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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

R v BOZIKIS

Young CJ, Anderson and Jenkinson JJ

19 December 1980 — [1981] VicRp 59; [1981] VR 587; (1980) 5 A Crim R 58

SELF-DEFENCE – PROVOCATION – THE DOCTRINE THAT EXCESSIVE SELF-DEFENCE MAY REDUCE MURDER TO MANSLAUGHTER HAS NO APPLICATION TO OFFENCES OTHER THAN MURDER, ATTEMPTED MURDER OR COMMITTING AN ACT WITH INTENT TO MURDER – QUESTION OF SELF-DEFENCE TO BE LEFT TO JURY.

YOUNG CJ: In my view the question of self-defence should not have been withdrawn from the jury. I agree with the reasons given by the other members of the Court for this conclusion. 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.

ANDERSON J: I have had the opportunity of reading in draft the reasons for judgment of Jenkinson J, and I accept his analysis of the evidence. In my opinion, the question of self-defence was a matter for the jury to determine and, on that account, I agree that the appeal should be allowed and a new trial ordered.

Accepting that the question of self-defence was a matter which should have been left to the jury, the Crown, in negativing self-defence would have had to satisfy the jury that the applicant had no reasonable belief that an unlawful attack which threatened him with death or serious bodily injury was being or was about to be made upon him. If the jury were satisfied that he had no such reasonable belief, then, having been satisfied that there was the requisite intention to murder, the applicant should have been convicted. If, however, the jury were not satisfied that he had no such reasonable belief, it was then for the jury to determine whether the force in fact used was reasonably proportionate to the danger which he believed he faced. If the jury were not satisfied beyond reasonable doubt that more force was used than was reasonably proportionate, then they should have acquitted the applicant. If the jury were satisfied beyond reasonable doubt that more force than was reasonably proportionate was used, they would have had to determine whether the applicant believed that the force he used was reasonably proportionate to the danger which he believed he faced.

If the jury were satisfied beyond reasonable doubt that the applicant did not have such a belief, then they should have convicted him of the charge of wounding with intent to murder. If the jury were not so satisfied, then the applicant should have been acquitted. These propositions stem, I believe, from what was said by Mason J in *Viro v R* [1978] HCA 9; (1978) 141 CLR 88, at p147; (1978) 18 ALR 257; (1978) 52 ALJR 418. Where murder is the charge, there may be a reason for finding that the homicide is manslaughter and not murder. But there is no such offence as wounding with intent to commit manslaughter. Notwithstanding *R v Newman* [1948] VicLawRp 16; (1948) VLR 61; [1948] 1 ALR 109, where the charge being considered is wounding with intent to murder and the intention to murder is proved, to my mind only two alternatives are open where self-defence is an issue; conviction or acquittal. It seems to me that there is no intermediate offence, as there may be where murder is the charge: see *R v Falla* [1964] VicRp 11; (1964) VR 78. The presentment may, of course, contain alternative counts. But that is a different matter.

JENKINSON J: Application for leave to appeal against a conviction of wounding with intent to commit murder. The first ground of the application was that the learned trial Judge had erred in withdrawing from the jury's consideration the question whether an acquittal of any of the charges might have been rested on self defence. It is convenient to consider that ground in relation, first,

to the first count. (See *R v Evans and Lewis* [1969] VicRp 109; (1969) VR 858; *R v Salika* [1973] VicRp 27; (1973) VR 272; *R v Pearce and Castano* (Full Court; unreported; 19 December 1978); *R v Hughes* (Full Court; unreported; 12 February 1980); cf. *Markby v R* [1978] HCA 29; (1978) 140 CLR 108; 21 ALR 448; (1978) 52 ALJR 626.)

The evidence would have justified a finding by the jury that the applicant and Golias had been on bad terms for several months before 8th March 1977, when they met in the late afternoon in a coffee bar they and other Greeks frequented; and that each of them might have thought that the other might offer violence to him by reason of past grudges. Insults and threats had on several occasions been exchanged, the jury may well have been persuaded. An intention required in respect of the first count of wounding with intent to commit murder is the intention to kill: no other mental state will suffice. See *R v Cruse* [1839] EngR 211; 173 ER 610; (1839) 8 C & P 541; *R v Bourdon* [1847] EngR 43; 175 ER 151; (1847) 2 Car & Kir 366; *R v Monkhouse* (1849) 4 Cox CC 55; *R v Whybrow* (1951) 35 Cr App R 141; *R v Grimwood* (1962) 2 QB 621; [1962] 3 All ER 285. Not only authority, but a due regard to the words of s11(1) of the *Crimes Act* 1958 indicates that the intention to kill is required, for it is only by causing death that the crime may be committed of the commission of which that section requires an intention.

The intention required may be not merely to cause death, but to cause death under circumstances in which the crime of murder would have been committed if death had been caused by the act charged. So much may be thought to be required by the words "with intent ... to commit murder". Consonant with that understanding of the section is the accepted principle that lawful self-defence precludes conviction of an offence against it: see *R v Falla* [1964] VicRp 11; (1964) VR 78; *R v Yugovic* [1971] VicRp 99; (1971) VR 816. But what should the verdict be, self-defence being in issue and fit for the jury's consideration, if the circumstances are such that, if the act charged had caused the death of the person whom the accused intended to kill, the verdict would have been not guilty of murder, but guilty of manslaughter?

A similar problem arises in relation to provocation; see the cases cited in (1973) Crim LR 727-736, and by Smith & Hogan: *Criminal Law* (4th ed.) p263 note 9; *R v Newman* [1948] VicLawRp 16; (1948) VLR 61; [1948] 1 ALR 109; *R v Spartels* [1953] VicLawRp 33; (1953) VLR 194; [1953] ALR 554; *R v Cunningham* (1959) 1 QB 288; (1958) 3 All ER 711; *R v Falla* [1964] VicRp 11; (1964) VR 78. In *R v Terzogly* (unreported 3 May 1973) Smith J charged a jury that provocation would preclude conviction of wounding with intent to murder, as Barry J and Sholl J had done in *R v Newman*, *supra* and *R v Spartels*, *supra* respectively.

It may be said that there are substantial considerations against requiring, on a charge of an offence specified in s11(1), proof that the accused did not have a belief that his act was reasonably proportionate to the danger he believed he faced and was in defence of himself or of some other person, as well as proof that his act was not in the jury's judgment reasonably proportionate to the danger which he believed he faced. Such a belief may be said to have no place as determinative of any criminal liability outside homicide, just as provocation had been said, in England and in New Zealand, to be available only on a charge of murder. (See Smith and Hogan, *op. cit*, pp263, 294.) Like provocation, the mistaken belief as to the reasonableness of the response by way of self-defence finds its justification as a criterion for mitigation from guilt of one offence (murder) to guilt of another, less grave offence (manslaughter), but neither conception can be utilised in that way when it is allowed an application to an offence other than murder.

Viscount Simon in *Holmes v DPP* (1946) AC 588 at 601; [1946] 2 All ER 124 said that in the case of crimes other than homicide provocation does not alter the nature of the offence at all but it is allowed for in the sentence. It is of course unnecessary that in this appeal this Court express any concluded opinion regarding provocation in relation to s11(1); but reasoning upon provocation may have an application in relation to self-defence, and if the conclusion which I have expressed, that the belief I have specified concerning self-defence precludes a conviction of an offence under s11(1), involves a refusal to accept the reasoning of the Court of Criminal Appeal in *R v Cunningham*, *supra*, and the *dictum* of Viscount Simon upon which that reasoning was based, and the decision of Pape J in *R v Falla*, *supra*, then I would, with the greatest respect, accept that consequence.

I have found it necessary to determine whether a belief of the applicant that a wound inflicted

with intent thereby to kill was reasonably proportionate, by way of self-defence, to the danger the applicant believed he faced would preclude conviction on the count of wounding with intent to commit murder, because the evidence was in my opinion such that a jury might reasonably have failed to be satisfied beyond reasonable doubt that the applicant did not believe that the wound inflicted on Golias's back, with intent thereby to kill, was reasonably proportionate, by way of self-defence, to the danger he believed he faced.

An accused is entitled to have left to the jury for their consideration any hypothesis which the evidence fairly raised for consideration, with an appropriate direction as to the law which would be applicable if it were adopted – even if it was a hypothesis inconsistent with that for which defence counsel had contended ... the trial Judge is not bound to leave merely fanciful theories which nothing in the evidence fairly supports ... But anything which may conceivably be thought by a reasonable jury to be a serious possibility should be dealt with by the jury." per Sholl J in *R v Tikos (No. 1)* [1963] VicRp 44; (1963) VR 285 at 289. Since it is the intention to kill with which this Court is presently concerned, not an intention to do grievous bodily harm (as to which see *R v Rainey* [1970] VicRp 83; (1970) VR 650), I go no further than to state my opinion that, if the evidence would permit a reasonable jury to fail of satisfaction beyond reasonable doubt that there was no reasonable belief by the accused that an unlawful attack which threatened him with death or serious injury was being or was about to be made upon him, the issue of self-defence must be left to the jury on a charge of wounding with intent to commit murder, unless the evidence is such that a reasonable jury could not fail of satisfaction beyond reasonable doubt that the accused did not believe that the force which he used – being force designed and intended to kill – was reasonably proportionate to the danger which he believed he faced„

In this case the evidence could not justify any supposition that the applicant might have believed himself in danger of death at the hands of Golias. It seems to me to be a consequence of what has been laid down in *Viro v R (supra)*, that he who kills, intending to kill, in the belief that killing is a reasonably proportionate response to a threat of serious bodily harm to be caused by an unlawful attack on himself, is not guilty of murder, nor of any of the offences specified in s11(1) of the *Crimes Act* 1958. In my opinion, an inference that he stabbed Golias in the back, intending to kill Golias, in the belief that that was a measure of self-defence reasonably proportionate to the danger which he believed he faced. The hypothesis that such was the state of the applicant's mind was one which the applicant's evidence fairly raised for the jury's consideration, in my opinion, and should therefore have been submitted to them with a direction as to the law which would be applicable if the jury were to fail of satisfaction beyond reasonable doubt that such was not the applicant's state of mind. I would grant the application and order a new trial.
