SUPREME COURT OF QUEENSLAND

CITATION:	*R v Corcoran* [2000] QCA 114
PARTIES:	**THE QUEEN** **v** **CORCORAN, Christopher Troy** (appellant)
FILE NO/S:	CA No 359 of 1999 SC No 402 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 April 2000
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2000
JUDGES:	Pincus, McPherson and Thomas JJA 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 – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – SELF - DEFENCE AND OTHER FORMS OF DEFENCE – GENERALLY – whether both limbs of s 271 of the *Criminal Code* require an objective assessment – whether accused's belief about the amount of force necessary to defend against attack was held on reasonable grounds CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MURDER – GENERALLY *Criminal Code* s 271, s 272 *Gray* (1998) 98 A Crim R 589, followed *Gray v Smith* [1997] 1 Qd R 485, considered *Julian* (1998) 100 A Crim R 430, mentioned *R v Vidler* [2000] QCA 63; CA No 356 of 1999, 10 March 2000, mentioned
COUNSEL:	Mr A J Rafter for the appellant Mr D Bullock for the respondent

SOLICITORS: Legal Aid (Queensland) for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PINCUS JA:** I have had the advantage of reading the reasons of McPherson JA and those of Thomas JA.

[2] Unsatisfactory aspects of the Code's self-defence provisions were discussed in *Gray v Smith* [1997] 1 Qd R 485. It should be added to what is said there that s 272 is too complex; it seems to deal primarily with the case in which A assaults B, provoking an assault by B upon A, which in turn provokes a further assault (causing death or grievous bodily harm) by A on B – the last of the three being the subject of the prosecution. Why this special situation should be thought worth a section to itself is not easy to understand. Further, as is pointed out in *Gray v Smith* at 489 and 490, s 271 and s 272 leave a significant gap in the law, where the person relying on self-defence has provoked the assault upon himself but does not apprehend death or grievous bodily harm. Another oddity is that under s 271(1) the accused who has used the lesser force faces the more stringent test: "such force ... as is reasonably necessary to make effectual defence" rather than the test of **belief** on reasonable grounds which is applicable to the more serious assaults, under s 271(2).

[3] The present case is but another illustration of the difficulty in applying these provisions. Plainly the Code would be improved if s 271 and s 272 were replaced by simpler and clearer provisions, expertly drawn.

[4] As is explained in the reasons of McPherson JA and Thomas JA, the judge used expressions in directing the jury which might have suggested that they had to determine "the reasonableness of the conduct of the accused with regard to both limbs or types of self-defence", reasonableness being objectively considered. The decision of this Court in *Gray* (1998) 98 A Crim R 589, is authority for the proposition that under s 271(2) the question is not whether the force used was objectively speaking necessary for defence, but rather whether the accused **believed** on reasonable grounds that it was. The criticism which the appellant makes of the relevant passage in the summing-up is not without substance, but I agree with the reasons given by McPherson JA for concluding that what was said could not have misled the jury.

[5] I also agree that *Gray* (1998) A Crim R 589 should be followed unless and until reconsidered, although as I have previously mentioned, there are possible arguments against its correctness: *Julian* (1998) 100 A Crim R 430.

[6] The appeal should be dismissed.

[7] **McPHERSON JA**: Christopher Corcoran pleaded not guilty to a charge of having murdered Anita Troy on a date between 12 and 27 February 1998 at the Gold Coast.

After a trial extending over some six or seven days he was sentenced to life imprisonment. This is his appeal against that conviction.

[8] The deceased Anita Troy was the appellant's maternal grandmother. He had lived with her since his birth in 1978 and so was some 19 years old at the time of her death. His mother and father had come to live at her parents' house when the appellant was born and stayed there until he was 14 months old. When his mother and father moved out, the appellant was left in the care of his grandparents, who brought him up. His grandfather died in 1983, but the deceased and the appellant continued to live together until her death. At that time they were the only persons living in the unit or townhouse at no 11 Madsen Place where she was killed.

[9] At that time the deceased was 75 years old, 165 cms tall and weighed 68 kgs. She was described by a neighbour as being frail in the months before her death. She had had one or more operations for a brain tumour, which had left her with facial palsy, impaired hearing and balance, and loss of vision in her left eye. She used a stick when walking. By character she was evidently not without a degree of determination or assertiveness. By contrast the appellant was described by his friends as quiet and shy. He showed great affection for his grandmother and did much to help her with her disabilities. Equally, she did a good deal for him. However, in the period after about December 1997, when the appellant lost his job, the two of them were overheard by neighbours arguing heatedly and loudly. At that time, they had only her pension to live on and were short of money. There is some evidence that he was gambling at the casino.

[10] Neighbours noticed the absence of the deceased in about mid-February. Inquiries elicited from the appellant the response that she was staying with friends of his in Brisbane. Eventually, in his absence, they broke into the unit. Her body was found upstairs in a wooden trunk or box in the ensuite of her bedroom. It was in a decomposing condition suggesting that she had died a week or so before the discovery. She had died from strangulation. Around her neck were an extension cord and a co-axial cable from a television set or the like.

[11] The appellant admitted to police that he had choked his grandmother and had put her body in the box. He said there had been continual arguments between them in which she criticised him for various reasons including his not having a job and there being no money. He had been sitting in the living room downstairs watching television when she came and started to complain again. He walked upstairs and she followed him arguing all the time. He went to the toilet and she went downstairs again.

[12] When he came out, the deceased was coming up the stairs once more, this time with a knife in her hand. She raised it and threatened the appellant saying she was going to put the knife right through him. He held her arm; she turned slightly, and he grabbed her around the neck with his left arm. She struggled and clawed him, but he applied pressure and wrestled her to the floor. He said she might have slipped on the stairs. She was making grunting noises, but he continued to apply pressure and did so even after she lost consciousness.

[13] The appellant said that the deceased had dropped the knife and started clawing at him just before they fell to the ground. He said he probably realised she had

dropped the knife; but he maintained the pressure with his arm. She was lying on her stomach; her body was on the stairs and her head was on the floor of the hall at the top of the stairs. He said he was lying on top of her with his arm between the floor and her neck. There was blood from her mouth on the carpet and he had difficulty getting his arm out from under her. When he saw the blood and saw that her face was purple he knew she was dead. He sat there for a long time and then got the two cords and tied them around her neck. He did not know why he had done that. He went and got the box from the garage and put her body in it.

[14] At the trial there was evidence from the appellant's mother and aunt about the tendency of the deceased on past occasions to brandish a knife when asserting her authority. The evidence of the medical experts differed about whether the death had been caused by strangulation by means of the appellant's arm or by ligature. The government pathologist thought it was caused by pressure from the cords around the neck. Two medical witnesses called by the defence considered that the state of decomposition was too advanced to be able to tell with any degree of confidence. The difference had some significance for the defence of self-defence raised by the appellant at his trial. If the deceased had been strangled by means of the two cords, self-defence seemed most unlikely to succeed.

[15] The learned trial judge summed up on the issue of self-defence under s 271(1) of the Criminal Code, and under s 271(2) in terms of *Gray* (1998) 98 A Crim R 589. What her Honour said in summing up in relation to s 271(2) was:

> "A second type of self-defence arises whether or not the killing was intentional. If Mrs Troy unlawfully assaulted Mr Corcoran and, one, the nature of the assault was such as to cause reasonable apprehension in Mr Corcoran of death or grievous bodily harm and, two, Mr Corcoran believe he could not defend himself from death or grievous bodily harm in any other way and, three, it was reasonable for him to so believe, then he is not guilty of murder or manslaughter.
>
> The onus lies on the Crown to disprove these matters beyond reasonable doubt. In other words, the Crown must disprove that he was justified in killing Mrs Troy because he actually believed on reasonable grounds that when he did the fatal act, it must be done if he was to survive the assault made on him."

[16] No complaint is made about this direction to the jury. Her Honour went on:

> "In determining the reasonableness of the conduct of the accused with regard to both limbs or types of self-defence, you may have regard to whether or not there was any means of retreat, such as running down the other set of stairs or locking himself in the toilet or the laundry or leaving the unit via the laundry door. You will remember the layout of the unit as shown on the plan and you will also remember what Mr Corcoran himself said in the police interview, which has been referred to you in the addresses of counsel and of which I will remind you again later."

[17] There was no request for redirection in respect of this passage in the summing up. What is now submitted, however, is that it was incorrect to direct the jury that

they should determine the reasonableness of the conduct under both limbs or subsections of s 271. Under s 271(1) there is, it was said, a requirement that the force used in defence be "reasonably necessary"; but there is no such requirement in s 271(2). On the authority of *Gray*, it is sufficient to attract the operation of that subsection of s 271 that the defender should have believed on reasonable grounds that "otherwise" (that is, without using that degree of force by way of defence) he could not preserve or save himself from death or grievous bodily harm.

[18] I do not consider that her Honour's direction offended against the provisions of s 271(2) as interpreted in *Gray*. The passage in question did not say that the jury ought to be satisfied that the degree of force used by the appellant to defend himself from the threat posed by his knife-wielding grandmother must, objectively speaking, be "necessary". What it said was that the jury might "have regard to whether or not there was any means of retreat", such as running downstairs or locking himself in the toilet. That consideration (whether there was an avenue of retreat available to him) was relevant to the question whether any belief he may have had about the degree of force needed to defend himself was held by him "on reasonable grounds" within the terms of s 271(2). If he could, by retreating in one of the ways suggested, have preserved or saved himself from death or grievous bodily harm at the hands of his grandmother, then it was open to the jury to conclude that his belief about the degree of force needed to do so was not entertained by him on reasonable grounds. The availability to the appellant of alternatives to strangling his grandmother to death was plainly relevant to the reasonableness of the belief, if any, that he may have held about the need to defend himself by strangling her. If the learned judge had said "In determining the reasonableness of the conduct *or belief* of the accused …", the passage in question would have been beyond criticism.

[19] The direction given by the learned judge did not invite the jury to substitute an objective assessment of what was needed to defend himself in place of a subjective belief on the appellant's part based on reasonable grounds. If the jury were left with any degree of confusion, it was removed in the very next passage of her Honour's summing up, where she said:

> "You are also entitled to consider the evidence as to previous threats and assaults as this is relevant to the question whether the nature of the assault was such as to cause reasonable apprehension of death or grievous bodily harm *and whether Mr Corcoran believed he could not otherwise defend himself and whether any such belief was on reasonable grounds*. If you are not satisfied beyond reasonable doubt that self-defence has been excluded then, as I said, you would find him not guilty of murder or manslaughter."

The direction to the jury to consider "whether Mr Corcoran believed he could not otherwise defend himself and whether any such belief was on reasonable grounds" accorded with the terms of s 271(2) of the Code. The jury cannot be said to have been left in any doubt that it was the appellant's belief that was the determining factor in considering the issue of self-defence under s 271(2).

[20] The appeal against conviction should be dismissed.

[21] **THOMAS JA**: I agree with the reasons of McPherson JA. I would add that *Gray*[1] is a decision about which some members of this court have reservations. However unless and until it is reconsidered it should be followed[2]. I express this reservation lest *Gray* might be thought to grow in stature through repeated applications in this court.

[22] I agree with the order proposed by McPherson JA.

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1 (1998) 98 A Crim R 589.

2 *R v Vidler* [2000] QCA 63; CA No 356 of 1999, 10 March 2000.