SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pickering* [2016] QCA 124
PARTIES:	**R** **v** **PICKERING, Rodney Peter** (applicant)
FILE NO/S:	CA No 34 of 2015 SC No 24 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Conviction: 12 February 2015
DELIVERED ON:	6 May 2016
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2015; 26 November 2015
JUDGES:	Holmes CJ and Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – where a jury found the appellant guilty of manslaughter – where the appellant alleged that s 31(1)(c) of the *Criminal Code* ought to have been left to the jury – whether the application of s 31(1)(c) of the *Criminal Code* was excluded by s 31(2) CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION OR NON-DIRECTION – where a jury found the appellant guilty of manslaughter – where the appellant killed the deceased whilst allegedly trying to avoid him – where the trial judge left ss 23(1)(b), 271, 272(1), 24 and 284 of the *Criminal Code* for the jury to consider – where the trial judge did not leave s 31(1)(c) of the *Criminal Code* to the jury to consider – where the appellant alleged that the absence of any instruction to the jury about s 31(1)(c) occasioned a miscarriage of justice – where the jury's verdict rejected self-defence under s 271(1) – where the appellant alleged it did not follow from the verdict that the jury would inevitably have rejected an application of s 31(1)(c) – whether there was a necessary inconsistency between a conclusion that s 271(1) was excluded but s 31(1)(c) applied – whether it was 'reasonably possible' that the failure to direct

the jury on s 31(1)(c) may have affected the verdict – whether the failure to direct the jury on the application of s 31(1)(c) occasioned a miscarriage of justice

Criminal Code (Qld), s 31(1)(c), s 31(2), s 271, s 668E
Criminal Code Amendment Act 1922 (Qld)
Reprints Act 1992 (Qld), s 7, s 8, s 43

A v Hayden (1984) 156 CLR 532; [1984] HCA 67, cited
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
Hill v Comben [1993] 1 Qd R 603; [1992] QCA 20, cited
Kaporonovski v The Queen (1973) 133 CLR 209; [1973] HCA 35, considered
Larsen v G J Coles & Co Ltd (1984) 13 A Crim R 109, considered
R v Evans & Gardiner (No 1) [1976] VR 517; [1976] VicRp 52, considered
R v Falconer (1990) 171 CLR 30; [1990] HCA 49, cited
R v Fietkau [1995] 1 Qd R 667; [1992] QCA 356, considered
R v LK (2010) 241 CLR 177; [2010] HCA 17, cited
R v Silk [1973] Qd R 298, considered
Smith v State of Western Australia (2010) 204 A Crim R 280; [2010] WASCA 205, cited
Taiapa v The Queen (2009) 240 CLR 95; [2009] HCA 53, cited
Van Den Hoek v The Queen (1986) 161 CLR 158; [1986] HCA 76, cited

COUNSEL:	M J Copley QC for the appellant B J Merrin for the respondent
SOLICITORS:	Anderson Telford Lawyers for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Fraser JA and the order he proposes.

[2] **FRASER JA:** A jury acquitted the appellant of murder and found him guilty of manslaughter. The appellant has appealed against his conviction on the sole ground that a miscarriage of justice occurred because s 31(1)(c) of the *Criminal Code* was not left for the jury to consider.

[3] Section 31, in its form in the current reprint, provides:

> "(1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances, that is to say–
>
> (a) in execution of the law;
>
> (b) in obedience to the order of a competent authority which he or she is bound by law to obey, unless the order is manifestly unlawful;
>
> (c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person, or to another person in the person's presence;

(d) when–

(i) the person does or omits to do the act in order to save himself or herself or another person, or his or her property or the property of another person, from serious harm or detriment threatened to be inflicted by some person in a position to carry out the threat; and

(ii) the person doing the act or omission reasonably believes he or she or the other person is unable otherwise to escape the carrying out of the threat; and

(iii) doing the act or making the omission is reasonably proportionate to the harm or detriment threatened.

(2) However, this protection does not extend to an act or omission which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself or herself liable to have such threats made to the person.

(3) Whether an order is or is not manifestly unlawful is a question of law."

[4] The respondent's submissions assumed that, as the appellant argued, s 31(1)(c) was potentially applicable and was fairly raised by the evidence. After the hearing of the appeal the Court sought further submissions from the parties about questions concerning the construction and application of s 31(1)(c). The parties made such submissions in writing and, at the request of the appellant, the Court reconvened to hear oral argument about one such question. The substance of the question is whether any application of s 31(1)(c) was excluded by s 31(2). Before considering that question I will discuss the arguments which were advanced by the parties upon the assumption that s 31(1)(c) was potentially applicable.

If s 31(1)(c) was not excluded by s 31(2), was there a miscarriage of justice?

[5] The trial judge left for the jury's consideration accident (s 23(1)(b)), self-defence against an unprovoked assault (s 271), self-defence against a provoked assault (s 272(1)), and the possible application of mistake of fact (s 24) and the duty of a person in charge of dangerous things (s 284). The trial judge was not asked to direct the jury about s 31(1)(c) and did not do so. The respondent did not contest the appellant's argument that it was nevertheless the duty of the trial judge to instruct the jury about that provision if it fairly arose on the evidence.[1] It was fairly raised by the evidence if, on the version of events most favourable to the appellant that was suggested by the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the act was not reasonably necessary to resist actual and unlawful violence threatened to the appellant, or to another person in the appellant's presence.[2]

---

1 See *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161-162; *Stevens v The Queen* (2005) 227 CLR 319 at 342 [68].

2 See *Taiapa v The Queen* (2009) 240 CLR 95 at 98[5], concerning s 31(1)(d) of the *Criminal Code*.

[6] I will summarise the relevant evidence. The appellant and the deceased had been best friends since they were young boys. The appellant gave evidence that, after he and the deceased had argued whilst drinking in a hotel during the evening of 19 December 2012, the deceased challenged him to a fight. The appellant did not want to fight and he walked home. The appellant's 22 year old son was not at home. The appellant decided to go out to look for him. The appellant took a knife with him because he thought that while he was looking for his son he might run into the deceased. Pulling out a knife "was the only way that I could keep him away from me, because I couldn't afford to get hit, I couldn't fight him …". The appellant thought that if the deceased hit him he would die. The appellant gave evidence that in July 2007 he had been assaulted and suffered a head injury and that doctors had warned him that he could be killed if he was again hit in the same way. The appellant received a text message from his son which conveyed that the deceased was trying to fight the son. The appellant went to a house where he knew there was a party. In response to a question whether the occupants knew where his son was, he was told that there was someone going down the back. The deceased and one Stevenson walked into the yard. The appellant was standing beside a car. He asked the deceased whether he had seen the appellant's son. The deceased swore at him and threatened to knock his son "over [the] head". The appellant asked the deceased why he was picking on him and his son and what was wrong with the deceased. The deceased swore, ripped his shirt off, pointed his finger at the appellant's face and was "really going off". The appellant told the deceased to stay away from him and that he just wanted to find his son and go home. The deceased jammed his finger into the appellant's chest. The deceased pulled out his knife and told the appellant to stay away. The deceased asked whether the appellant thought that the deceased was frightened of the knife. The appellant kept telling the deceased to stay away from him. Someone handed drinks to the deceased and the appellant. The appellant saw Stevenson walk behind him. Someone else got between the appellant and the deceased and tried to settle the deceased down, but the deceased was not listening to that person. The deceased continued to argue with the appellant whilst the deceased was slowly putting on his shirt.

[7] The appellant told the deceased not to "forget about Paul" or to "just remember Paul. Don't want another good mate killing himself over a woman". The deceased reacted by (again) ripping his shirt off and approaching the appellant. The deceased was "proper going off his head". The appellant gave evidence that he "couldn't go backwards anywhere, I'm just up against the car". The appellant saw a man nodding his head. The appellant saw Stevenson holding a big steel bar in his right hand above his (Stevenson's) head. The appellant gave evidence that he was scared of the deceased and begging him to stay away. The appellant thought that he had yelled at the deceased to stay away from him or he would stab him. The appellant had not seen the deceased that angry before. The appellant said that the deceased "was going to steam-roll me … he was going to wipe me out". In summing up to the jury the trial judge observed that evidence from two other witnesses raised "as a not unrealistic proposition" the prospect that the appellant was about to be assaulted by the deceased.

[8] The appellant gave evidence that he "was trying to keep [the deceased] away from me, and then all of a sudden … [the deceased's] on top of me" and the knife was in the deceased. The appellant accepted that he was holding the knife in his hand when the deceased was stabbed. A doctor gave evidence that the deceased died of the injuries he sustained as a result of the stab wound. The wound was on the left upper front part of the chest under the collar bone and went through the skin into the underlying tissues. It damaged the major artery and major vein to the left arm. The

distance from the skin surface to the point where the blood vessels were damaged was about nine and a half centimetres.

[9] The jury was not bound to accept the appellant's evidence, but it is not useful to refer to other evidence in the Crown case which painted a different picture of the appellant's conduct. The Crown could seek to exclude any application of s 31(1)(c) on various grounds, including that the deceased did not in fact threaten violence to the appellant, any threatened violence by the deceased was not unlawful, or, having regard to opportunities reasonably available to the appellant to leave the scene, his act of stabbing the deceased in the chest in the way he did was not reasonably necessary in order to resist the threatened violence. What version or combination of versions should be accepted was an issue for the jury to consider in light of its views about the credibility of the witnesses and the reliability of their evidence. If s 31(2) does not exclude any application of s 31(1)(c), I would accept, as both parties argued, that it was fairly raised upon the evidence which I have summarised.

[10] The question is whether, as the respondent argued, the absence of any instruction to the jury about s 31(1)(c) did not occasion any miscarriage of justice because it was not "reasonably possible" that the failure to direct the jury "may have affected the verdict".[3] The respondent's argument upon that question turned upon the effect of the rejection of self-defence which was implicit in the jury's verdict.

[11] Section 271 of the *Code* provides:

> "(1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
>
> (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm."

[12] The respondent argued that there was no miscarriage of justice because the jury's rejection of self-defence under s 271(1) of the *Code* established that the jury would have been satisfied that the prosecution had also excluded any application of s 31(1)(c). The appellant replied that the trial judge did not leave s 271(1) for the jury's consideration but left only s 271(2). Alternatively, the appellant argued that, even if the jury considered s 271(1), it did not follow from the verdict that the jury inevitably would have rejected any application of s 31(1)(c); the jury might have found that the prosecution had excluded s 271(1) on the ground that the force used by the appellant was likely to cause death or grievous bodily harm.

[13] There is merit in the appellant's alternative argument. There is no necessary inconsistency between a conclusion, with reference to s 31(1)(c), that the prosecution did not prove beyond reasonable doubt that the appellant's conduct was not reasonably necessary to resist violence threatened by the deceased and a conclusion that s 271(1) was

---

[3] *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13[38], per McHugh and Gummow JJ quoting from *Simic v The Queen* (1980) 144 CLR 319 at 332.

excluded on the ground that the force used by the appellant in stabbing the deceased was likely to cause death or grievous bodily harm. That requirement of s 271(1) is not reflected in s 31(1)(c).

[14] The respondent argued that the trial judge's directions precluded the jury from rejecting s 271(1) on that ground. The argument focussed upon the trial judge's direction to the jury that the prosecution could exclude the defence "by persuading you beyond a reasonable doubt that [the deceased] did not assault – in this threatened way I have explained – the accused and that [if] there is the prospect of an honest and reasonable mistake of fact about that [it] is excluded. [The prosecution can also exclude this defence] by establishing to your satisfaction beyond a reasonable doubt that it was a provoked assault in which case, again, s 271 would not apply." An effect of the trial judge's directions was that self-defence under s 271(1) would not be open if the prosecution proved beyond reasonable doubt either that the deceased did not assault the appellant or that the appellant provoked any such assault. The respondent argued that the jury's verdict therefore established that s 31(1)(c) was inapplicable, either because there was no threatened violence or because any such threat was not unlawful (because it was provoked).

[15] Upon the evidence in this case there is no material difference between what was "reasonably necessary … to resist" the threatened violence (s 31(1)(c)) and what was "reasonably necessary to make an effective defence" against the assault (s 271(1)). As to the additional requirement of s 271(1) that force used in self-defence "is not intended, and is not such as is likely, to cause death or grievous bodily harm", the respondent argued that it was irrelevant because the trial judge left self-defence to the jury only under s 271(2), the references to the first part of s 271(1) being made only because they were relevant to any application of s 271(2). The respondent referred to subsequent directions by the trial judge:

> "The defence can be excluded by the Prosecution if it proves beyond a reasonable doubt any one of these propositions: that the defendant was not unlawfully assaulted by the deceased; that the defendant gave provocation for the assault; that the nature of the assault was not such as to cause reasonable apprehension of death or grievous bodily harm; that the defendant did not actually believe on reasonable grounds that he could not otherwise save himself from death or grievous bodily harm. If the Prosecution proves any of those, any single one of them, then it would exclude the defence because they are, of course, the elements of the defence."

[16] However the trial judge did not limit the references to s 271(1) to its introductory clause.[4] The trial judge gave the jury a copy of the complete section at the beginning of the trial. In summing up to the jury the trial judge read the whole of s 271 and referred the jury to its copy of the section. The jury had that document in the jury room when considering their verdict. The trial judge did not direct the jury that the prosecution could exclude s 271(1) **only** by persuading the jury beyond a reasonable doubt that the deceased did not assault the appellant and that the appellant did not have an honest and reasonable mistake of fact about that, or that it was a provoked assault. In these circumstances it cannot be assumed that the jury did not exclude s 271(1) on the (unsurprising) ground that the force used by the appellant was intended or was likely

---

[4] See Bench Book Direction No 86A.1, which suggests that, when directing juries about s 271(2), the trial judge might read to the jury only the first part of s 271(1) and all of s 271(2).

to cause death or grievous bodily harm. It follows that the jury's verdict does not establish either that the deceased did not assault the appellant (so that the deceased did not threaten violence to the appellant for the purposes of s 31(1)(c)) or that the appellant provoked any assault by the deceased (so that any assault by the deceased was not unlawful for the purposes of s 31(1)(c)).

[17] Upon the record of the trial there is a reasonable possibility that the trial judge's failure to direct the jury about s 31(1)(c) may have affected the verdict. The ground upon which the respondent argued that there was no miscarriage of justice in terms of s 668E(1) of the Code has not been made out. For the same reason, it cannot be concluded that no "substantial miscarriage of justice has actually occurred" for the purposes of the provision in s 668E(1A).[5]

[18] For those reasons I conclude that there was a miscarriage of justice if s 31(2) did not exclude any application of s 31(1)(c).

[19] The differences between the requirements for protection under s 31(1)(c) and the requirements for self-defence in s 271 and s 272 make it seem strange that both provisions may be invoked to exclude criminal liability for an offence charged against an accused upon the basis of the same threatened violence amounting to an assault upon the accused. Self-defence is inapplicable and s 31(1)(c) is potentially applicable where the violence threatened against the accused does not amount to an assault as defined in s 245. Conversely, it may be arguable that s 31(1)(c) is inapplicable where the violence threatened against the accused amounts to an assault as defined in s 245 and self-defence is potentially applicable. Such a construction would confine the operation of s 31(1)(c) to cases where the threatened violence does not amount to an assault upon the accused person or where the relevant act of the accused does not constitute an offence to which the self-defence provisions apply.[6] No such argument was adverted to in this appeal and I do not express any view about it.

Did s 31(2) exclude any application of s 31(1)(c)?

[20] The appellant argued that s 31(2) did not exclude the application of s 31(1)(c) in this case for two reasons: first, because s 31(2) applied only to s 31(1)(d), and, secondly because manslaughter was not one of the offences in relation to which s 31(2) applied. The respondent did not challenge the appellant's argument. Nevertheless it is necessary for the Court to reach its own conclusions upon those questions, each of which turns upon the proper construction of those provisions of the *Code*.

Does s 31(2) apply to s 31(1)(c)?

[21] As the first contention, the appellant argued that various considerations suggested that s 31(2) applied only to s 31(1)(d). The appellant emphasised the reference to "this protection" rather than "these protections" in s 31(2), the marginal notes in Sir Samuel Griffith's draft of a *Code of Criminal Law 1897*, and the ambit of the offences which excluded the defence of duress at common law.

---

5 See *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44].

6 As to the latter case, s 36(1) provides that the provisions of Chapter 5 apply to all persons charged with any criminal offence against the statute law of Queensland. See, for example, *R v Warner* [1980] Qd R 207, in which s 31(1) was found to be potentially applicable in relation to dangerous driving causing death. Section 31(1)(a) was successfully invoked in relation to a drug offence in *R v Slade* [1995] 1 Qd R 390 and s 31(1)(d) was potentially applicable, although unsuccessfully invoked, in relation to a drug offence in *R v Taiapa* [2008] QCA 204. Although the range of offences to which s 31(1)(c) might apply is limited by the terms of that paragraph, it might apply to some offences to which s 271 and s 272 do not apply.

[22] Section 31 is derived from clause 33 in the draft *Code*:

"*Justification and Excuse: Compulsion.*

33. A person is not criminally responsible for an act or omission, if he does or omits to do the act under any of the following circumstances, that is to say–

Common Law.

(1) In execution of the law;

(2) In obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful;

Common Law.
Compare Bill of 1880, s. 56.
Compare German Civil Code of 1896, s. 221
[That mode of defence which is necessary for the purpose of averting an immediate unlawful attack upon the person using such defence is not unlawful under any circumstances.]

(3) When the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or in his presence to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal, relation , or in the relation of master or servant;

Probably Common Law.
Bill of 1880, s. 24

(4) When he does or omits to do the act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution;

But this protection does not extend to an act or omission which would constitute an offence punishable with death, or an offence of which actual danger to the life or grievous bodily harm to the person of another, or an intention to cause such danger or harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself liable to have such threats made to him.

Whether an order is or is not manifestly unlawful is a question of law."

[23] That provision, without the marginal notes and with some changes in paragraph (3) and in the paragraph (which I will refer to as "the exception") which follows paragraph (4), was enacted in 1899 as s 31 of the *Code*:

> "31. A person is not criminally responsible for an act or omission, if he does or omits to do the act under any of the following circumstances, that is to say –
>
> (1) In execution of the law;
>
> (2) In obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful;
>
> (3) When the act is reasonably necessary in order to resist actual and unlawful violence threatened to him, or to another person in his presence;
>
> (4) When he does or omits to do the act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution:
>
> But this protection does not extend to an act or omission which would constitute an offence punishable with death, or an offence of which grievous bodily harm to the person of another,[7] or an intention to cause such harm, is an element, nor to a person who has by entering into an unlawful association or conspiracy rendered himself liable to have such threats made to him.
>
> Whether an order is or is not manifestly unlawful is a question of law."

[24] In the current reprint (see [3] of these reasons), the exception has been numbered as a separate subsection, s 31(2), with consequential changes in the punctuation. The reprint was produced under the *Reprints Act* 1992. That Act authorises renumbering and consequential amendments in accordance with current drafting practice but it does not authorise a change in the effect of a provision.[8] It is therefore necessary to construe s 31(2) without regard to that renumbering and the changes in the punctuation.

[25] The punctuation and paragraph numbering in the reprint suggest that the exclusion in s 31(2) is not confined to s 31(1)(d). That reflects the decision in *R v Silk*.[9] Kelly AJ

---

7 The words in the draft *Code* "actual danger to the life" were omitted in the *Code* as enacted, which added a definition of "grievous bodily harm": "The term grievous bodily harm means any bodily injury of such a nature as to endanger or to be likely to endanger life, or to cause or be likely to cause permanent injury to health." Those words remain but the definition has been amended to extend to other injuries.

8 *Reprints Act* 1992, ss 7(1)(h), 8, 43.

9 [1973] Qd R 298.

there held that the exception after s 31(4) (now s 31(2)) was intended to apply to all of the circumstances dealt with in s 31 and was not limited to s 33(4) (now s 31(1)(d)). At that time the form of s 31 was very similar to the original enactment. (A difference was that the exception commenced with the words, "but this protection does not extend to an act or omission which would constitute the crime of treason or wilful murder or murder, or any of the crimes defined in the second paragraph of s 81 and in s 82 of this *Code* …".) Kelly AJ found it difficult to impute to the legislature an intention that, although the exception would restrict reliance on s 31(4) in relation to an act done by a person to save himself from immediate death or grievous bodily harm, it would not restrict reliance upon s 31(3) in relation to an act reasonably necessary to restrict threatened violence falling short of death or grievous bodily harm. The reference to "threats" in the last part of the proviso could apply to the threatened violence described in s 31(3) equally as well as the threatened death or grievous bodily harm described in s 31(4). A point in the other direction, Kelly AJ considered, related to the fact that execution by hanging was a part of the law at the time the section was originally enacted but ceased to be the law in 1922. The *Criminal Code Amendment Act* 1922 amended the section by insertion of the words in the exception, "the crime of treason or wilful murder or murder or any of the crimes defined in the second paragraph of s 81 and in s 82 of this *Code*", in substitution for the words "an offence punishable by death". The same Act abolished the punishment of death. Kelly AJ thought that the legislature was looking at the matter afresh in 1922. Kelly AJ considered that little assistance was obtained from the form in which the section was set out in the *Code* and that the punctuation was of no assistance.

[26] In *R v Fietkau*,[10] the Court endorsed Kelly AJ's reasoning, save that the Court considered that the punctuation was of assistance; the fact that subsection (4) (now s 31(1)(d)) concluded with a colon, rather than with a semi-colon such as concluded each of the preceding subsections, related each of the subsections more closely to one another than to the exception. That made it more likely that the exception referred to each of the protections in the subsections. The Court also pointed out that no expression in the exception linked it exclusively to subsection (4). The Court noted the argument against this conclusion that cl 24 of the draft *English Criminal Code* upon which much of the *Criminal Code Bill* of 1881 was based contained, in effect, only subsection (4) and the exception, and that common law duress was not available as a defence to robbery, murder, and, generally, treason. The Court considered that in the absence of ambiguity resort to those matters was not justified.[11] The High Court refused special leave to appeal from that decision.

[27] The substance of the appellant's arguments was considered and rejected in *R v Fietkau* in the Court's reasons summarised in the preceding paragraph. It is necessary to refer specifically only to two arguments which were not discussed in that case.

[28] Firstly, the appellant argued that if the exception applied to s 31(1) (now s 31(1)(a)) the hangman would have been exposed to a charge of murder. The appellant cited Virtue SPJ's statement in *Mackinlay v Wiley*[12] that the same provision in the Western Australian Criminal Code excused from criminal liability "the hangman, the prison authorities, the bailiff and others who are servants of the law and justice and act in accordance with the demands of them that are made by their official position". Kelly AJ

---

10 [1995] 1 Qd R 667 at 671-672 (Davies JA, Moynihan and White JJ). Section 31 was amended after the decision in *R v Silk*, but those amendments are not material for present purposes.

11 *Hill v Comben* [1993] 1 Qd R 603 at 606.

12 [1971] WAR 3. That passage was quoted with approval by Lee J in *R v Slade* [1995] 1 Qd R 390 at 399.

considered and rejected a similar argument in *R v Silk*, with reference to the amendments made to the section in 1922 consequent upon the abolition of capital punishment. In my respectful opinion the appellant's argument is wrong for different reasons.

[29] The application of the exception would not have exposed the hangman to liability for murder and nor would it have exposed other officials executing sentences, court process or warrants to criminal responsibility. A person is guilty of murder only if that person unlawfully kills another under certain circumstances (relevantly, if the person intends to cause the death of the person killed): s 302(1). A killing is not unlawful if it is "authorised or justified or excused by law": s 291. Before the abolition of capital punishment, legal authority for the hangman to execute a prisoner who had been sentenced to death was conferred by that sentence of death and specific provisions of the *Code*. Section 305 of the *Code* (as enacted) provided that "any person who commits the crime of murder or wilful murder is liable to the punishment of death", s 651 specified the terms in which that sentence was to be pronounced, s 664 described the manner in which the sentence was to be carried out, and the *Code* as enacted contained (and the current form of the *Code* still contains) the following provisions:

(a) Section 247: "It is lawful for a person who is charged by law with the duty of executing or giving effect to the lawful sentence of a court to execute or give effect to that sentence".

(b) Section 248 makes it lawful for a person charged by law with a duty of executing the lawful process of a court to arrest or detain a person according to the terms of the process.

(c) Section 249 makes it lawful for a person charged by law with the duty of executing a lawful warrant issued by a court or justice or other person having jurisdiction to arrest or detain a person according to the directions of a warrant.

(d) Section 250 makes it "immaterial whether the court or justice or person had or had not authority to pass the sentence or issue the process or warrant in the particular case; unless the person executing the same knows that the sentence or process or warrant was in fact passed or issued without authority".

(e) In relation to the execution of any sentence, process or warrant by a person who would be justified to do so under any of the sections 247 to 250, s 251 provides that where this sentence, process of warrant is purportedly passed or issued by a court, justice, or other person the person executing it "is not criminally responsible for any act done in such execution, notwithstanding that the court, justice, or person, had no authority to pass the sentence or issue the process or warrant, if in such execution the person acted in good faith and in the belief that the sentence, process, or warrant, was that of a court, justice, or other person having such authority."

(f) Subsequent sections provide relief from criminal responsibility in defined circumstances such as where a person executing a warrant arrests the wrong person (s 252) and where the process or warrant is bad in law because of a defect in substance or form apparent on the face of it (s 253).

(g) Section 254 makes it "lawful for a person who is engaged in the lawful execution of any sentence, process, or warrant, or in making any arrest,

and for any person lawfully assisting the person, to use such force as may be reasonably necessary to overcome any force used in resisting such execution or arrest".

(h) Section 283 however provides that "[i]n any case in which the use of force by one person to another is lawful the use of more force than is justified by law under the circumstances is unlawful".

[30] A sentence of death under s 305 and sections 651, 664, and 247 (and sections 250 and 251 where applicable) authorised the use of the specified lethal force by persons executing and assisting in the execution of the sentence. Section 31(1) (now s 31(1)(a)) was therefore not required for the protection of the hangman who put into effect a sentence of death and nor is it required to protect persons who execute other sentences or any of the process and warrants referred to in the provisions I have mentioned.

[31] In that context, it is not easy to accept that s 31(1)(a) was designed to relieve a person from criminal responsibility for an act done in the execution of the law which (in terms of the exception in s 31(2)) would constitute offences as serious as murder and unlawfully doing grievous bodily harm, even where the killing or grievous bodily harm resulted from the act being done with unnecessary force such as to be rendered unlawful by s 283. The context supplied by s 283 and the other provisions concerning execution of sentences, court process, and warrants thus supplies further support for the construction in *R v Fietkau*, under which s 31(2) applies to all of the paragraphs of s 31(1), including (c).

[32] Secondly, the appellant argued that application of the exception to s 31(2) (now s 31(1)(b)) would have exposed members of the colonial army or navy to prosecution for obeying apparently lawful orders. However the commencement of the *Code* on 1 January 1901 coincided with the coming into force of the Commonwealth *Constitution*, which provided for responsibility for the former colonies' naval and military forces to be passed to the Commonwealth (see ss 68-70) and for the Commonwealth thereafter to have exclusive power to make laws upon those matters (s 52). Furthermore, the *Code* as enacted contained a specific provision which authorised the use of force by the armed forces in Queensland: s 265 provided, as it now provides, that it is lawful for a person bound by military law to obey the lawful commands of that person's superior officer "in order to the suppression of a riot, unless the command is manifestly unlawful".[13] The appellant did not refer to any other situation in which, at the time when the *Code* was enacted, it might have been anticipated that, whether before or after the transfer to the Commonwealth of the Colony's armed forces, members of those armed forces might have been deployed in Queensland in a way which justified the use of lethal force or force which caused grievous bodily harm.

[33] The appellant referred to the marginal notes in the draft *Code*, one of which (referring to the common law) seems to apply to paragraph (b). The High Court has strongly endorsed the conventional view of the common law that "it is no excuse for an offender to say that he acted under the orders of a superior officer".[14] In *R v Clegg*[15] Lord Lloyd of Berwick (with whose reasons the other Law Lords agreed) cited a case decided in 1816 for the proposition that it is not a defence to a charge of murder by

---

13 In a footnote to the corresponding clause of the draft Code (cl 272), Sir Samuel Griffith observed that this was perhaps only an instance of the general rule declared by cl 26 (which was enacted as s 24 of the *Code*).

14 *A v Hayden* (1984) 156 CLR 532 at 540 (Gibbs CJ); see also at 550 (Mason J: "…superior orders are not and never have been a defence in our law…"), and, to similar effect, at 562 (Murphy J), 582 (Brennan J), and 593 (Deane J).

15 [1995] 1 AC 482 at 498.

a soldier that the soldier was acting in obedience to superior orders. If reference to the common law is permissible in this context, it supplies further support for the decision in *Fietkau*.

[34] The appellant also referred to a statement in a footnote to the relevant provision in the draft *Code* that it "appears to be a necessary qualification as in the case of persons subject to military law". Assuming, again without deciding, that this statement is admissible in this construction exercise, it does not supply any support for the appellant's argument that the exception does not apply to what is now s 31(1)(b).

[35] There is another aspect of the statutory context which should be taken into account. Even if (which does not fall for decision in this appeal) the apparent breadth of s 31(1)(c) should be read down by reference to its context,[16] its terms still provide a very broad protection. That protection overlaps with, but in some respects is broader than, the justification given by s 271 for self-defence against an unlawful and unprovoked assault comprising the threatened application of force. One example is that s 31(1)(c) may not always require that the person making the threat "has actually or apparently a present ability to effect the person's purpose" as is required by s 245 for a threatened force to amount to an "assault" for the purposes of s 271; s 31(1)(c) might in some circumstances apply to a pre-emptive strike which could not be justified under s 271.[17] Furthermore, justification under s 271(1) is not available for force which is intended or likely to cause death or grievous bodily harm, whereas s 31(1)(c) might apply although the person uses such force; and justification under s 271(2) for an offence of murder, manslaughter or unlawfully doing grievous bodily harm is only available if the nature of the assault is such as to cause a reasonable apprehension of death or grievous bodily harm, whereas no similar apprehension is necessarily required by s 31(1)(c). Section 31(1)(c) nevertheless might protect against liability for an offence of murder, manslaughter or unlawfully doing grievous bodily harm unless s 31(2) excludes that protection. In short, the application of the exception in s 31(2) would provide results which seem consistent with the legislative purpose underlying s 271 but the appellant's construction would produce the opposite result. That contextual consideration supplies further support for the construction endorsed in *R v Fietkau*.

[36] The numbering and punctuation of s 31 in the current reprint accurately reflects the decision in *R v Fietkau* that the exception in s 31(2) applies to s 31(1)(c). I would affirm that decision.

Is s 31(2) inapplicable on the ground that it does not refer to manslaughter?

[37] The remaining question is whether s 31(2) did not exclude the application of s 31(1)(c) in this case because the offence of which the appellant was convicted, manslaughter, is not one of the offences mentioned in s 31(2).

[38] The appellant argued that the "act" for the purposes of s 31(1)(c) was the stabbing of the deceased. The question for the jury was whether the act of stabbing the deceased was reasonably necessary in order to resist actual and unlawful violence threatened to the appellant. The appellant argued that: s 31(2) would not serve any useful purpose if it denied the protection provided by s 31(1) to an act which was not the subject of the charge; and the phrase "an act … which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an

---

16 See *Smith v State of Western Australia* [2010] WASCA 205 per McLure P (Owen J agreeing) at [8]-[18].

17 See O'Regan, *New Essays on the Australian Criminal Codes* (1988), p 98.

intention to cause such harm, is an element …" should be understood as referring to the "offence" in relation to which the appellant seeks exculpation, namely, manslaughter. The appellant argued that this construction was supported by what was submitted to be the conventional meaning of the word "act" in this chapter of the *Code*, as "some physical action, apart from its consequences – the firing of the rifle rather than the wounding in *Vallance v The Queen* … and the wielding of the stick, rather than the striking or the killing of the baby in *Timbu Kolian v The Queen* ...".[18] The appellant argued that the expression "which would constitute … an offence of which grievous bodily harm to the person of another" did not apply merely because the evidence showed that the act constituted such an offence; that expression conveyed only that the relevant act charged against the accused would, but for the protection in s 31(1), constitute the relevant offence. The appellant referred to cases in which trial judges had left s 31(1)(c) to juries in relation to charged offences of manslaughter.[19] The appellant argued that it was an insufficient justification for a different construction that it seemed surprising that the protection in s 31(1) was available in relation to a charge of manslaughter but not in relation to a charge of doing grievous bodily harm or any offence in which an intention to do such harm is an element (if that did seem surprising). The appellant argued that this construction was consistent with the common law, under which duress may operate as a defence to manslaughter: for that proposition the appellant cited *R v Evans & Gardiner (No 1)*.[20] The final limb of the appellant's argument was that s 31(2) could not apply because grievous bodily harm is not an "element" of the offence of manslaughter. That was submitted to have been established by a conclusion in *Kaporonovski v The Queen* that an element of an offence is a "necessary component" of that offence as it is defined by one of the provisions of the *Code*.[21]

[39] The issue turns upon the meaning of the phrase in s 31(2) "act … which would constitute … an offence … of which grievous bodily harm to the person of another is an element". *Kaporonovski v The Queen* relevantly concerned the question whether, for the purposes of the definition of "provocation" in s 268 and the excuse in s 269 of assaults committed upon provocation, assault is "an element" of the offence of manslaughter. That concept is a technical one. That the context in which s 31(2) refers to that concept differs from the context considered in *Kaporonovski* does not justify this Court in not applying the decision in that case. That is so even though perhaps the most common example of the offence of manslaughter (of which the present case is an instance), is one in which the evidence in the Crown case, if accepted, proves that the accused unlawfully killed the deceased by an unlawful assault causing grievous bodily harm from which death resulted.

[40] As to the meaning of "act" in s 31, s 2 of the *Code* provides that "[a]n act or omission which renders the person doing the act or making the omission liable to punishment is called an offence." In *R v Falconer*,[22] Mason CJ, Brennan and McHugh JJ referred to identical provisions in the Western Australian Criminal Code and endorsed as the correct meaning of "act" in s 23 the meaning attributed to it by Kitto J in *Vallance* of

---

18 *Kaporonovski v The Queen* (1973) 133 CLR 209 at 231, Gibbs J, Stephen J agreeing at 241. Consistently with that analysis, McTiernan ACJ and Menzies J (at 215) described the relevant "act" as "the forcing of the glass against and into Bajric's face" and the relevant "event" as "the grievous bodily harm suffered by Bajric", in terms which were consistent with Gibbs J's analysis.

19 *R v Smith* [2005] 2 Qd R 69, *R v Hunt* [2009] QCA 397 and *R v Skondin* [2015] QCA 138.

20 [1976] VR 517 per Lush J at 522.

21 *Kaporonovski v The Queen* (1973) 133 CLR 209 at 217-218 (McTiernan ACJ and Menzies J), 223 (Walsh J).

22 (1990) 171 CLR 30 at 38. See also *The Queen v Van Den Bemd* (1994) 179 CLR 137 at 139, *Murray v The Queen* (2002) 211 CLR 193 at [8], and *R v Taiters* [1997] 1 Qd R 333.

"a bodily action which, either alone or in conjunction with some quality of the action, or consequence caused by it, or an accompanying state of mind, entails criminal responsibility". The word "act" seems to be used in s 31 in the same sense.

[41] The critical question in this case concerns the content to be given to the words "would constitute". That question was not in issue and it was not discussed in any of the decisions cited by the appellant. Nor does the antecedent common law supply assistance upon the answer to that question. When the *Code* was enacted there was considerable uncertainty about the relevant content of the antecedent common law. In a footnote to the exception after paragraph (4) of cl 33 of the draft *Code*, Sir Samuel Griffith wrote that the "law on this point is very meagre. The text substantially adopts the recommendations of the Commissioners of 1878, but limiting the exception to capital offences and causes of serious injury to the person. They proposed that it should extend to piracy, robbery, arson, and forcible abduction." The same uncertainty is reflected in the case to which the appellant referred, *R v Evans & Gardiner (No 1)*. Although, as the appellant submitted, Lush J held that duress was available as a defence to manslaughter, his Honour was unable to find any direct authority upon that question.[23] It is also noteworthy that the marginal notes to cl 33 in the draft *Code* do not suggest that the relevant provisions of the clause necessarily reflect the common law. It is unclear whether the marginal note opposite paragraph (4) was intended to comprehend the exception after that paragraph, but the word "Probably" in that marginal note indicates a degree of uncertainty about the relevant common law. The marginal notes opposite paragraph (3) of cl 33 suggest that the *German Civil Code* was influential. Furthermore, Sir Samuel Griffith's letter to the Attorney-General enclosing the draft Code states "*Criminal Responsibility* – This most important and difficult branch of the law is dealt with in Chapter V" and he explained that he had "appended to several of the sections Notes to which I invite special attention…".[24] The provisions in issue in this case may be among the "few instances (to which special attention is in each case called in the Notes)" in which Sir Samuel Griffith proposed "the adoption of principles which, perhaps, are not at present recognised by our law."[25]

[42] In any event, the question in this case turns upon the meaning of ordinary words in s 31(2) considered in their context. It does not turn upon any word or expression which bore an established meaning under the pre-existing law. It follows that the provision should be construed "according to its natural meaning and without any presumption that it was intended to do no more than to re-state the existing law…"[26]

[43] The context in which s 31 is found is important. As is to be expected, the *Code* has always provided a more severe maximum penalty for manslaughter than for unlawfully doing grievous bodily harm. The maximum penalty under the *Code* for manslaughter is and always has been life imprisonment: s 310. The maximum penalty for unlawfully doing grievous bodily harm is 14 years imprisonment: s 320(1). In the *Code* as originally enacted the maximum penalty for that offence was imprisonment with hard labour for seven years: s 320. Those provisions suggest an unsurprising legislative policy that, whilst in particular cases unlawfully doing grievous bodily harm might attract a sentence which is more severe than sentences imposed in particular cases of manslaughter, because the offence of manslaughter involves the death of a person it

---

23 [1976] VR 517 at 522.

24 Sir Samuel Griffith's explanatory letter to the Attorney-General enclosing the draft *Code*, 29 October 1897, at x.

25 Sir Samuel Griffith's explanatory letter to the Attorney-General enclosing the draft *Code*, 29 October 1897, at vii.

26 *R v LK* (2010) 241 CLR 177 at 220 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

is generally to be regarded as a much more serious offence. Yet upon the appellant's construction, s 31(2) would exclude protection where the offence charged is unlawfully doing grievous bodily harm, but the protection would not be excluded for a charge of manslaughter where the only material factual difference is that death results from the same grievous bodily harm caused by the same act. It is impossible to accept that this might reflect the legislative purpose.[27] The discussion in [34] of these reasons points to the same conclusion.

[44] The appellant's construction should not be adopted if another construction which does not produce such surprising results is reasonably open upon the text. Another construction is reasonably open upon the text. Upon the construction advocated by the appellant, both the reference in s 31(1)(c) to "the act" and the reference in the exception to "an act … which would constitute an offence …" are to the physical act which is an element of the offence charged. In *Larsen v G J Coles & Co Ltd*,[28] Connolly J (Campbell CJ and Demack JJ agreeing) discussed the provisions in ss 23 and 24 of the same Chapter of the *Code* which in defined circumstances relieve a person from criminal responsibility for "an act or omission". In relation to s 23, Connolly J regarded the relevant act as being the "act charged". Similarly, Connolly J observed that the "act or omission" referred to in s 24 "is the act or omission charged". It is also not difficult to accept that the reference in s 31(1)(c) to "act" is to the "act or omission" identified in the introductory words of s 31(1). In that respect it is right to say, as the appellant submitted, that any other view would render s 31(1)(c) pointless. It does not follow, however, that the exception in s 31(2) can apply only in relation to an act or omission which is an element of the particular offence charged against the appellant.

[45] So far as is relevant in the present case, the criterion of operation of the exception in s 31(2) is a specified quality of the act or omission referred to in s 31(1): if the act or omission "would constitute" an offence described in s 31(2), then protection for that "act or omission" is excluded. The expression "would constitute" does not require the frame of reference to be confined to the offence charged. It may be the better construction of s 31(2), and it is at least a reasonably open construction, that, whatever offence is charged, the question is whether or not the act or omission for which the accused seeks protection in relation to the offence charged constitutes one of the offences described in s 31(2). That construction, which does not produce the very surprising results of the appellant's construction, should be adopted.

[46] The appellant argued that surprising results remained inevitable upon that construction. That may be so, since not all cases of manslaughter involve assaults causing grievous bodily harm and, the *Code* contains other offences which might be thought to be more serious than one of the offences mentioned in s 31(2). The appellant did not contend that any such surprising results would be avoided upon the construction he advocated. The fact that the same surprising results may occur upon any construction which is reasonably open on the text is not a reason for rejecting the only construction which will avoid other surprising results.

---

27 The results of the appellant's construction seem even more surprising in light of amendments made to the definition of "grievous bodily harm" in 1997. That definition is not now limited, as it was when the *Code* was enacted, to "bodily injury of such a nature as to endanger or to be likely to endanger life, or to cause or be likely to cause permanent injury to health". It now also comprehends "the loss of a distinct part or an organ of the body" and "serious disfigurement", and that is so "whether or not treatment is or could have been available". I put this aside for present purposes.

28 (1984) 13 A Crim R 109 at 110-111.

[47] Applying what I have concluded is the correct construction, s 31(2) excludes any protection which otherwise might have been conferred upon the appellant by s 31(1)(c). The relevant "act" in s 31(1)(c) for which the appellant seeks protection in relation to the charged offence of manslaughter is the appellant's act of stabbing the deceased in the way that he did. Section 320 of the *Code* provides that a "person who unlawfully does grievous bodily harm to another is guilty of a crime …". Grievous bodily harm to the person of another is obviously an element of that offence. Upon the medical evidence, there could be no doubt that the injuries sustained by the deceased as a result of the "act" amounted to grievous bodily harm. I understood that so much was not in issue in this appeal. The guilty verdict was inconsistent with that act having been done in self-defence, accidentally, or under an operative mistake of fact. Accordingly, in terms of s 31(2), the appellant's act of stabbing the deceased in the way that he did was an act that would constitute the offence of unlawfully doing grievous bodily harm because (applying the authorities discussed in [40] of these reasons) that act, in conjunction with the appellant's state of mind and the grievous bodily harm the act caused to the deceased, would entail criminal responsibility for that offence. The conclusion that any protection under s 31(1)(c) was therefore excluded is not falsified by the circumstances that the deceased subsequently died from the grievous bodily harm he suffered as a result of the appellant's act of stabbing the deceased and the appellant was charged with murder and convicted of manslaughter.

Proposed order

[48] I would dismiss the appeal.

[49] **GOTTERSON JA:** I agree with the order proposed by Fraser JA and with the reasons given by his Honour.