SUPREME COURT OF QUEENSLAND

CITATION:	*R v Greenwood* [2002] QCA 360
PARTIES:	**R** **v** **GREENWOOD, Mark** (appellant)
FILE NO/S:	CA No 68 of 2002 DC No 351 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	20 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2002
JUDGES:	Williams and Jerrard JJA and Atkinson J 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 – where appellant convicted of grievous bodily harm pleaded self-defence against unprovoked assault and aiding in self-defence pursuant to s 271 and s 273 respectively of the *Criminal Code* (Qld) – where only evidence thereof was based on appellant's testimony and that of his defacto spouse that the complainant threatened to kill the appellant – whether the directions of the learned trial judge on the operation and effect of s 271(2) confused the jury in assessing the state of mind of the appellant as to whether the test is subjective or objective – consideration of the distinction in tests between s 271(1) and (2) of the code – *Marwey v The Queen* followed – whether the directions of the learned trial judge did not clearly distinguish the tests between those provisions APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – MISCARRIAGE OF JUSTICE - CIRCUMSTANCES NOT INVOLVING MISCARRIAGE – WHERE RESULT OF

TRIAL NOT AFFECTED – NO EFFECT ON JURY'S MINDS – whether the learned trial judge erred in directing the jury on the relevant tests to be applied in relation to self defence pursuant to s 271(1), s 271(2) and s 273 of the *Criminal Code* (Qld) – whether the use of the term 'reasonably necessary' on that one occasion in directing on s 271(2) amounted to a misdirection because it stipulated an additional objective requirement over and above the need for the defender's belief to be based on reasonable grounds – *R v Vidler* followed

Criminal Code Act 1899 (Qld), s 271(1), s271(2), s 273

Marwey v The Queen (1977) 138 CLR 630, applied
R v Corcoran [2000] QCA 114, CA No 359 of 1999, 7 April 2000, considered
R v Gray (1998) 98 A Crim R 589, followed
R v Hagarty [2001] QCA 558, CA No 243 of 2001, 7 December 2001, followed
R v Julian (1998) 100 A Crim R 430, considered
R v Muratovic [1967] Qd R 15, applied
R v Vidler (2000) 110 A Crim R 77, followed

COUNSEL: H Walters for the appellant
R G Martin for the respondent

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

[1] **WILLIAMS JA:** The appellant was convicted in the District Court at Townsville of doing grievous bodily harm to one Bramich. A sentence of three years' imprisonment was imposed. At the trial the appellant was represented by experienced senior counsel, but his initial notice of appeal was drafted by himself. That notice relied on the ground that the verdict of the jury was unsafe and unsatisfactory, and also asserted that the sentence was manifestly excessive. When the matter was listed for hearing on 15 August 2002 fresh counsel appeared on behalf of the appellant. He indicated that the appellant did not wish to proceed with the application for leave to appeal against sentence, and that he sought to rely on fresh grounds of appeal against conviction. In consequence on that date the court dismissed the application for leave to appeal against sentence, and gave leave to furnish additional grounds of appeal against conviction. On the hearing of the appeal on 5 September 2002 the following grounds of appeal (leaving out particulars) were argued by counsel for the appellant:

1. The learned trial judge erred in law in directing the jury in relation to self defence pursuant to s 271(2) of the *Criminal Code Act* 1899 (as amended) and as a consequence the appellant has been wrongly deprived of a fair chance of acquittal at the trial.
2. The learned trial judge erred in law in directing the jury in relation to self defence pursuant to s 271(1) of the *Criminal Code Act* 1899 (as amended) and as a consequence the appellant had been wrongly deprived of a fair chance to acquittal at the trial.

3. The learned trial judge erred in law in directing the jury in relation to aiding in self defence pursuant to s 273 of the *Criminal Code* and as a consequence, the appellant had been wrongly deprived of a fair chance of acquittal at the trial.

[2] The particulars of each ground were in substantially identical terms. It was said that the form of direction given with respect to each provision varied from time to time when restated in the course of the summing up and that created confusion. Further it was said that the directions were not clear and unambiguous and tended to blur the distinction between the three provisions of the Code. In particular it was said that the learned trial judge erred in directing the jury that for the purpose of s 271(2) the relevant state of mind of the appellant was to be determined objectively. Finally it was said that the learned trial judge erred in directing the jury on s 271(2) because he said that the force used in defence was to be "reasonably necessary".

[3] The incident giving rise to the charge occurred in the early morning of 21 October 2000 in the car park of licensed premises called Geoff's Place on Magnetic Island off Townsville. The complainant (Bramich) and a man named Hodgson were drinking in those premises over a period of time on the night in question. For much of that time they were in the company of the appellant's de facto partner (Von Banchet). It is clear that each of those three persons had consumed a large quantity of alcohol prior to the events in question.

[4] Prior to October 2000 there had been some domestic difficulties between the appellant and Von Banchet. The complainant knew Von Banchet prior to the evening in question and the appellant believed (whether justifiably or not is irrelevant) that the complainant had on prior occasions acted inappropriately with her.

[5] On Friday night 20 October the appellant went to a barbecue and film night at a local sports club, whilst Von Banchet went to Geoff's Place. She was there for some hours and consumed a large quantity of alcohol. Around 12.30 a.m. on 21 October the appellant, accompanied by another man, went to look for Von Banchet at Geoff's Place.

[6] The evidence generally supported the following relevant background facts. In the course of the evening Hodgson and Von Banchet were kissing and cuddling in the public bar. That occurred off and on over a period of time. Later in the evening Hodgson and Von Banchet were in an outside area near the swimming pool. There was a conflict of evidence as to precisely what happened next. According to Hodgson he was kissing Von Banchet again when the appellant approached. According to the appellant's evidence as he came to the area looking for Von Banchet he heard her screaming, "Get your hands off me". He said she sounded distressed and he ran towards her. The appellant then attacked Hodgson and won that fight. There was conflicting evidence as to whether or not the appellant kicked Hodgson whilst the latter was on the ground. It is sufficient to say that Hodgson was beaten up but has made no formal complaint.

[7] The assault on the complainant Bramich occurred shortly thereafter. Bramich himself has no recollection of the assault on him. It was not disputed at the trial that he received injuries which amounted to grievous bodily harm. The uncontested

evidence was that Bramich received fractures to his face to such an extent that the entire facial skeleton was loose from the base of the skull. The medical evidence was to the effect that an injury of that type was most common in car accidents where a person, not wearing a seat belt, struck the dashboard.

[8] Although evidence was called from a number of witnesses no one appears to have actually seen the commencement of the assault on Bramich. It occurred shortly after the altercation with Hodgson. After that incident the appellant was seen walking around abusing a number of people and then the witnesses became aware of his assaulting Bramich in the car park. A number of witnesses gave evidence of seeing kicks being delivered to the complainant's head. The evidence overwhelmingly established that there was a very brutal assault by the appellant on Bramich and that the assault included kicks to the head.

[9] The only other evidence of relevance came from Von Banchet and the appellant. According to the former after the assault involving Hodgson she was grabbed by the complainant who said "You're coming with me"; he started dragging her up the street. She then screamed "Get your filthy fucking hands off me". When the appellant approached and demanded that the complainant leave her alone she heard the complainant say "I'm going to kill you, you little cunt". Then the appellant assaulted the complainant.

[10] According to the appellant after the fight with Hodgson he went towards the car park and then heard Von Banchet asking someone to leave her alone. He then saw the complainant holding on to Von Banchet by both arms from behind. As the appellant approached, the complainant pushed Von Banchet aside "and told me he was going to kill me and then lunged towards me and struck me". At a later point in his evidence the appellant said that the complainant said "I'm going to fucking kill you, you cunt" and "came straight at me, shaped up". According to the appellant's evidence he then "went in as hard as I could. The man said he was going to kill me." The fight ensued in the course of which the complainant sustained the injuries described previously.

[11] In submissions after the case for the appellant was closed and before final addresses, counsel for the appellant contended that the jury should be asked to consider both sub-sections of s 271 and also s 273. The broad contention was that it was open to the jury to find facts which could call into play those provisions. Undoubtedly counsel addressed on each of those three possible scenarios.

[12] Section 271 deals with self defence against unprovoked assault, and is in the following terms:

> "(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, and 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 cannot otherwise preserve the person defended from death or grievous bodily

> harm, it is lawful for the person to use any such force as to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm."

[13] Section 273 deals with aiding in self defence and is in these terms:

> "In any case in which it is lawful for any person to use force of any degree for the purpose of defending himself or herself against an assault, it is lawful for any other person acting in good faith in the first person's aid to use a like degree of force for the purpose of defending the first person."

[14] When dealing with the onus of proof in the summing up the learned trial judge correctly told the jury that there was an onus on the Crown to negative self defence and acting in defence of his de facto spouse. He told the jury that "before you can convict the accused you would have to reject those defences and reject them beyond reasonable doubt".

[15] After reading ss 271 and 273 to the jury the learned trial judge expanded on those provisions and indicated to the jury the evidence which was relevant to each of those defences.

[16] What he said in relation to aiding in the defence of Von Banchet was unremarkable. It is not necessary to say more about the summing up in that regard. The learned trial judge then went on in general terms outlining the operation and effect of s 271. What was said with respect to the first paragraph thereof was also unremarkable. The transcript then records him as saying with respect to the second paragraph thereof:

> "If what Mr Bramich did to him was such as to cause reasonable apprehension on his part of death or grievous bodily harm and he believed on reasonable grounds – it was objectively, an objective belief that he could not otherwise defend himself from what Mr Bramich was about to do or was doing to him, he could not defend himself from suffering death or grievous bodily harm, from being killed or suffering grievous bodily harm then it is lawful for him to use such force as is reasonably necessary for his defence, even though that force may cause grievous bodily harm."

[17] It will be necessary to return to aspects of that passage subsequently. Thereafter the learned trial judge again expanded on self defence; the "first situation" he referred to was that where s 271(1) applied, and the "second part of the defence" was where s 271(2) applied. This rather lengthy passage follows immediately on that quoted above:

> "So in the first situation there are the elements, there must be an unlawful assault by Bramich on the accused; (2) that it was not provoked by the accused or his wife in the aiding and self defence situation, and the force which he uses must be reasonably necessary to make an effectual defence against the assault. That is an objective test not concerned with the accused's actual state of mind. If you were standing in the car park watching events, would you have considered it reasonably necessary to do what the accused did. So

> what is reasonable defence in those circumstances depends on all of the facts, including the nature of the assault. And it is also necessary that the force used in defence is not intended by the accused and is not such as is likely to cause death or grievous bodily harm.
>
> If you were to conclude beyond reasonable doubt that, for example, the force used was more than was reasonably necessary, that would be the end of the defence, gone, finished. If you were to conclude beyond reasonable doubt that the force used was in fact intended to cause grievous bodily harm, or was such as is likely to cause grievous bodily harm, that is the end of the defence, finished, gone. Except for this, if – and this is the second part of the defence – if there was an unlawful assault by Bramich on the accused, not provoked by the accused and the assault by Bramich on the accused or on the accused's wife was such – in other words, it was such an assault as to cause a reasonable apprehension on the part of the accused that he was going to be killed or himself suffered grievous bodily harm, then he is allowed to respond by causing grievous bodily harm to the assailant, provided he believes, that is, has an actual belief that he cannot otherwise defend himself from death or grievous bodily harm and that belief must be based on reasonable grounds."

[18] There followed further expansion on the defences. In the course of dealing with circumstances which called into play s 271(2) the learned trial judge again reiterated that the prosecution was required to satisfy "you beyond reasonable doubt that the assault by Bramich on him or on his wife was not such as to cause reasonable apprehension on his part that he was going to be killed or suffer grievous bodily harm and that he believes that he cannot otherwise defend himself and that belief is based on reasonable grounds." In the very next paragraph there was again a reference to the effect that the appellant "believes that doing so is the only way in which he or she could reasonably save themselves from an unprovoked assault."

[19] The only other passage which need be noted occurred during redirections. In the course of again dealing with the issue of self defence the learned trial judge said:

> "The degree of force may be only part of the circumstance as to whether the accused believed his actions were necessary to defend himself and whether he held that belief on reasonable grounds."

[20] It is clear that a defence relying on s 271(1) calls for an objective test whereas the test pursuant to s 271(2) is subjective, but with an objective component. That distinction was made clear in the reasoning of Gibbs J in *R v Muratovic* [1967] Qd R 15 at 18-19, a passage approved by a majority of the High Court in *Marwey v The Queen* (1977) 138 CLR 630. There Barwick CJ at 637 said that s 271(2) requires an "actual belief by the accused on reasonable grounds of the necessity of the fatal act for his own preservation". Later on the same page he said: "What the second paragraph requires is that the accused believes on reasonable grounds when he does the fatal act that it must be done if he is to survive the assault made upon him. The element of reasonableness is supplied by the need for the belief to be founded on reasonable grounds". That reasoning was reinforced by this court in *Gray* (1998) 98 A Crim R 589, where McPherson JA relevantly said at 593:

> "Approached in this way, there is plainly a difference between the mental condition predicated of a defender under s 271(1) and under s 271(2). In the case of 271(1), the degree of force used must be 'reasonably necessary' to make 'actual defence' against the assault. The criterion in that instance is objective and does not concern itself with the defender's actual state of mind. In the case of 271(2) it is, at least in part, subjective. The defender must believe that what he is doing is the only way he can save himself or someone else from the assault. He must hold that belief 'on reasonable grounds'; but it is the existence of an actual belief to that effect that is the critical or decisive factor."

[21] The reasoning in *Gray* supports the proposition that the existence of a belief on reasonable grounds is not the same as saying that doing the act that causes grievous bodily harm must be objectively necessary. In *Hagarty* [2001] QCA 558 Davies JA speaking of s 271(2) said that it "contains both a subjective element, the accused's belief, and an objective one, that it must be on reasonable grounds". To that extent it is clear that s 271(2) calls for the application of an objective test with regard to the reasonableness of the belief.

[22] In my view a reasonable juror hearing the summing up in this case would have had a clear understanding that a different test applied when considering s 271(2) to that which applied when considering s 271(1). The summing up as a whole, in my view, clearly told the jury that an objective test applied with respect to s 271(1), whereas when applying s 271(2) the critical matter was the appellant's "actual belief" – the words used by the learned trial judge – that he could not otherwise defend himself from death or grievous bodily harm.

[23] The learned trial judge also emphasised to the jury, and this was important on the facts of this case, that such belief had to be based on "reasonable grounds". That was important on the facts because the only evidence capable of supporting such a belief was that of the words attributed to the complainant by the appellant and Von Banchet: "I'm going to kill you." There was no evidence suggesting that the complainant was armed in any way. The capacity to carry out such threat, if made, was limited to the complainant's physical capabilities.

[24] It was in that context that the learned trial judge used the expression "it was objectively, an objective belief" in the passage quoted above. When the passage is read in context it is clear, in my view, that the reference was to the belief and not to the force to be used. The learned trial judge was saying no more than that the test for determining whether the belief was based on reasonable grounds was "objective".

[25] Counsel for the appellant submitted that the jury may well have been overborne by the later statement that the jury might consider the position from the point of view of a person "standing in the car park watching events" and ask the question would such person have "considered it reasonably necessary to do what the accused did". But those remarks were made with respect to the application of s 271(1) and were entirely correct with respect thereto. As already stated, the learned trial judge clearly differentiated between the two situations. In my view a juror would not have

been confused or overborne by that reference when considering the position under s 271(2).

[26] Notwithstanding some criticism (see, for example, Pincus JA in *Julian* (1998) 100 A Crim R 430 and Pincus JA and Thomas JA in *Corcoran* [2000] QCA 114) *Gray* is still authority for the proposition that the approach to s 271(2) dictated by *Muratovic* and *Marwey* effectively writes out of the section the words "necessary for defence". This court in *Vidler* (2000) 110 A Crim R 77 at 82-3, after referring to *Gray* said: "The use of the words 'such force as is necessary to defend' do not amount to a misdirection unless they expose the vice of an additional objective requirement over and above the need for the defender's belief to be based on reasonable grounds". That must be so when one finds the word 'necessary' included by the legislature in the definition of the defence.

[27] The learned trial judge summed up in accordance with *Gray* and the other relevant decisions when dealing with s 271(2) in all the passages other than that quoted first above. On some three occasions after that passage he gave a direction which could not be challenged in any way. The problem arises because in the first quoted passage he said it was "lawful for him to use such force as is reasonably necessary for his defence". Given what was said in *Vidler* there would clearly be no difficulty if the word "reasonably" was deleted. The question is whether or not the insertion of the word "reasonably" on that one occasion amounted to a misdirection because it stipulated "an additional objective requirement over and above the need for the defender's belief to be based on reasonable grounds". Reading the summing up as a whole I have come to the conclusion that the jury would not have taken that from what was said by the learned trial judge.

[28] At the end of the summing up the jury would have been left in no doubt but that the appropriate test to apply with respect to s 271(2) was whether the appellant reasonably believed that the only way in which he could save himself from death or grievous bodily harm was by acting as he did.

[29] As already noted the issues raised by ss 271 and 273 were dealt with on a number of occasions in the course of the summing up. It is true that the words used by the learned trial judge varied somewhat when dealing with each provision on each occasion, but I am not satisfied that that created confusion in the minds of the jury. I am further satisfied that the summing up did not blur the distinction between those provisions of the Code; at the end of the day the summing up clearly directed the jury as to the appropriate distinctions.

[30] If, contrary to the conclusions I have expressed above, the use of the expressions "it was objectively, an objective belief" and "such force as is reasonably necessary for his defence" constituted misdirections it would be unrealistic to conclude that such errors could have made any difference to the outcome. The prosecution case was extremely strong. If there be any misdirection then, in my view, it would be an appropriate case in which to apply the proviso.

[31] For all of those reasons the appeal against conviction should be dismissed.

[32] **JERRARD JA:** I have read and respectfully agree with the reasons for judgment and proposed order of Williams JA. I add the following observations on the matters raised by the learned judge in paragraph (26) and (28) of his judgment.

[33] The effect of current judicial authority on the proper directions to a jury on s 271(2) of the Code is that a trial judge may risk causing what would be regarded as a misdirection if that judge actually reads the section in full to the jury, or directs them in terms of the direction in the last paragraph on page 5 of the Supreme and District Courts of Queensland Bench book. That direction reads:

> "So if [the defendant] reasonably feared death or grievous bodily harm, and thought that he could not otherwise save himself except by responding as he did, I tell you as a matter of law that it was lawful for him to do what was necessary for defence, even if that might cause the death of the other man."

[34] That suggested direction is defective in omitting the requirement that the defendant's "thought" be on reasonable grounds, but its final passage does actually reflect the final words of the section which, as has been observed, current judicial authority effectively writes out of it.

[35] In these situations where reasonable apprehension of an assault which threatens potentially lethal force has been established, judicial authority has expressed what the prosecution must then relevantly negative under s 271(2) in terms describing only a state of mind, described in differing ways. One can deduce from the judgment of Gibbs J (as he then was) in *R v Muratovic* [1967] Qd R 15 at 18-19 that it is:

- An honest belief on reasonable grounds that the person accused could not preserve the person defended from death or grievous bodily harm otherwise than by using the force that the person accused did in fact use.

Barwick CJ in *Marwey v R* (1977-78) 138 CLR 630 at 537 described it as:

- The actual belief by the accused on reasonable grounds of the necessity of the fatal act for (the accused's) own preservation.

In *Gray* (1997-1998) 98 A Crim R 589 at 593 the judgment of McPherson JA (that of the Court) effectively describes that as:

- An actual belief on reasonable grounds that what the accused did was the only way he could save himself (or someone) else from the assault.

In *Vidler* (1999-2000) 110 A CrimR 77 at 82 it was described as:

- An actual state of belief based on reasonable grounds that the defendant could not preserve (himself) otherwise than by doing what he did.

[36] Were it not for the binding authority of the judgment in the High Court in *Marwey,* one might be excused for thinking that s 271(2) provides two qualifying matters (a reasonable apprehension of death or grievous bodily harm from an assault threatened, and a belief on reasonable grounds that the person threatened cannot be defended in any other way than by the use of the force actually used from that threatened death or grievous bodily harm), which matters when established make lawful the use of such force as is necessary for defence against the person threatening to cause that death or grievous bodily harm. Whether the force actually

used was necessary would seem at first blush to require objective assessment rather than subjective belief.

[37] However, that is not the way the section has been interpreted. In *Marwey* the judgments in the High Court approved a passage in the judgment of Gibbs J in *Muratovic,* cited by Barwick CJ at page 636 of the CLR Report. In the passage quoted Gibbs J treated the expression in s 271(2) "such force….as is necessary for defence" as being, when those qualifying matters were established or not disproven, the same as "such force as….the accused honestly and reasonably believed to be necessary", that being the force actually used, the use of which entitled the accused to an acquittal. Although both Barwick CJ and Mason J (as he then was) questioned a reference to s 24 of the *Criminal Code* in the passage quoted by Barwick CJ from the judgment of Gibbs J in *Muratovic,* it is difficult to understand how one can equate the lawful use of such force as is necessary for defence with the lawful use of such force as an accused honestly and reasonably believes to be necessary for defence, other than by reference to s 24.

[38] Accordingly, I express the same hesitations as Pincus JA[1] and Thomas JA[2] as to the correct construction and directions to a jury with respect to s 271(2). I respectfully consider the most appropriate description of the relevant state of mind in the authoritatively approved or suggested directions is that of Barwick CJ in *Marwey,* which draws the jury's attention to the actual belief of an accused person on reasonable grounds of the necessity of the fatal act for his or her own preservation. Out of an abundance of caution I would re-express the test remarked upon by Williams JA in paragraph (28) herein as being whether the appellant actually believed on reasonable grounds that it was necessary to act as he did to save himself (or another) from death or grievous bodily harm.

[39] **ATKINSON J:** I agree with the reasons of Williams JA and with the order he proposes, as well as the further observations of Jerrard JA.

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1 In *R v Julian* (1998) 100 A Crim R 430

2 In *Corcoran v R* [2000] QCA 114