[32] I found therefore Mr [Summers] discharged one shot in the air, pointing his .308 backwards over his shoulder towards the hill and thus away from the location of [the complainant] and his colleagues.

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[8] NOE at 30.
[9] NOE at 30.

[33] The issue of whether he later presented the firearm towards [the complainant] required separate consideration because the latter maintained the shooter pointed the firearm at him and he could even see the shooter's eyes through the scope.

[34] I had doubts about the accuracy of [the complainant]'s evidence on these topics.

[35] First, [the complainant] resting on his army expertise claimed the sound of "a crack" then "a bang" was indicative the bullet must have gone past him. His evidence supporting that theory was however undermined by his police statement in which he initially described hearing only "a loud bang", which he said sounded like a .308 rifle, and then turned around. In that statement, [the complainant] never suggest he had been "shot at" as he claimed in his evidence. His theory to the contrary was therefore questionable as to its accuracy. Second, his theory came up against opinion evidence to the contrary by [witness A]. [Witness A] heard the shot and testified in his considerable experience it was likely an air shot. In sum, I found [the complainant]'s evidence he was "shot at" inaccurate. He innocently drew that wrong conclusion.

[36] However, perceptions are a different thing. I accepted [the complainant]'s evidence to the extent he held a perception, albeit a mistaken one, that he had been shot at. His reaction to it was consistent with that perception. Discussed later.

[37] Third, I found [the complainant]'s observation Mr [Summers] then aimed the firearm at him was inaccurate, especially in the wake of defence evidence to the contrary. In the face of that reliable body of evidence there remained at least a reasonable possibility [the complainant]'s observation was in error. Moreover, as analysed earlier, I found it more likely Mr [Summers] never presented the firearm at [the complainant].

Conclusions on s 52 charge

[38] I acknowledge that under s 52 the element of presentation of a firearm does not require proof a defendant pointed it directly at a complainant. In the context of the legislative objectives of the Arms Act proof of presentation is sufficient if the firearm

is brandished, deployed or displayed in a threatening way. That suffices to establish the element of presentation.[10]

[39] In the end, I was not satisfied under this legal test the police had established Mr [Summers] presented the firearm towards [the complainant] after Mr [Summers] had discharged the shot. For those reasons the charge under s 52 was **dismissed**.

[40] The issue under s 52 as to whether Mr [Summers] had a "lawful and sufficient purpose" in firing the shot did not therefore require determination.

Section 48 charge—proof of essential elements established

Discharging firearm—the "so as to frighten" element

[41] When Mr [Summers] discharged a shot from his .308, [the complainant] naturally reacted. He honestly believed, albeit a mistaken perception, that the shot had been fired at him because he believed he heard the sound of the cracking behind him and the bang in front of him. That perception would have frightened most people in [the complainant]'s situation. And I accepted from the overall evidence by inference that he was in fact frightened by the initial shot.

[42] This factual finding engaged the principle in *Dreadon v Police*.[11] In *Dreadon*, Fisher J addressed the issue as to what constitutes "frighten" under s 48. Section 48 uses the words "so as to" frighten. In *Dreadon*, Fisher J held this element focuses on causation. Fisher J held that while the prosecution need not show positive evidence a defendant intended to frighten, s 48 requires evidence from the prosecution that a person was in fact frightened. This is because the focus of the language moves away from personal culpability to potentially uncontemplated consequences. And Fisher J held that this interpretation was consistent with one of the principal objectives of the Arms Act to promote safe use of firearms. And he observed that the positive responsibility of ensuring the discharge of a firearm would not have those consequences would be consistent with this objective. In short, the concept of "so as to frighten" focuses on causation in fact and not on intent or culpability.

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[10] *Ashby v Police* (1994) 12 CRNZ 114 at 117-118.
[11] *Dreadon v Police* (1990) 6 CRNZ 481.

[43] The facts in *Dreadon* offer a helpful comparison. Dreadon's parents lived on a farm and had previously served a trespass notice on their son. On the day, the parents heard a sudden noise and saw a figure escaping. Both identified the figure as their son. He was convicted on the strength of the parents' evidence.

[44] On appeal, Fisher J upheld the finding—even in the absence of direct evidence on the point—that the discharge of the firearm frightened either or both parents. He held there was a reasonable inference it had. The reaction of the parents was to telephone the police—like [the complainant]'s reaction. And Fisher J considered it would be futile to suggest inferentially the parents were not frightened by the discharge of the firearm in the circumstances.

[45] Here, a similar reasonable inference can be and was drawn by surrounding circumstances. The shot fired from the .308 would have been loud, as Mr [Summers] intended it to be. And, as found, [the complainant] honestly believed he had been shot at. The inference he was in fact frightened was therefore compelling. It was supported by his reactions; fright followed by anger, leading to retreat to his vehicle to telephone the police. Overall, I was sure on an inferential analysis [the complainant] was in fact frightened by the shot, as to be expected in the circumstances. Even [witness B] got a "hell of a fright".

[46] That finding was sufficient to establish the so-as-to-frighten-element under s 48.

Why the self-defence plea must be considered under the s 48 charge

[47] In his evidence, Mr [Summers] claimed he was acting in self-defence at the moment he discharged the shot. That narrative feeds into the determination of whether he had a "reasonable excuse" under s 48 for discharging the firearm. However, both elements—self-defence and reasonable excuse—raise materially different issues and require at first separate determination. I explain why below.

[48] Any defendant's plea a firearm was discharged in self-defence raises concerns. It would be rare for circumstances to exist where a person will have a "lawful, proper and sufficient purpose" say under s 45 for possessing a loaded firearm intending its

possible use on other persons.[12] And no-one is entitled to claim some general self-defence justification in keeping a loaded firearm readily available just in case some "heavies" are out to get you.[13] See, for example, *Gray v R,* where the offender possessed a loaded and holstered firearm at his apartment in expectation of the return of his partner with whom he had an argument together with her associate. It was held not to be justified self-defence.[14]

[49] But possession of a firearm for a genuine *purpose* of self-defence is lawful.[15] For instance, under a s 45 charge, a defendant has the burden under subs (2) of proving it is more likely than not he had some "lawful, proper, and sufficient purpose" for possession of the firearm. If a defendant can establish he had possession for the lawful *purpose* of self-defence, and that he had a proper and sufficient purpose, he would be entitled to an acquittal.

[50] Also, as Mr Rishworth pointed out, it has been held in a prosecution under s 52 that a "lawful and sufficient" purpose—albeit a different test to s 45—existed where a defendant operating under a genuine mistake of fact that when he woke up he thought the knocking at this door might be another visit by burglars—*Stanbury v Police*.[16]

[51] In *Stanbury*, Jeffries J held that where the act—presentation of a firearm—is committed under a mistake of fact which disproves any criminal intent, it is not a crime. More particularly where a person acts "under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such act *lawful*".[17]

[52] The test under s 48 is different. It speaks only about "reasonable excuse"; not about a "lawful and sufficient purpose" (s 52) nor a "lawful, sufficient and proper purpose" (s 45). However, in principle the existence of a lawful self-defence purpose must be one of the circumstances against which the reasonable-excuse-test is

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[12] *Attorney-General's Reference (No.2 of 1983)* [1984] 1 QB 456.
[13] *Gemmell v Police* HC Christchurch, A 27/86, 26 March 1986.
[14] *Gray v R* [2019] NZCA 207.
[15] *R v Young* CA 266/85, 8 March 2006.
[16] *Stanbury v Police* (1988) 3 CRNZ 253. I was not required to consider the *Stanbury* principle under the s 52 charge because as noted I was not satisfied Mr [Summers] had presented the firearm.
[17] *Stanbury* at p. 255 (my emphasis).

measured in a given case. For these reasons, I considered a preliminary examination of whether a genuine self-defence plea existed here was appropriate.

Mr [Summers]'s self-defence narrative rejected

[53] In his evidence, Mr [Summers] said he fired the shot because he believed "someone, probably a neighbour, was going to get killed" and believed his family and neighbours were in "immediate danger". And when pressed by the prosecutor, he protested his actions were "entirely for self-defence and defence of my neighbours".[18]

[54] As is well-settled under s 48 of the Crimes Act, I must first determine the circumstances as Mr [Summers] *believed* them to be at the time he discharged the firearm. In deciding that issue I took a view that is as favourable to Mr [Summers] as was reasonably possible. However, the fact this test is subjective did not mean Mr [Summers]'s statements as to his beliefs must be taken at face value or accepted uncritically. In determining the circumstances as he honestly believed them to be, I was entitled to take into account the actual circumstances as I found existed on the day in question for the purpose of analysing his state of mind at the time.[19]

[55] I found Mr [Summers]'s self-defence assertion was an exaggeration of the actual circumstances he truly believed to exist at the moment he discharged the shot.

[56] Mr [Summers] told me [witness B] had alerted him to shots being fired at *stock* across the road. No hint then that human life or limb was at risk. Far from it. His belief in that state of affairs was affirmed when he ventured outside, along with [witness C], to spy on the men. Along with [witness C], he watched the men enter a plot of land on the opposite side of a public roadway. Mr [Summers]'s spontaneous remark to [witness C] that the group "were getting brave" was an expression of what he then honestly believed—albeit a mistaken belief— the men were illegal poaching

[18] NOE at 11.

[19] This formulation of the test is taken from *Afamasaga v R* (2015) 27 CRNZ 640 at [40]. *Afamasaga* was a multi-defendant murder trial. Issues of self-defence were raised both at trial and on appeal. The Court of Appeal considered the trial judge's directions on self-defence were correct, see at [50]. (I was lead prosecuting counsel at the trial and prepared the Crown's response to the appeal, but was appointed to the bench shortly thereafter).

in broad daylight. He personally believed therefore what would appear obvious to any onlooker in his position.

[57] At the time he fired his .308, I found he knew he and his family were not truly in immediate danger nor under perceived threat. After all the other group were oblivious to his whereabouts until he made himself known, as he wanted to, by firing his loud .308. And the other men were on a neighbour's property across a public road sufficiently well away from Mr [Summers]. The assertion he fired the shot in defence of himself and his family was farfetched. I rejected his evidence to the contrary.

[58] But what about his belief as to risk to the neighbours? As noted earlier, Mr [Summers] testified he saw the men "undertaking their operations outside of the vehicle, behind it". And he said he "could see them but not see parts of them below that vehicle or behind the bulldozer".[20] Essentially, he asserted he did not know whether they had firearms on them at that point. They of course did not.

[59] I found Mr [Summers] knew at the very moment he discharged his .308 that the other group were not in possession of firearms. Whilst the movement of the men around the vehicle and bulldozer may have obscured his view for some of that sighting, I found he knew they were unarmed at the time he fired the shot.

[60] I found it more likely he had the men under keen observation at that point; as he did when he first ventured outside to spy on them. His entire focus was likely on whether they were still in possession of the firearms. And he told me he had "perfect or reasonable vision" at that time and thus did not need to moments later peer at [the complainant] through his scope after the shot, as the latter claimed.[21] And the yelling contest between Mr [Summers] and [the complainant] that immediately followed must have been at a point when Mr [Summers] knew the latter was not armed. I ultimately found Mr [Summers] knew the men were unarmed at the time he pulled the trigger. Just as [witness C] was aware.

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[20] NOE at 14.
[21] NOE at 14.

[61] My conclusions as to the actual circumstances as Mr [Summers] believed them to be was partly supported by Mrs [Summers]'s evidence. She too testified she thought the men were shooting at livestock and told Mr [Summers] that.[22] During her evidence-in-chief, she never suggested she feared the group were going to shoot at her or her family or neighbours. But later she followed the family line suggesting she thought they were under threat. However, that assertion was contradicted by her earlier evidence in chief as to what she told [the defendant] that led him to retrieve his .308.

[62] Also, [witness C] similarly confirmed these circumstances. He too accepted [the complainant]'s group did not even know he and [witness C] were watching them until [the defendant] fired the shot.[23] He too said he thought they were poachers and thought they were stealing the stock across the road. And that they were unarmed at the time they were out of the vehicle. But added: "You never know what people with guns can do."

[63] It is of course Mr [Summers]'s subjective perceptions that matter here; not that of [witness B or C]. But the point here is their evidence supports the analysis of what the actual circumstances were as I found Mr [Summers] believed them to be.

[64] Having fixed the subjective circumstances, I in turn found that Mr [Summers] did not fire the shot under self-defence. The group were not threatening him, his family or his neighbours at the moment he pulled the trigger. They were on land across the road and unarmed outside the vehicle. That group were oblivious to Mr [Summers]'s whereabouts until he wanted to make himself known by firing his .308. He was not acting under a misconceived belief he needed to defend himself or others. He fired the shot for other reasons, as found below.

Without reasonable excuse element proved

[65] Conclusions thus far. Mr [Summers] deliberately discharged his .308 in the air whilst near a dwelling house so as to frighten [the complainant] in the way explained.

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[22] NOE at 18.
[23] NOE at 32.

He was not acting under a belief he needed to fire the shot in defence of himself or others. The determination of the charge under s 48 therefore distilled to whether the shot was fired "without reasonable excuse". I found Mr [Summers] had no reasonable excuse in the circumstances. My reasons follow.

[66] As a concept in law, reasonable excuse means an excuse which is reasonable in the circumstances. It is an objective enquiry. Much depends on fixing the circumstances and then judging them objectively.

[67] Part of the context is recognition of the legislative aims of the Arms Act. Significantly, the legislation is designed to promote safe possession and use of firearms. Part of that objective is achieved by prophylactic measures. The general principle of safe possession and use is reflected in the reasoning of case law cited already.

[68] The circumstances in which a "reasonable excuse" under s 48 is assessed and determined must align with the statutory aims. The criminal sanction under s 48 is designed to promote that aim. Having said that, s 48 clearly recognises there may be circumstances where discharging a firearm near a dwelling house can be reasonably excused.

[69] I found Mr [Summers] deliberately discharged his .308 as a warning shot to the group he perceived were illegally poaching in broad daylight. He wanted the loud noise from his .308 to stop the men in their tracks so to speak, to alert them to his presence and knowledge of their (perceived) illegal activities. However, in the circumstances, I found this was not a "reasonable excuse" under s 48.

[70] A warning shot was fired in the air but not because Mr [Summers] truly believed he and others were in immediate or potential danger. Mr [Summers] mistakenly thought the group were poaching. I found he wanted to bring that to a halt by alerting them to his presence. But Mr [Summers] was entirely wrong about his perceptions. What appeared to be obvious to him turned out to be wrong. [The complainant] was carrying out his duties, albeit in a cavalier manner, as an animal control officer. And this occurred at a point when Mr [Summers] was fully aware the proper authority to stop alleged hunting or poaching—the police—had been contacted

by [witness B] before he even ventured outside; certainly, before the warning shot was fired. To make matters worse, Mr [Summers] fired the shot knowing at that moment the men were not holding firearms. He deliberately fired a warning shot heard by a then unarmed group. In these overall circumstances, deliberately discharging a .308 near a dwelling house that frightens mistaken poachers all points to unsafe use of that firearm.

[71] Mr [Summers] is not a policeman. He has no duty to maintain law and order along [the road] by discharging his .308 in the neighbourhood. His obligation under the Arms Act was to act in a way that promoted safe use of that firearm. Having stripped the self-defence veneer away, it was clear to me Mr [Summers] was acting more like a *de-facto* neighbourhood 'sheriff'; albeit he was looking at a 'cowboy' operation across the road.

[72] And he eventually conceded that firing the shot in the circumstances was "an incredibly stupid thing to do".[24] He said he would never do it again because no matter how justified he felt at the time, looking back it was "a very stupid thing to do."[25] Whilst I accept there was an element of hindsight in this concession, the concept of reasonable excuse is objectively determined. Here, Mr [Summers] was unwittingly conceding that under objective enquiry his actions were foolish. Reactions to what he did could have been more serious than they were.

Conclusions on s 48 charge

[73] In the overall circumstances, noted above, Mr [Summers]'s act of deliberately discharging his .308 near a dwelling house so as to frighten mistakenly assumed poachers was patently unreasonable.

[74] For all those reasons I found the charge under s 48 proved.

W P Cathcart
District Court Judge

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[24] NOE at 14.
[25] NOE at 15.