21/88

SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

R v HONEYSETT

Hunt, McInerney and Allen JJ

2 October 1987 — (1987) 10 NSWLR 638; (1988) 34 A Crim R 277

CRIMINAL LAW – ASSAULT/AFFRAY – SELF-DEFENCE – WHETHER DEFENCE AVAILABLE – WHETHER DEFENCE LIMITED TO CASES WHERE ACCUSED THREATENED WITH DEATH OR SERIOUS BODILY HARM.

In affray/assault cases, the issue of self-defence may be properly raised and it is for the tribunal of fact to evaluate the violence of the accused's act in self-defence by reference to the nature of the danger with which he believed he was threatened. The scope of the issue of self-defence should not be limited to cases where the accused reasonably apprehended that he would suffer death or serious bodily harm.

***Zecevic v DPP* [1987] HCA 26; (1987) 162 CLR 645; (1987) 71 ALR 641; (1987) 61 ALJR 375; (1987) 25 A Crim R 163, followed.**

HUNT J: (with whom McInerney and Allen JJ agreed) *[After setting out the facts and some of the trial judge's directions to the jury, continued]* ... **[3564]** The High Court has since *Viro's Case* once more reformulated the law of self-defence. That was in *Zecevic v DPP* [1987] HCA 26; (1987) 162 CLR 645; (1987) 71 ALR 641; (1987) 61 ALJR 375; (1987) 25 A Crim R 163. As I understand that decision, the law relating to this particular issue has not changed. Although there are statements in the judgments of the High Court which refer to a reasonable apprehension by the accused that he was threatened with death or serious bodily harm (for example, at 650), the ultimate question is stated in terms which exclude any such requirement.

The joint judgment of Wilson, Dawson and Toohey JJ (at 652) expressed it in this way:

> "The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in a reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is one of general application and is not limited to cases of homicide."

Mason CJ (at 646) accepted the joint judgment as correctly stating what is now the law of self-defence. Brennan J (at 655) and Gaudron J (at 668) specifically accepted the formulation of the ultimate question proposed in the joint judgment, despite their disagreements with other aspects of that joint judgment. However, as the joint judgment went on to point out (at 652-653), a person who kills with the intention of doing so or of inflicting serious bodily harm can hardly believe on reasonable grounds that it is necessary to do so in order to defend himself, unless he perceives a threat which calls for such a response. A threat does not ordinarily call for that response unless it causes a reasonable apprehension on the part of that person of death or serious bodily harm. The joint judgment went on to state that the issue should be put to the jury in terms that, in determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, what should be considered is whether the force used by the accused was proportionate to the threat offered. Gaudron J also accepted the judgment of Dixon CJ in *R v Howe* [1958] HCA 38; (1958) 100 CLR 448; [1958] ALR 753; 32 ALJR 212 as permitting self-defence to operate even in murder trials beyond those cases in which the apprehended threat was of death or serious bodily harm.

As I said earlier, if the limitation imposed by the trial judge in the present case is not justified even where the accused has killed in self-defence and has been charged with murder or manslaughter, **[3565]** even less so could it logically be justified where the alleged act of the accused was one merely of assault, or where an assault is made the basis for a charge of affray. The jury must in every case evaluate the violence of the accused's act in self-defence by reference to the

nature of the danger with which he believed that he was threatened. Where that act is merely one of assault, in which of necessity no question can arise of an intention on the part of the accused to kill or to inflict serious bodily injury, it would in my view be quite illogical to exclude the issue of self-defence unless there was a reasonable apprehension by the accused that he would suffer death or serious bodily injury. The accused's act of assaulting the victim may be evaluated by a jury (putting to one side any question of onus) as proportionate to a very much less serious threat reasonably apprehended by him at the time, so that in such a case the issue of self-defence does properly arise.

The Crown argued that, even if it was an error to tell the jury (putting to one side once again any question of onus) that an issue of self-defence arises only where an accused reasonably believes that he is threatened with death or serious bodily harm, the jury would necessarily have understood his Honour's directions not as limiting the scope of self-defence in this case but only as a general illustration or as demonstrating one case in which self-defence might arise.

I am unable to accept that argument. It is true that, in the general directions which I have already quoted, his Honour introduced the subject in terms which are consistent with the references to death or serious bodily harm being such a general illustration, although the direction is by no means expressly so limited and it is stated in terms which are readily capable of being understood as having been intended to be a limitation upon the scope of the issue of self-defence. What he said was that:

> "... a person threatened with death or serious bodily harm is justified in striking if it is reasonably necessary for his defence."

However, his Honour went on almost immediately to equate such a person with the accused in this case. He said:

> "He [that is, the person threatened with death or serious bodily harm] need not wait until he is struck. More violence must not be used than is reasonably necessary to repel the attack and the accused must reasonably believe that what he did was necessary to defend himself against the attack."

Throughout the remainder of the relevant direction, as it was earlier quoted by me, his Honour returned to the use of the expression "a reasonable person" rather than "the accused". Whatever room for doubt there may have been at that stage, what was intended by his Honour was put beyond doubt when he **[3566]** next turned to the questions which, he told the jury, were posed by the issue of self-defence. The very first such question was expressed in these terms:

> "... are you satisfied beyond reasonable doubt that the accused did not reasonably believe that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made on him?"

After correctly directing the jury that they had to consider the accused's own belief and not what some imaginary reasonable man would have believed, his Honour said:

> "If the answer to this question is 'yes', the question of self-defence disappears from the trial. I will repeat that question. Are you satisfied beyond reasonable doubt that the accused did not reasonably believe that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made upon him?"

That was clearly and unarguably a direction which limited the scope of the issue of self-defence in the present case, so that the jury had to disregard the whole question of self-defence if the Crown had satisfied them that the appellant did not reasonably believe that he was threatened with death or serious bodily harm. There was thus a misdirection. Unfortunately, no complaint was made nor was a redirection sought, notwithstanding an opportunity to do so almost immediately after the direction was given and another opportunity at the conclusion of the summing-up. This is, however, not a case where the absence of such a complaint leads to the conclusion that, in the context of the atmosphere as it existed at the trial, there was not seen to be a need for any such direction: cf *R v William David Heaney* (CCA, 13th June, 1978, unreported). In no circumstances could the correction of a misdirection such as the present be seen as unnecessary. Self-defence was raised directly by the appellant; there was considerable evidence beyond the material in his own unsworn statement which supported the availability of that issue in the case.

It was, however, no part of the appellant's case that he had been threatened with death or serious bodily harm. There was simply no evidence to support such a case being made.

Indeed, had the law required such an apprehension of death or serious bodily harm before any issue of self-defence arose, the trial judge should have excluded the whole issue from the jury – upon the basis that there had not been raised during the trial any explanation for the act of the accused which had sufficient substance to merit consideration by the jury, and thus no onus lay upon the Crown to exclude the possibility that the accused was acting in self-defence: *Bratty v Attorney-General for Northern Ireland* [1963] AC 486 at 516. The authorities are collected in *Spautz v Williams* 7 ALR 144; 45 FLR 112; (1983) 2 NSWLR 506 at 522-523; 23 ALT 31. The misdirection thus negated any chance which the appellant had of an acquittal on the affray charge upon the issue of self-defence.

[His Honour referred to other matters not relevant to this Report, upheld the appeal and quashed the conviction]. [Reprinted with kind permission from 8 Petty Sessions Review (NSW) *p3559.]*
