20/88

HIGH COURT OF AUSTRALIA

ZECEVIC v DPP (VIC.)

Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ

10 February, 1 July 1987

[1987] HCA 26; (1987) 162 CLR 645; (1987) 71 ALR 641; (1987) 25 A Crim R 163; 61 ALJR 375; Noted 62 ALJ 75; 104 LQR 239; 37 ICLQ 348

CRIMINAL LAW – MURDER – SELF-DEFENCE – EXCESSIVE FORCE – WHETHER ACCUSED MUST HAVE REASONABLE GROUNDS FOR BELIEF THAT RESPONSE NECESSARY – WHETHER DEFENCE LIMITED TO CASES OF HOMICIDE.

Per Wilson, Dawson and Toohey JJ, Mason CJ, agreeing: In respect of the issue of self-defence, the question to be asked 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 tribunal of fact is left in reasonable doubt about the matter, then the accused is entitled to an acquittal. The question is one of general application and is not limited to cases of homicide.

WILSON, DAWSON and TOOHEY JJ: *[After setting out the facts, referring to propositions laid down in* Viro v R *[1978] HCA 9; (1978) 141 CLR 88; (1978) 18 ALR 257; (1978) 52 ALJR 418; and to other authorities, Their Honours continued)]* … **[ALR 652]** It is apparent, we think, from the difficulties which appear to have been experienced in the application of *Viro*, that there is wisdom in the observation of the Privy Council in *Palmer* that an explanation of the law of self-defence requires no set words or formula. 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 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. Where homicide is involved some elaboration may be necessary.

Murder consists of an unlawful killing done with intent to kill or to do grievous bodily harm. Recklessness may be put to one side as having no apparent relevance in the context of self-defence. Manslaughter also consists of an unlawful killing, but without such an intent. A killing which is done in self-defence is done with justification or excuse and is not unlawful, though it be done with intent to kill or do grievous bodily harm. However, a person who kills with the intention of killing or of doing 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 that 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. If the response of an accused goes beyond what he believed to be necessary to defend himself or if there were no reasonable grounds for a belief on his part that the response was necessary in defence of himself, then the occasion will not have been one which would support a plea of self-defence. That is to say, the killing will have been without justification or excuse and it will be for the jury to determine how it must be regarded. If it was done with intent to kill or to do grievous bodily harm, then unless there was provocation reducing it to manslaughter, it will be murder. In the absence of such an intent it will be manslaughter. See *Viro* (CLR at 101).

When upon the evidence the question of self-defence arises, the trial judge should in his charge to the jury place the question in its factual setting, identifying those considerations which may assist the jury to reach **[653]** its conclusion. In attempting to identify those considerations in any abstract manner here, there is a danger of appearing to elevate matters of evidence to rules of law. For example, it will in many cases be appropriate for a jury to be told 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, it should consider whether the force used by

the accused was proportionate to the threat offered. However, the whole of the circumstances should be considered, of which the degree of force used may be only part. There is no rule which dictates the use which the jury must make of the evidence and the ultimate question is for it alone. The trial judge should also offer such assistance by way of comment as is called for in the particular case. No doubt it will often also be desirable to remind the jury that in the context of self-defence it should approach its task in a practical manner and without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection.

There is, however, one situation which requires particular mention. It should, we think, be regarded as raising only evidentiary matters to be considered in arriving at an answer to the ultimate question, although in the code States it is treated as raising matters of law: see s272 of the *Criminal Code* 1899 (Qld); s249 of the *Criminal Code* 1913 (WA); s47 of the *Criminal Code* 1924 (Tas). Where an accused person raising a plea of self-defence was the original aggressor and induced or provoked the assault against which he claims the right to defend himself, it will be for the jury to consider whether the original aggression had ceased so as to have enabled the accused to form a belief, upon reasonable grounds, that his actions were necessary in self-defence. For this purpose, it will be relevant to consider the extent to which the accused declined further conflict and quit the use of force or retreated from it, these being matters which may bear upon the nature of the occasion and the use which the accused made of it. Indeed, even in circumstances in which the accused was not the original aggressor, retreat in the face of a threat of violence before resort to force may be relevant to the belief of the accused or the reasonableness of the grounds upon which the accused based his belief. There is, however, no longer any rule that the accused must have retreated as far as possible before attempting to defend himself. It is a circumstance to be considered with all the others in determining whether the accused believed upon reasonable grounds that what he did was necessary in self-defence: *R v Howe* [1958] HCA 38; (1958) 100 CLR 448 at 462-4 per Dixon CJ; [1958] ALR 753; 32 ALJR 212; *Viro* (CLR at 115-16) per Gibbs J.

What we have said involves a departure from the propositions which were accepted in *Viro*, but it is necessary to refer specifically to only two of the differences. In *Viro* self-defence is confined to a response to an unlawful attack, whereas the law as we have explained it is not so confined. Whilst in most cases in which self-defence is raised the attack said to give rise to the need for the accused to defend himself will have been lawful, as a matter of law there is no requirement that it should have been so. This is demonstrated by the exhaustive examination of authority carried out by Ormiston J in *R v Lawson & Forsythe* [1986] VicRp 53; [1986] VR 515; (1985) 18 A Crim R 360. Thus, for example, self-defence is available against an attack by a person who, by reason of insanity, is incapable of forming the necessary intent to commit a crime. It is, however, only in an unusual situation that an attack which is not unlawful will provide **[654]** reasonable grounds for resort to violence in self-defence. The whole of the surrounding circumstances are to be taken into account and where an accused person has created the situation in which force might lawfully be applied to apprehend him or cause him to desist – where, for example, he is engaged in criminal behaviour of a violent kind – then the only reasonable view of his resistance to that force will be that he is acting, not in self-defence, but as an aggressor in pursuit of his original design. A person may not create a continuing situation of emergency and provoke a lawful attack upon himself and yet claim upon reasonable grounds the right to defend himself against that attack.

The second difference lies in the treatment of the use of excessive or disproportionate force. As we have expressed the law, the use of excessive force in the belief that it was necessary in self-defence will not automatically result in a verdict of manslaughter. If the jury concludes that there were no reasonable grounds for a belief that the degree of force used was necessary, the defence of self-defence will fail and the circumstances will fall to be considered by the jury without reference to that plea. There is some force in the view, adopted by Stephen, Mason and Aickin JJ in *Viro*, that this may result in the conviction for murder of a person lacking the moral culpability associated with that crime. Experience would suggest, however, that such a result is unlikely in practice. As the Court of Appeal in England pointed out in *R v McInnes* [1971] 3 All ER 295; (1971) 1 WLR 1600; 55 Cr App R 551 at 562:

> "...it is important to stress that the facts upon which the plea of self-defence is unsuccessfully sought

> to be based may nevertheless serve the accused in good stead. They may, for example, go to show that he may have acted under provocation or that, although acting lawfully, he may have lacked the intent to kill or cause serious bodily harm, and in that way render the proper verdict one of manslaughter."

And, as we have already said, an accused person is not liable to be convicted of murder unless the jury is satisfied beyond reasonable doubt that there was an intention to kill or do grievous bodily harm...
