IN THE COURT OF APPEAL [1992] QCA 356

SUPREME COURT OF QUEENSLAND C.A. No. 212 of 1992

T H E Q U E E N

v.

ALEKSANDER FIETKAU

(Appellant)

REASONS FOR JUDGMENT OF THE COURT

Delivered the 21st day of October 1992

The appellant was convicted in the Supreme Court at Brisbane on 26 June 1992 of the murder of Stephen Ali on or about 25 September 1991. The appellant, who gave lengthy tape recorded interviews to the police and who also gave evidence at the trial, admitted to stabbing Ali in the back with a large knife and, a few minutes later, to hitting him on the head several times with a sledge hammer. The cause of death could not be established but on the evidence had to be either the stabbing or the striking on the head with the sledge hammer or a combination of both. The appellant relied on defences under ss. 273 and 31(3) of the Criminal Code.

The appellant was living in a house, apparently in a de facto relationship with an aboriginal woman, Grace York. The other occupants of the house were a Ms. Deborah Finch and her friend, Malcolm Coch. On the night in question the appellant was awoken by Ali at about 1 a.m. demanding entry to the house wanting a

light for his cigarette. When the appellant refused Ali kicked the door in and as the appellant came from his bedroom he was attacked and assaulted by Ali. The appellant called out to Coch for help and shortly afterwards lost consciousness. When he came to he saw Ali sitting on Coch's stomach or chest punching him in the face. There was blood on Coch's face, Coch's arms were limp by his side and he appeared to be unconscious. The appellant said: "I didn't know how long Malcolm was going to last. From what I saw Malcolm was already unconscious and I didn't know, you know, just didn't know if he was going to get up and hurt me again or hurt somebody, Grace or Debbie. I just didn't know."

The appellant left the room and found a knife. When he returned Ali was still hitting Coch and he, the appellant, then stabbed Ali in the back with the knife. Ali then slumped over and the appellant revived Coch. The appellant said that, in stabbing Ali, he was not just defending Coch but also himself, Grace and the other woman. He felt that Ali was a danger to himself and the household, a life threatening danger and he feared him very much.

The appellant then went outside. When he came back into the room within a few minutes he saw Ali sitting propped up against the doorway. He said that he didn't quite believe that he had killed him. He looked for an object to hit him on the head with. He went to the shed outside the house and got a sledge hammer. He thought that if he did not hit Ali he would get up

and everything would start again. He hit Ali in the head with the sledge hammer three or four times on the top of the head.

The appellant appealed on three grounds. The first asserted that the learned trial judge had erred in permitting cross examination of the appellant in relation to his conduct towards his wife. This ground was not pursued. The second and third were in the following terms:

"2.His Honour the learned trial judge failed to adequately direct the jury in relation to Section 24 and the provisions relating to self defence and defence of another.

3.His Honour the learned trial judge failed to adequately direct the jury in relation to Section 31(3)."

The second ground was pursued only with respect to self defence and defence of another.

Section 273 of the Criminal Code provides:

"273. In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself against an assault, it is lawful for any other person acting in good faith in his aid to use a like degree of force for the purpose of defending such first mentioned person."

The section thus requires reference back to s. 271 which is in the following terms:

"271. When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for him to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, provided that the force used is not intended, and is not such as is likely to cause death or grievous bodily harm.

> 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 he cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for him to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm."

There does not seem to be much doubt that the nature of the assault by Ali upon Coch was such as to be capable of causing a reasonable apprehension in the appellant of death or grievous bodily harm to Coch.

His Honour's direction on the application of s. 273, so far as it is relevant to the appellant's argument on appeal, was in the following terms:

> "He said, I suppose you might think, that he did what he did to protect himself from further attacks by the deceased, that he did what he did to protect Malcolm from the continuation of the assault upon him and also that he had in the back of his mind that he was protecting the women from attacks that might at some future time be made on them. But the most immediate need, you might well think, on any view of the evidence, was the need to protect Malcolm from further assaults. I direct you that in any case where it is lawful for a person to use force of any degree for the purpose of defending himself against an assault, it is also lawful for a person acting in good faith in his aid to act to use a like degree of force for the purpose of defending the person.
>
> So, to use the case of Malcolm as an example, he was under attack by the deceased, according to the accused's evidence and the record of interview, and to an extent also by the evidence of Deborah Finch. It was submitted that he was therefore entitled to use a degree of force to defend himself had he been able to. But you will recall, of course, the deceased got the better of him and he was not actually resisting

because he was apparently unconscious.

What the Criminal Code says is the accused, providing he was acting in good faith, was entitled to use the same degree of force to defend Malcolm as Malcolm would have been entitled to use had he been capable of resisting.

...

The issue for you really is whether, in all the circumstances, the Crown has excluded beyond reasonable doubt that the accused believed, on reasonable grounds, that he could not otherwise preserve the man, Malcolm, from death or grievous bodily harm. In other words, he could not by other means preserve him from death or grievous bodily harm. If the Crown has excluded that beyond reasonable doubt, self defence fails in respect of what was done.

...

He says that the violence of the continuing assault was such as to cause reasonable apprehension or reasonable fear that death or grievous bodily harm might be inflicted on the man Malcolm. He says that he also believed on reasonable grounds that he could not otherwise preserve Malcolm from death or grievous bodily harm. That is, that he could not preserve Malcolm from death or grievous bodily harm by using means other than stabbing the deceased with the knife.

...

The real issue, you might think, in this case, is whether the Crown has proved beyond reasonable doubt that it was unreasonable for the accused to believe that the only way he could preserve Malcolm from death or grievous bodily harm was to plunge the knife into the deceased's back.

...

I should mention, seeing it is, I suppose, technically raised on the evidence that self defence was also claimed on the basis that he was protecting himself and the women. I should say to you that if you find that the Crown had not excluded self defence beyond reasonable doubt in respect of the accused's assistance to Malcolm, then he would be entitled to

be acquitted on that basis. It would therefore be unnecessary to go on to consider whether he was entitled to the benefit of any defence in respect of himself, or the women, but if you do find that the Crown has excluded, beyond reasonable doubt, self defence in relation to assistance to Malcolm, at least in principle you should exclude - consider the exclusion of the defence in respect of himself and the women. It is, of course, a matter for you, but you may well think that the claims of self defence on those bases are not as strong as they were in respect of the incident in respect of Malcolm. There was no assault actually being committed on the accused or the women at the time of the stabbing, and you might well think in that situation that it would be impossible that that complies with the requirement of the defence because one of the prerequisites is that the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm. There was actually no assault being committed on himself or the women at the time and therefore the argument would be there was no basis for the accused to apprehend death or grievous bodily harm from any assault being committed against him at that time and against the women. There was no assault against them and no basis, you may well think, for the accused to apprehend death of grievous bodily harm or to apprehend an assault being committed on them which would be necessary to claim the benefit of self defence as a person aiding them.

Just to summarise that aspect of it: if you find that the accused is entitled to the defence of self defence in respect of assistance to Malcolm it is unnecessary to go on to consider other aspects of self defence. If you find he is not entitled to the defence of self defence in relation to assistance to Malcolm, while it is a matter for you, you might well think that the claim in respect of himself and the women is less substantial than that claim, and if he fails on the first one in respect of Malcolm, then it is, you might think, inevitable that he would also fail in respect of the others."

The appellant's complaint about this direction is that it fails to put to the jury, either properly or at all, the appellant's reasonable apprehension that he could not otherwise preserve

himself or the women, Grace York and Deborah Finch, from death or grievous bodily harm. This complaint gives rise to two questions. The first is whether s. 273 permitted the jury to take into account, not only the appellant's belief on reasonable grounds, that he could not otherwise preserve Coch from death or grievous bodily harm, but also a belief by him on reasonable grounds that he could not otherwise preserve himself or the women from death or grievous bodily harm. Only if an affirmative answer is given to that question is it necessary to answer the second question which is whether the learned trial judge failed to put that defence adequately to the jury.

Section 271 would not, in the circumstances of this case, have permitted the appellant to stab, let alone batter, Ali in self defence. Nor would it have permitted either of the women to do so. The reason why it would not is that none of them was the object of an unprovoked assault at the relevant time. The force permitted by the second paragraph of s. 271 is "such force ... as is necessary for defence", that is, referring back to the first paragraph, for defence "against the assault".

Where s. 271 would permit a person such as Coch to defend himself by such force as may cause death or grievous bodily harm, s. 273 permits another person such as the appellant to use a like degree of force "for the purpose of defending such first mentioned person" but not otherwise. Consequently neither s. 271 nor s. 273 would provide any defence to the appellant based on a belief by him, however reasonable, that he could not

preserve himself or the women from death or grievous bodily harm except by the use of such force which might itself cause death or grievous bodily harm.

Nevertheless the learned trial judge seems to have left that defence open, albeit, as the appellant complains, in a "truncated form". It follows from what we have said that his Honour was wrong to leave it open at all. Leaving it open, even in a truncated form, could only have helped the appellant. The appeal on this ground must therefore fail.

Section 31 of the Criminal Code, so far as material, provides:

"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 the crime of treason or murder, or any of the crimes defined in the second paragraph of section eighty one and in section eighty two of this Code, 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 liable to have such threats made to him.

..."

His Honour directed the jury on the basis that a defence was open under s. 31(3). The appellant's criticism of his Honour's direction, like his criticism of the direction with respect to s. 273, was that it did not put to the jury, either properly or at all, the reasonable necessity of the stabbing or battering in order to resist violence threatened to the appellant and to the women. However, it is unnecessary to consider that question if, as was held in R. v. Silk (1973) Qd.R. 298, s. 31(3) does not extend to an act which would constitute murder.

The question in that case, as in this, is whether the paragraph which follows sub-s. (4) qualifies each of sub-ss. (1) to (4) or only sub-s. (4). Kelly A.J. in that case held that it qualified each of those sub-sections. We agree with his Honour.

His Honour thought that the punctuation in the section was of no assistance in its construction. We think that it is. Each of sub-ss. (1), (2) and (3) concludes with a semi-colon. Sub-section (4) concludes with a colon, thereby relating each of the sub-sections more closely to one another than to what follows; and making it more likely that the protection referred to in the following paragraph refers to each of the protections provided for in sub-ss. (1) to (4).

Nor is there any expression in the paragraph which follows sub-s. (4) which links it exclusively to that sub-section. The only expression in that paragraph which may relate to a corresponding expression in any of the numbered paragraphs, "such threats" in the last of the possible exclusions in that paragraph, may relate equally to the word "threatened" in each of sub-ss. (3) and (4).

Kelly A.J. in the above case also pointed out that if that paragraph qualified only sub-s. (4) it would have the curious result that a person who does or omits to do an act in order to save himself from immediate death or grievous bodily harm threatened to be inflicted upon him would not be protected in respect of an act which itself would constitute an offence of which grievous bodily harm or an intention to cause such harm is an element; whereas a person who does an act reasonably necessary in order to resist actual and unlawful violence threatened to him or another person, but not necessarily such violence as would cause or cause the risk of death or grievous bodily harm, would be so protected.

On the other hand, it may be said that clause 24 of the draft English Criminal Code from which Sir Samuel Griffith took much of his draft Code (the Criminal Code Bill of 1880) contains only, in effect, sub-s. (4) and the paragraph which follows it; and at common law duress was not available as a defence to the offences of robbery, murder and, at least generally, treason:

Hale, History of the Pleas of the Crown, Vol. 1, p. 51. However, in the absence of ambiguity, and we see none here, we do not think that resort to such matters is justified: see Hill & ors. v. Comben (1992) Aust. Torts Reports 61,143 at 61,145.

For these reasons we conclude that s. 31(3) provides no protection to an act which would constitute the crime of murder. It therefore has no application here. Again, the fact that his Honour left this defence open at all could only have benefited the appellant. We would therefore refuse the appeal on this ground also.

The appeal must be dismissed.

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND C.A. No. 212 of 1992

Mr Justice Davies
Mr Justice Moynihan
Justice White

T H E Q U E E N

v.

ALEKSANDER FIETKAU

(Appellant)

REASONS FOR JUDGMENT OF THE COURT

Delivered the 21st day of October 1992

MINUTES OF ORDER: *Appeal against conviction dismissed*

CATCHWORDS: **CRIMINAL LAW - DEFENCES - Appellant convicted of murder - whether trial judge erred in leaving open defence per s. 273 - whether s. 31(1) can extend to an act which would constitute murder**

Criminal Code s. 271, 273, 31

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Legal Aid Office for the Appellant

Date(s) of Hearing:01/10/1992

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND C.A. No. 212 of 1992

T H E Q U E E N

v.

ALEKSANDER FIETKAU

(Appellant)

DAVIES JA
MOYNIHAN SJA
WHITE J

Reasons for Judgment of the Court delivered the 21st day of October 1992

'APPEAL AGAINST CONVICTION DISMISSED'