# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Andreassen* [2005] QCA 107 |
| PARTIES: | **R**<br>v<br>**ANDREASSEN, Jonathon Baird**<br>(appellant) |
| FILE NO/S: | CA No 334 of 2004<br>SC No 29 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | Supreme Court at Cairns |
| DELIVERED ON: | 15 April 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 March 2005 |
| JUDGES: | Williams and Keane JJA and Fryberg J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Appeal against conviction dismissed** |
| CATCHWORDS: | CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - WHERE GROUNDS FOR INTERFERENCE WITH VERDICT - PARTICULAR CASES - WHERE APPEAL DISMISSED - appellant convicted of murder - trial judge directed jury as to self-defence under s 271 *Criminal Code* - did not refer in summing up to defence under s 272 *Criminal Code* - jury instructed that defence of self-defence not available if appellant had provoked assault to which he had responded - appellant said in police interview that his actions were in self-defence - whether jury should have been directed as to defence under s 272 - whether the jury would inevitably have convicted - application of the proviso<br><br>*Criminal Code* 1899 (Qld), s 271, s 272, s 668E(1A)<br><br>*Dhanhoa v The Queen* (2003) 77 ALJR 1433, cited<br>*Festa v The Queen* (2001) 208 CLR 593, considered<br>*R v Bojovic* [1999] QCA 206; [2000] 2 Qd R 183, cited<br>*R v Corry* [2005] QCA 87; CA No 306 of 2004, 1 April 2005, distinguished |

COUNSEL: A J Glynn SC for appellant
D L Meredith for respondent

SOLICITORS: O'Reilly Stevens Bovey Lawyers (Cairns) for appellant
Director of Public Prosecutions (Queensland) for respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree with all that is said therein and in consequence the appeal must be dismissed.

[2] **KEANE JA:** The appellant was convicted of the murder of Jason Robert Ryman on 7 April 2003. The sole ground of the appellant's challenge to his conviction now consists of the contention that the learned trial judge erred in failing to direct the jury that the Crown must negative the defence provided by s 272(1) of the *Criminal Code* 1899 (Qld) beyond reasonable doubt before they could convict the appellant.

**Background**

[3] In September 2004, the appellant, the deceased and two other men named Rawlings and Limbom, were living at the Barrier Reef Hotel in Cairns. A dispute arose between Rawlings and the appellant and Limbom which led to threats of violence being made by Rawlings and the deceased against Limbom and the appellant, although these threats were not actually made directly by either Rawlings or the deceased to the appellant or Limbom.

[4] On the night of 15 September 2004, the deceased and Rawlings had been drinking in a number of locations before going to the Sports Bar, a Cairns nightclub, after 11.00 pm. A short time later, the appellant and Limbom arrived. They had also been drinking, and had ingested a quantity of amphetamines.

[5] After a short time, Limbom and the appellant approached Rawlings and the deceased who were standing at an upright barrel in the nightclub. Limbom says that he arrived a short time before the appellant, during which time Rawlings apologized to him for the threats and allegations which he had made. According to Limbom, he and Rawlings shook hands. According to Rawlings, he apologized to the appellant after Limbom had gone to the bar to buy a drink. On neither version, did the deceased offer an apology.

[6] The appellant admitted at the trial that he stabbed the deceased, that the stabbing caused a wound to the upper chest of the deceased, and that the body the subject of post-mortem examination by Dr Williams, was that of the deceased. Dr Williams confirmed that the deceased died as a result of the stab wound to the upper chest.

[7] The Crown case at trial was that the deceased was stabbed while the two of them were standing at the barrel. The only witnesses who gave evidence that they saw the appellant strike the deceased were Rawlings and Thomas Dybro.

[8] According to Rawlings, he saw the flash of an arm and heard a sound like fingers being thumped on a chest shortly after he had intervened in a loud dispute between the appellant and the deceased. No witnesses saw a knife at any time in the nightclub; however, when the appellant was approached shortly after 1.00 am the following morning, a knife was located with the blade between floorboards adjacent to where the appellant was seated. Blood matching the deceased's was found on the floorboards.

[9] Thomas Dybro said that the appellant shouted in the deceased's face, and the deceased turned his face away from the appellant, and that after a time the appellant pushed the deceased in the belly or the solar plexus. Mr Dybro saw no weapon. He saw the deceased take a step back and swing a punch at the appellant. The two men then moved to Mr Dybro's right and he could not see anything after that happened.

[10] Kym Schneekloth said she saw the two men struggling, but did not see either strike the other. She said that when she first saw the two men, they were moving briskly in the same direction, with the appellant moving backwards followed by the deceased, who was moving forwards.

[11] Melinda Brannelly gave evidence that she saw the deceased retreating and the appellant advancing upon him.

[12] Mattias Graepel gave evidence that he saw the appellant moving away from the deceased when the deceased pushed him in the back. He said that the deceased then fell to the ground. The inference which the Crown contends should be drawn from the fact that Graepel did not see the appellant do anything to the deceased is that the deceased had already received his fatal injury when he followed the appellant and pushed him in the back.

[13] When the appellant spoke to the police, shortly after the incident, he said, amongst other things:

> "Some guy attacks, you know, it was self-defence. I mean, what do you do?"

[14] Later in the interview, the following passage appears:

> "Before we go any …? … being threatened … (indistinct) … ? … for days…. Just pull up one second …? … and days by …. Just pull up one second! … (indistinct). Pull up one second. How are you feeling at the moment? -- Yeah, I'm alright. I am just a bit upset."

**The issues at trial**

[15] The issues left to the jury were as follows:

(a) intent, including the issue of intoxication;
(b) self-defence pursuant to s 271(2) of the *Criminal Code*; and
(c) provocation.

[16] The learned trial judge directed the jury that the issue of self-defence had been "squarely raised" by the appellant's statements to the police referred to above. Her Honour then instructed the jury in terms of s 271(2) of the *Criminal Code*, as follows:

> "First, there must have been an unlawful assault on the accused. Secondly, the accused must not have provoked that assault. Provocation means any wrongful act or insult of such a nature as to be likely when done to an ordinary person to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered. Thirdly, the nature of the assault must be such as to cause reasonable apprehension in the accused of death or grievous bodily harm. Fourthly, the person using the force by way of defence believes that he cannot otherwise preserve himself from death or grievous bodily harm and that belief must be on reasonable grounds."

[17] The learned trial judge went on to direct the jury in relation to the level of force that might legitimately be used in self-defence. She went on to say:

> "When considering whether the prosecution have excluded, beyond reasonable doubt, a defence under this section, you should understand that the important issue is the state of mind or belief of the defendant. The question you must ask is, 'Have the Crown proved beyond reasonable doubt that the defendant did not actually believe on reasonable grounds that it was necessary to act as he did to save himself from death or grievous bodily harm?' "

**The issues on appeal**

[18] Section 272 of the *Criminal Code* is concerned to provide for a defence of self-defence in the case of self-defence against provoked assaults, or where the accused has unlawfully assaulted another person. It is in the following terms:

> "(1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
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> (2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavour to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable."

[19] Having regard to the terms of the learned trial judge's direction to the jury, it is clearly the case that the jury's attention was not drawn to the availability of a defence under s 272. Importantly in this regard, the jury were instructed that a defence of self-defence would not be available to the appellant if he had provoked the assault against which he said he was defending himself.

[20] The appellant's submission is that the jury's evident rejection of the defence of self-defence under s 271 of the *Criminal Code* may be explicable on the basis that the jury considered that the appellant's assault upon the deceased was in response to an assault upon the appellant by the deceased, which assault the appellant had himself provoked or initiated. The emphasis of the learned trial judge's direction was upon the question whether the Crown had negatived beyond reasonable doubt that the appellant believed on reasonable grounds that it was necessary for him to act as he did in order to save himself from death or grievous bodily harm. The jury had been told, however, that this issue only arose if the assault by the deceased on the appellant was unprovoked. The learned trial judge (understandably having regard to the way the trial was run by the defence) did not direct the jury that self-defence under s 272 may have been available as a defence, if they were satisfied beyond reasonable doubt that the assault by the deceased upon the

appellant had been provoked by the appellant. The jury may well have formed the view on the evidence that any assault by the deceased upon the appellant was provoked by the appellant so that it became unnecessary for the jury further to consider the issues concerning the reasonableness of the appellant's response to the deceased's assault about which they had been directed in detail by the learned trial judge.

[21] It was, therefore, submitted for the appellant that the trial was affected by an error of law, in that the jury was not directed that self-defence may have been available to the appellant as a defence even if the deceased's assault on the appellant had been provoked or initiated by him.

[22] The defence did not, at trial, suggest that the attack by the deceased upon the appellant had been provoked or initiated by the appellant. Indeed, counsel for the appellant at trial put to Mr Dybro that the punch to the belly which Dybro saw was a punch by the deceased against the appellant. No redirection was sought by counsel who appeared for the appellant at trial to put a defence under s 272(1) to the jury. These circumstances would not matter if the appellant was, in truth, denied a fair chance of acquittal.[1]

[23] There was a strong Crown case that the force used by the appellant was excessive; and that this was so, whether the assault against which he was defending himself was unprovoked, or provoked or initiated by the appellant. As I have said, it was this aspect of the issue as to self-defence which, understandably, was the principal focus of attention at the trial.

[24] The appellant's submission seeks to build upon the learned trial judge's direction to the jury that self-defence had been "squarely raised" by the appellant's statement to the police, to argue that, if the issues whether the appellant reasonably apprehended death or bodily harm at the hands of the deceased, and whether the force used by the appellant was excessive, were properly left to the jury, then it was erroneous not to direct the jury to consider that a resolution of these issues in the appellant's favour could lead to a verdict for the appellant even if the jury found that he had provoked the deceased's assault upon him.

[25] At trial, the Crown conceded that self-defence was "raised because the accused said it"; but that concession was limited to s 271(2) of the *Criminal Code*. The Crown's submission on appeal is that there was no sufficient evidentiary basis for a defence under s 272 because there was no evidence of a provoked assault on the appellant by the deceased, or of an assault by the deceased initiated by the appellant, in response to which the appellant struck the fatal blow.

[26] In my view, the evidence of the witnesses Dybro, Schneekloth, Brannelly and Graepel to which I have referred is not so clearly to the effect for which the Crown contends as to make good the Crown's submission.

[27] I turn then to the broader question whether it can be said that this is a case for the application of the proviso. The legal principles in this area are relatively straightforward. As I said recently in *R v Corry*:[2]

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1 See *Dhanhoa v The Queen* (2003) 77 ALJR 1433 at 1439 [38].

2 [2005] QCA 87; CA No 306 of 2004, 1 April 2005 (footnotes omitted).

> "…it is well established that once it is accepted that there is evidence, however weak or tenuous it may be, on which the jury **might** find the plea of self-defence to be made out, it is for the jury to resolve any questions of fact arising in relation to that evidence. This is in contrast to cases in which there is no evidence which might establish a foundation for a reasonable apprehension of death or bodily harm in the appellant or for the proposition that the force used by the appellant was reasonably necessary for his preservation from death or bodily harm."

[28] *Corry* was a case falling into the first category. It concerned a fatal stabbing that occurred late at night at the house of the deceased. The deceased and the accused were the only persons present in the house at the time the stabbing occurred. The accused later admitted to police that he had gone to the deceased's house with two concealed weapons with the intention of scaring him. He also told the police, however, that the deceased, upon being confronted, 'had a go at' the accused and 'just kept coming' before being stabbed. I concluded that this evidence was sufficient to warrant the putting of a defence under s 272 of the *Criminal Code* and that the proviso did not apply because it was not inevitable that the jury would have rejected the accused's version of events.

[29] This case, on the other hand, falls into the second category. In my opinion, and notwithstanding that the issue of reasonable apprehension of death or grievous bodily harm and excessive force were left to the jury, whether the attack by the appellant on the deceased in this case was provoked or unprovoked the jury must have inevitably convicted. The appellant could not, on any view of the evidence, have had a reasonable apprehension of death or grievous bodily harm at the hands of the deceased or the belief it was necessary for his preservation from death or grievous bodily harm to stab the deceased in the chest with a knife.[3]

[30] The appellant's statements to the police were not, in my respectful opinion, a sufficient evidentiary foundation upon which a jury might possibly conclude, either that the appellant reasonably apprehended death or grievous bodily harm at the hands of the deceased, or that it was reasonably necessary for the appellant's preservation from death or grievous bodily harm to stab the deceased in the chest with a knife, so as to cast upon the Crown the onus of negativing these possibilities beyond reasonable doubt. To the extent that the learned trial judge directed the jury that self-defence was open to the appellant as an excuse, that was an error in favour of the appellant. This Court should not now accede to the appellant's attempt to build upon that error by pointing to a failure to compound that error. As I have said, the error was in the appellant's favour. It did not lead to a miscarriage of justice.

[31] In *Festa v The Queen*[4] McHugh J, with whom Hayne J relevantly agreed, said:

> "[121] The question whether a jury, acting reasonably, would inevitably have convicted an accused ultimately falls to be determined by the relevant court according to its assessment of the facts of the case. [*Wilde v The Queen* (1988) 164 CLR 365 at 372.] The prevalence of dissenting views in cases dealing with the application of the proviso [See, eg, *R v Miller* (1980) 25 SASR 170;

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3 See *R v Bojovic* [1999] QCA 206; [2000] 2 Qd R 183 at 185.

4 (2001) 208 CLR 593 at 631 - 633 [121] - [123].

*Liberato v The Queen* (1985) 159 CLR 507; *Green v The Queen* (1997) 191 CLR 334; *Farrell v The Queen* (1998) 194 CLR 286.] illustrates the largely subjective nature of the inquiry, resting as it does on factors such as the error alleged, the relative strength of the prosecution and defence cases and the court's characterisation of the hypothetical jury, 'acting reasonably' and properly directed. As Brennan, Dawson and Toohey JJ stated in *Wilde* [(1988) 164 CLR 365 at 373. See also *Simic v The Queen* (1980) 144 CLR 319 at 331.]:

> 'In the end no mechanical approach can be adopted and each case must be determined upon its own circumstances.'

[122] But one important development has occurred since this Court decided *Mraz*, *Storey*, *Driscoll* and *Wilde*. Courts of criminal appeal are now required to examine and analyse the evidence in criminal trials to a much greater extent than previously. This Court has interpreted the 'miscarriage of justice' ground of appeal as entitling a court of criminal appeal to examine the whole of the evidence and form its own opinion as to whether there is a reasonable doubt as to the accused's guilt. Even thirty years ago, such an approach would not have been contemplated. In *M* v *The Queen* [(1994) 181 CLR 487 at 494, cited and applied by Gaudron, McHugh and Gummow JJ in *Jones v The Queen* (1997) 191 CLR 439 at 451.] Mason CJ, Deane, Dawson and Toohey JJ said:

> 'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.'

[123] Although the term 'miscarriage of justice' appears both as ground of appeal and as part of the criterion for determining whether a conviction should stand, the issue under each provision is different. In one, the issue is whether the jury must have had a reasonable doubt; in the other, it is whether the jury must have convicted. But that said, there is no reason why the role of a court of criminal appeal should differ in deciding these issues. In examining the evidence for the purpose of applying the proviso, the court should assume that ordinarily if it thinks that the accused must be convicted, so would a reasonable jury. Speaking generally, the court's view of the evidence should prevail except where the error has so affected issues of credibility that the court cannot determine what are the primary facts of the case. In cases of circumstantial evidence, for example, the court's view of the evidence should be regarded as the view of the reasonable jury unless proof of one or more circumstances has been affected by an error relating to credibility. Even when a particular

> circumstance involves a credibility issue, other circumstances may be admitted or proved which are sufficient to permit the court to sustain the conviction."

[32] These observations of McHugh J are apposite here. The appellant's statements to the police say nothing at all, either expressly or by implication, as to the state of the appellant's apprehension as to the consequences for life and limb of the deceased's assault. And on the evidence, there is no basis at all for regarding the appellant's stabbing the deceased in the chest as reasonably necessary for his self-defence.

[33] I am, therefore, of opinion that this is a proper case for the application of the proviso in s 668E(1A) of the *Criminal Code*.

**Conclusion**

[34] In my opinion, the appeal should be dismissed.

[35] **FRYBERG J:** Most of the circumstances giving rise to this appeal are summarised in the reasons for judgment of Keane JA. I shall not repeat them; but I add one matter. Atkinson J also directed the jury:

> "If the prosecution cannot, to your satisfaction, beyond reasonable doubt, exclude the possibility that the killing occurred in self-defence as the law defines it, that is the end of the case. The defendant's use of force would be lawful and you should find him not guilty."

After a couple of general comments about self-defence, her Honour instructed the jury on that definition in the terms quoted by Keane JA.

[36] The appellant now submits that her Honour erred in not directing the jury on self-defence under s 272 of the Code, as well as under s 271. He submits that the jury might have rejected the latter on the basis either that the accused provoked an assault by the deceased or that there was an assault by the deceased in response to an earlier assault initiated by the appellant. (These elements from s 271(1) are incorporated by reference into s 271(2).) He submits that in that event it would have been necessary for the jury to have considered self-defence under s 272. It is not suggested that a direction under s 272 would have been necessary if the jury's verdict was based on a rejection of any other element of s 271(2).

[37] No such direction was sought at trial. It is easy to see why. Such a direction would have undermined the appellant's case on provocation.

[38] To negative self-defence under s 271(2) the prosecution had to negative at least one element of the defence, and to do so beyond reasonable doubt. That onus was just as applicable to the elements incorporated from s 271(1) as it was to the other elements of s 271(2). The jury could have rejected self-defence on the basis of one of the incorporated elements only if it was satisfied beyond reasonable doubt that the prosecution had negatived that element. Stripping most of the negatives, the jury would have had to have been satisfied beyond reasonable doubt either that the appellant provoked the deceased to assault him or that he unlawfully assaulted the deceased.

[39] In my judgment the evidence was insufficient for the jury to have been so satisfied. In other words neither conclusion was open to the requisite standard. The evidence was just too vague. Moreover the prosecution did not suggest otherwise. It did not

seek a direction that the jury could reject self-defence on the basis that one of the incorporated elements had been negatived beyond reasonable doubt, nor was any such direction given. It is in my judgment inconceivable that the jury's verdict could have been based on such a finding.

[40] Perhaps her Honour could, with the concurrence of the Crown prosecutor, have spelt out explicitly for the jury that such a finding was not open on the evidence; but had she done so she might have been criticised for pedantry, given the manner in which the trial was conducted. In any event in the context of this trial such a direction could have made no difference. The jury's rejection of self-defence under s 271(2) is not explicable on the basis that they were satisfied as to the existence of one of the incorporated elements. It was not open to them to be so satisfied to the requisite standard. It was therefore unnecessary to give a direction under s 272.

[41] On the assumption that this conclusion is incorrect, I agree with Keane JA. In the circumstances of the case the appellant's bald, self-serving assertion to the police, “Some guy attacks, you know, it was self-defence. I mean, what do you do?” was not enough to “raise” the defence under s 271(2) of the Code. Given the concession by the Crown to the contrary, it is understandable that her Honour should have directed the jury as she did. It was however unnecessary. Its inclusion in the instructions to the jury operated in the appellant's favour. He cannot now be heard to complain that a more elaborate but even more unnecessary direction would have been more in his favour.

[42] I agree with the order proposed by Keane JA.