15/86

SUPREME COURT OF VICTORIA — FULL COURT

R v TRAIN

Crockett, McGarvie and Hampel JJ

16 December 1985 — [1985] 18 A Crim R 353

CRIMINAL LAW – INFLICTING/CAUSING GRIEVOUS BODILY HARM/ASSAULT OCCASIONING ACTUAL BODILY HARM – SELF-DEFENCE – ELEMENTS OF DEFENCE – PRINCIPLES OF NECESSITY AND PROPORTION.

Where the issue of self-defence arises in cases concerning the inflicting/causing grievous bodily harm or assault occasioning actual bodily harm, the test is whether the accused reasonably believed that an attack was being made or about to be made on him. If, in acting to defend himself, the accused injured someone he reasonably believed to be an attacker, he is guilty of no crime if what he did was reasonably necessary, having regard to the danger which he reasonably believed he faced.

***R v Rainey* [1970] VicRp 83; [1970] VR 650, followed;**
***R v Kincaid* [1983] 33 SASR 552; (1983) 9 A Crim R 284, cited;**
***R v McManus* [1985] 2 NSWLR 448; 20 A Crim R 14, followed.**

McGARVIE J: (with whom Crockett and Hampel JJ agreed) **[1]** Lee Anthony Train, a man of 26, seeks leave to appeal against convictions in the County Court on 18th July 1985 for the offences of inflicting grievous bodily harm on Robert Andrew Walsh, causing grievous bodily harm to Steven Lesley Newman with intent to do him grievous bodily harm and of an assault occasioning actual bodily harm to Gary George Newman.

The charges arose from a violent encounter in Nicholson Street, Fitzroy, at about 1 a.m. on 7th May 1983. Broadly, the evidence for the prosecution was that five men and the wife of one of them were walking to a car parked in Newry Street, which runs to the east off Nicholson Street. Two other men, said to be the applicant and a dark haired man, made insulting remarks and threw a bottle which **[2]** hit one of the five men, Robert Andrew Walsh. The two men ran off and Walsh chased them down Newry Street and when they turned right into Nicholson Street. About 30 metres along Nicholson Street Walsh caught up with the applicant turned to face him, then broke a beer bottle on the footpath and walked backwards whilst flourishing the broken bottle in front of him. The dark-haired man went to a van, was rummaging in it, and called the applicant to the van. Walsh walked to the back of the van and lunged at the two men, making contact with one of them. The two men armed themselves, the applicant with a metal rod in a vinyl bag, and the dark-haired man with a wheel brace. Walsh and his companions who joined the encounter were injured by blows from the metal rod, the wheel brace or both.

About a year later the applicant was interviewed by a detective but declined to answer questions. At his trial the applicant made an unsworn statement and called no witnesses. He said that he and the dark-haired man had been walking down Newry Street to go to the car of Neil Evans, which was parked in Nicholson Street. Evans had agreed to take them home. He and the dark-haired man walked past the other group in Newry Street and the people in the group seemed loud, drunk and boisterous. He heard no insulting remarks made to the group and saw no bottle thrown. As he got to the corner of Nicholson Street he saw a group of men running towards Nicholson Street yelling and shouting abuse. He did not have a bottle or anything in his hand and he and the dark-haired man ran to the car where they were surrounded by their pursuers. Walsh lunged at them and the applicant fell to the ground and felt blows to his head and body. The men **[3]** who had pursued them were angry and hostile. He was scared for his safety. He struggled to his feet and the dark-haired man pushed the bag into his hands. Steven Lesley Newman came towards him, looking very angry and powerful. He swung the bag at him and could have hit him more than once. He did not want to hurt Steven Newman. He denied he hit Gary Newman. He thought he was in great danger of being hurt by those who were attacking them, he acted only to protect himself and his only concern was to get away from his attackers.

He said that eventually Neil Evans arrived and let him and the dark-haired man into the car and they drove off. The applicant said his injuries consisted of cuts and abrasions to the forehead and inside of his mouth and bruising to the back and rib cage area. The applicant did not suggest that any of the men who had surrounded him and his companion had a weapon.

The ground relied on by Mr Morgan-Payler in his clear, concise argument for the applicant, is that the learned Judge misdirected the jury as to the law of self-defence. He made several specific criticisms and submitted in addition that overall the directions on self-defence lacked conciseness and clarity and were confused.

The decision of *Viro v R* [1978] HCA 9; [1978] 141 CLR 88; [1978] 52 ALJR 418; 18 ALR 257, settled for Australia the nature and content of many of the component parts of the concept of self-defence. The most significant change which the decision made to the law was as to the legal effect upon a charge of murder of the use by the accused of excessive force in self-defence. That change has also changed the law on charges of attempted murder or wounding with intent to murder. There were no such charges **[4]** before this jury. On a charge of murder, where proportionality arises on the issue of self-defence, it is relevant for the jury to consider whether the force used in the defensive response of the accused was in fact reasonably proportionate to the danger he reasonably believed he faced and also whether he actually believed that it was reasonably proportionate. The law on a charge of wounding with intent to murder was laid down in *R v Bozikis* [1981] VicRp 59; [1981] VR 587; (1980) 5 A Crim R 58.

In charges such as those before the jury in this case, where an issue arises as to the necessity for or proportionality of the response of the accused, the jury needs only to decide whether the defensive response of the accused was in fact reasonably necessary or proportionate having regard to the danger he reasonably believed he faced. If the defensive response was in fact unnecessary or disproportionate in the light of the believed danger, it went beyond the right of self defence, regardless of whether the accused believed that it was reasonably necessary and proportionate. With these offences the position is still basically as it was stated in *R v Rainey* [1970] VicRp 83; [1970] VR 650 at 651. In *R v Bozikis* [1981] VicRp 59; [1981] VR 587 at 589; (1980) 5 A Crim R 58 Young CJ said:

> "... it would not follow that a person charged with common assault who pleaded self-defence which failed because he had used excessive force should be guilty of no crime. If his plea of self-defence failed, for whatever reason, he would be guilty of common assault. The doctrine that excessive self-defence may reduce murder to manslaughter has no application to offences other than murder or attempted murder or committing an act with intent to commit murder."

In *Morgan v Colman* [1981] 27 SASR 334 at 336; (1981) 4 A Crim R 324, in stating with the approval of the other two members of the **[5]** Court the general rules of self-defence applicable to offences other than murder, Wells J said:

> "It is both good sense and good law that where a person is subjected to, or genuinely fears, an attack (which may take the form of unarmed violence or the use of a weapon) he may use force to defend himself. It is both good sense and good law that, for the purposes of his defence, that person may do, but he may only do, what is reasonably necessary for the purpose, having regard to all the circumstances as he genuinely believed them to be at the time. If he does no more than is reasonably necessary in those circumstances, then such force as he employs is justifiable and lawful. If, in those circumstances, force by way of defence is not called for, or if, though some measure of defence is warranted, he plainly oversteps the mark and uses force that is not reasonably necessary, then what he does is unlawful. That is the general rule."

[6] In referring to a genuine fear of attack, and to the circumstances as the person genuinely believed them to be, His Honour is, in the interests of simplicity, giving a direction more favourable to the accused than that which the law prescribes. Strictly, the test is whether the accused reasonably feared an attack and reasonably believed particular circumstances to exist. See *R v Kincaid* [1983] 33 SASR 552 at 556-7; (1983) 9 A Crim R 284.

In the form of directions suggested by Street CJ in the unreported decision of *R v McManus* (Court of Criminal Appeal of New South Wales, 21st June 1985) [1985] 2 NSWLR 448; 20 A Crim R 14) which is noted in [1985] 59 ALJ 644, Question 2 and the section which follows it on p645, treats the law in respect of charges such as those in this case as being as I have stated it.

In this case it was necessary for the learned trial judge to inform the jury in language chosen by him and appropriate to the circumstances, that if the applicant reasonably believed that an attack was being made or about to be made on him and acting to defend himself injured someone he reasonably believed to be an attacker, he would be guilty of no crime if what he did was reasonably necessary, having regard to the danger which he believed he faced. One of the main arguments relied on by the prosecution in support of its case that the applicant was not acting in self-defence was that he could have kept running instead of stopping at the car, and then would have needed to apply no force to anyone. In this context, it was clearer to put the test to the jury in terms of what was reasonably necessary rather than what was reasonably proportionate. **[7]** The latter test would be clearer to a jury if applied to a situation where some force was justified, and the question is whether the force used was excessive. Of course, the question whether the act of the accused was reasonably proportionate to the believed danger is merely a particular application of the question whether the act was reasonably necessary having regard to the believed danger. The Judge put the test in terms of what was reasonably necessary.

The learned Judge usually put the test in terms of whether what the accused did was reasonably necessary. In this case that was clearer than putting it in terms of whether the force used was reasonably necessary or reasonably proportionate. In a case where the accused was justified in applying some force in the way he did and the issue is whether the force used was excessive, it is clear and convenient to put the issue in terms of whether the force used was reasonably proportionate to the danger which the accused believed he faced. In the general run of cases other aspects will be important beside the aspect of whether an excessive degree of force was used.

Often, in deciding whether the defensive response of an accused was reasonably necessary, it will be relevant to consider the intent with which force was used and the part of the victim's body to which it was applied. Thus, if a man who has a pistol is being pursued and about to be attacked by a person with an iron bar, he may be justified in using the pistol in self-defence. If he uses the pistol to shoot the pursuer, the amount of force used against that person is identical wherever he shoots him, and with whatever intention. However, the view of a jury as to whether the act of shooting was reasonably **[8]** necessary having regard to the danger the man with the pistol believed he faced, may be very different if the pursuer is shot in the foot with the intention of immobilising him than if he is shot in the heart with intent to kill him.

The trial Judge directed the jury not only as to self-defence but also upon the right of the applicant to act in defence of his companion. In the interests of simplicity, I refer only to self-defence. The way in which the jury is to be informed of the relevant law of self-defence is a matter to be left to the good judgment of the trial Judge. The primary objective should be to state the law in a way that the jury are most likely to be able to comprehend and remember. Sometimes it may be best to direct the jury as to the questions they should ask themselves and the steps they should follow. The basic directions suggested by Street CJ, and mentioned above, are a helpful guide on this. Similar simplified directions have been circulated amongst judges over recent years. Sometimes it may be thought best to read to the jury and provide them with copies of the simplified questions and steps to be followed. That practice was sanctioned by the Court of Criminal Appeal in *Wilson v R* (unreported 12 November 1980). The care to be taken by trial judges in providing documents to juries was stressed by the Court of Criminal Appeal in *R v Zikovic* (17 A Crim R 396, 31 October 1985). In other cases, the best approach to directions may be that recommended by Smith J (with the support of Winneke CJ and McInerney J) in *R v Yugovic* [1971] VicRp 99; [1971] VR 816 at 822. Under that approach the issue of self-defence is put to **[9]** the jury -

> " ... in terms of the Crown having to establish beyond reasonable doubt that the act charged was not justified; and of the law saying that the act is justified when certain conditions exist; and of the Crown, therefore, having to establish beyond reasonable doubt that one or more of those conditions did not in fact exist."

That form of direction may conveniently be followed by indicating to the jury which conditions the prosecution asserts it has established did not exist. The precise issues of self-defence have then been identified and the proper position on onus of proof upon the issues has clearly been stated. I will deal with some of the criticisms of the directions, in an order of convenience, which is not the order of importance which counsel for the applicant gave them in his argument.

Mr Morgan-Payler drew attention to passages in the charge where the learned Judge had told the jury, in effect, that the right of self-defence exists when a person is attacked. As a matter of law the right to respond in self-defence existed if the applicant reasonably believed that an attack was being made or about to be made on him. It existed even though the applicant's reasonable belief was a mistaken one. *Viro v R* [1978] HCA 9; [1978] 141 CLR 88 at 177 per Aickin J; (1978) 18 ALR 257; (1978) 52 ALJR 418. If the applicant reasonably believed that an attack was being made or about to be made on him, the right to make a necessary response in self-defence existed even though, in fact, no one in the other group had attacked or had any aggressive intention.

His Honour never specifically told the jury that **[10]** the applicant's right of self-defence depended on his reasonable perception of whether he was being or about to be attacked. The learned Judge did tell the jury that the Crown would prove that the acts of the accused were not done in self-defence if it proved that the accused did not believe the occasion for self-defence had arisen, or that the accused did not reasonably believe that an unlawful attack was being or about to be made on him.

Another criticism of the directions of self-defence made on behalf of the applicant is that the jury were told that they were to consider whether the response of the applicant was reasonably necessary, having regard to the danger which he faced. His Honour did direct the jury to this effect when he first directed the jury on self-defence. During a break in the charge when His Honour invited exceptions, Mr Dickinson, who appeared for the applicant at the trial, referred the Judge to the words of Mason J in the third of the propositions set out in *Viro v R* [1978] HCA 9; [1978] 141 CLR 88 at 146-7; (1978) 18 ALR 257; (1978) 52 ALJR 418, that the jury must consider "whether the force in fact used by the accused was reasonably proportionate to the danger which he believes he faced". **[11]** He submitted that whether the applicant's defensive response went beyond what was reasonably necessary was to be assessed not in the light of the actual danger he faced but in the light of the danger which he believed he faced. The submission was correct. However, when His Honour further directed the jury he did not specifically mention this aspect, although what he said on another aspect of self-defence reinforced his earlier directions on this aspect.

After the jury retired to consider their verdict at 12.19 pm., counsel for the prosecution and defence joined in seeking further directions on the test for deciding whether the applicant's response was disproportionate or beyond what was reasonably necessary. His Honour gave directions to the same effect as his earlier directions. When the jury retired, Mr Dickinson repeated his exception that the jury should have been told that whether the response of the applicant was reasonably necessary was not to be assessed having regard to the nature of the attack and its surrounding circumstances, but having regard to the danger which he believed he faced. His Honour declined to re-direct.

At 4.16 pm. the jury returned to court with a question. The Foreman told his Honour the jury were having some difficulty. They were unable to agree on the issue of self-defence on the point of law of not inflicting more force than is necessary to defend himself; he repeated, more force than is absolutely necessary to defend himself. He said that was the most important question, but another one was under what circumstances can weapons such as the alleged weapons **[12]** be used as a matter of self-defence. His Honour said he would re-charge the jury entirely on self-defence and he would tell them what he said before in its entirety. He told the jury the first thing they would have to decide was whether the applicant was attacked and that self-defence did not arise unless he was attacked. He said that the law says that a man who is attacked may defend himself but the jury had to decide if there was an attack. In the course of the redirection the learned Judge said:

> "if you get to the point where you feel, well, there was an attack which required self-defence, ... the next thing you have to think about is that the man is not entitled to use more force or inflict more harm than is reasonably necessary to defend himself."

Otherwise what was said on this aspect was to the same effect as that to which counsel for the applicant had earlier taken exception. The Judge told the jury it was their task to decide whether the attack would require the use of weapons mentioned in the evidence. When the jury retired, Mr Dickinson repeated his exception, submitting that the question from the jury indicated

that the jury was considering the question of proportion. He submitted that it has not been made clear that in assessing the proportionality of what the applicant did, the jury had to look at the danger he believed he faced, not at what was absolutely necessary to defend himself.

The jury were given no further directions and gave their verdict at 5.30 pm. The learned Judge misdirected the jury in giving the limited direction that the accused was acting in self-defence **[13]** if what he did was reasonably necessary, having regard to the danger which he faced. He should have conveyed to them that the accused was acting in self-defence if what he did was reasonably necessary having regard to the danger which he believed he faced. In this context the danger which he believed he faced means the danger which he reasonably believed he faced.

In view of the evidence in this case the misdirection was in my opinion a serious one. There was evidence that the applicant and his companion had been chased by one or more men of the other group and eventually all those in that group arrived on the scene. There was evidence that Robert Walsh had lunged at the two men and had hit one of them. There was also evidence that those in the larger group had no aggressive intentions towards the applicant and his companion. It was a situation in which the jury could have taken the view that there was a great difference in degree between the danger the applicant actually faced and the danger he might reasonably have believed he faced. The first question from the jury indicates that the jury were finding difficulty on whether the response of the applicant went beyond the necessities of the occasion. At the trial counsel for the applicant repeatedly took objection to the mis-direction in terms that were clear and accurate and referred to relevant authority.

As I mentioned earlier when dealing with Mr Morgan-Payler's first criticism of the charge, the learned Judge told the jury that the Crown would prove that the acts of the accused man were not done in self-defence if it proved that the accused did not believe the occasion for self-defence had **[14]** arisen. This could be taken as implying that it was the belief of the accused as to what the circumstances were that was important. Such an implication could not satisfy the requirement of stating the actual issues clearly to the jury.

In another respect, the direction on whether the applicant went beyond the necessities of the occasion was more favourable to the applicant than the direction which strictly would have complied with the law. The learned Judge told the jury that the Crown would prove that the acts of the accused man were not done in self-defence if it proved that the accused knew that the means he employed to defend himself went beyond what was reasonably required, having regard to the nature of the attack and its surrounding circumstances. This gave the accused the advantage of having his defensive response tested by what he knew or believed to be reasonably necessary, rather than by what was in fact reasonably necessary.

However, the jury were misdirected to the disadvantage of the applicant on an essential factual component of the case against him and that component was central to the issues which arose on the evidence in this case. In my opinion this misdirection warrants a new trial. It is not necessary to mention further the other submissions made on behalf of the applicant. I would grant leave to appeal, allow the appeal, set aside the conviction and order a new trial.
