SUPREME COURT OF QUEENSLAND

CITATION:	*R v Major* [2013] QCA 114
PARTIES:	**R** **v** **MAJOR, Kenneth Faron Shawn Lionel** (appellant)
FILE NO/S:	CA No 269 of 2012 SC No 357 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	10 April 2013
JUDGES:	Fraser JA and Daubney and Peter Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Appellant's conviction set aside.** **3. There be a new trial of the charge of manslaughter.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was convicted of manslaughter – where the appellant contends that a defence under s 270 of the *Code of Criminal Law* should have been left to the jury, but was not – whether a defence under s 270 of the *Code of Criminal Law* is available when a person is charged with manslaughter – whether a defence under s 270 of the *Code of Criminal Law* was available in the present case – whether there was a miscarriage of justice CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – PROVOCATION – AVAILABILITY OF DEFENCE – where the respondent submitted that although the appellant was physically present when the provocation occurred his attention was directed elsewhere – where the respondent submitted the appellant was not "in the presence of" the provocative conduct – whether a defence of provocation is available

Criminal Code 1899 (Qld), s 264, s 270

Clarke v R [2008] NSWCCA 36, cited
Davis v The Queen (1998) 73 ALJR 139, cited
Dhanhoa v The Queen (2003) 217 CLR 1; [2003] HCA 40, cited
Howe v The Queen (1981) 55 ALJR 5, considered
Kaporonovski v The Queen (1973) 133 CLR 209; [1973] HCA 35, cited
Oxer v Grant, Unreported, Supreme Court of Western Australia, 3 November 1994, considered
Pearson's Case (1835) 2 Lew CC 216; [1835] EngR 189, cited
Pollock v The Queen (2010) 242 CLR 233; [2010] HCA 35, cited
R v Arden [1975] VR 449; [1975] VicRp 43, cited
R v Fisher (1837) 8 C & P 182; [1837] EngR 1115, cited
R v Hagarty [2001] QCA 558, cited
R v Johnstone [2003] QCA 559, considered
R v Martyr [1962] Qd R 398, cited
R v Prow [1990] 1 Qd R 64, considered
R v Quartly (1986) 11 NSWLR 332, cited
R v Sleep [1966] Qd R 47, considered
R v Terry [1964] VR 248; [1964] VicRp 33, considered
R v Williams [1971] Qd R 414, cited
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited
Van Den Hoek v The Queen (1986) 161 CLR 158; [1986] HCA 76, cited

COUNSEL: C W Heaton SC for the appellant
M R Byrne SC for the respondent

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

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Peter Lyons J. I agree that the appellant's conviction of manslaughter should be set aside and a new trial ordered because s 270 of the *Criminal Code* was potentially applicable on the evidence and that should have been left to the jury.

[2] Peter Lyons J has summarised and analysed the evidence in terms which I gratefully adopt and will not repeat.

[3] On the question whether s 270 may be invoked in a charge of manslaughter I would add to what Peter Lyons J has written that Hart J gave an affirmative answer to that question in *R v Sleep*.[1]

[4] Otherwise my reasons concern the respondent's argument that s 270 potentially applies only where the evidence raises a reasonable possibility that a provocative act

[1] [1966] Qd R 47 at 54.

or insult would be repeated, and that there was no such reasonable possibility here because there was no evidence of any relevant conduct by the deceased after he had ceased his assault upon the appellant's sister.

[5] Section 270 of the *Code* makes it lawful for a person "to use such force as is reasonably necessary to prevent the repetition of an act or insult of such a nature as to be provocation to the person for an assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm". It cannot be reasonably necessary to use force to prevent the repetition of a provocative act or insult unless there is a reasonable possibility of such a repetition. As to the applicable test in that respect, in *Oxer v Grant*[2] White J held that the same provision in s 247 of the Western Australian *Criminal Code* was capable of application only where the provoked person held an apprehension of the possibility of a repetition of the act or insult and that apprehension was objectively reasonable. I respectfully disagree with the proposition that it is relevant to consider whether the accused reasonably apprehended a repetition of the act or insult. Consistently with authority upon the meaning of "reasonably necessary" in s 271(1),[3] the relevant question for the jury on this aspect of s 270 was whether the prosecution had proved beyond reasonable doubt that on the jury's objective analysis of the circumstances revealed by the evidence there was no reasonable possibility of the provocative act or insult being repeated. To that extent I would accept the first limb of the respondent's argument.

[6] I do not accept the second limb of the respondent's argument. I agree with Peter Lyons J that s 270 does not require evidence that, after the initial insult or act by the person against whom the force is used, that person threatened to repeat the insult or act. Rather, the question whether the prosecution has excluded any reasonable possibility of repetition of the provocative act or insult must be answered with reference to all of the relevant circumstances revealed by the evidence.

[7] Peter Lyons J's analysis of the evidence demonstrates that on the whole of the evidence it was clearly open to the jury to conclude that the prosecution had not excluded the reasonable possibility that the deceased would again assault the appellant's sister.

[8] Subject only to these remarks, I agree with Peter Lyons J's reasons. I agree with the orders proposed by his Honour.

[9] **DAUBNEY J:** I have had the advantage of reading in draft the reasons for judgment of Peter Lyons J. I agree with His Honour's reasons and with the orders proposed by him.

[10] **PETER LYONS J:** The appellant has appealed against his conviction of manslaughter. He submits that a defence under s 270 of the *Code of Criminal Law*[4] *(Code)* should have been left to the jury, but was not.

Background

[11] It is convenient to commence by referring to some of the events leading up to the death of the deceased, and identifying some of the evidence.

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2 Unreported, Supreme Court of Western Australia, 3 November 1994.

3 See *R v Hagarty* [2001] QCA 558 at [3] – [8] (Davies JA) and [33] – [34] (Williams JA).

4 See s 2(1) of the *Criminal Code* 1899 (Qld).

[12] On the evening of 13 February 2010, and the early hours of the following morning, the appellant was at Surfers Paradise in the company of a number of people, including his partner, Ms Koro; his sister, Ms Shontarley Major; and Ms Joy Tuleca. For part of the time they were at the Bourbon Bar, on or near Cavill Mall. Also present at the Bourbon Bar were two young women, Ms Latonia Navosa, and Ms Joana Navosa, nieces of the appellant.

[13] On the same night, the deceased had been drinking with his friend, Mr Falala, at the Bourbon Bar.

[14] There came a point in time, in the early hours of the morning of 14 February, when all of these people had left the Bourbon Bar and were in Cavill Mall. Three of them[5] gave evidence that Latonia Navosa and Joana Navosa were sitting on seats in Cavill Mall, when an older Fijian man, whom Ms Major's evidence identified as the deceased, came over to the seats, and after some brief conversation, struck or slapped Ms Joana Navosa across the face. Two of them[6] gave evidence that the appellant then came over and said to the man "not to touch Joana" or to "leave us alone".

[15] Subsequently, Mr Falala made some form of approach to Ms Koro, resulting in a dispute between Mr Falala and the appellant. They then moved towards the beach, for the purpose of a fight, but the fight did not take place. Ms Tuleca gave evidence that the appellant indicated he did not want to fight Mr Falala.

[16] Then the deceased approached the appellant. According to Ms Major, the deceased was swearing at the appellant and had grabbed at the appellant and pushed him. According to Ms Tuleca, the deceased was shouting at the appellant, and was "trying to get into (the appellant's) face". Ms Major intervened, remonstrating with the deceased. There was evidence that the deceased put his hand, or hands, on Ms Major's throat, and told her he was going to choke her. After a short time, he desisted. Ms Major turned to the appellant and told him that the deceased had tried to choke her. On Ms Major's evidence, the appellant was a couple of steps away; on Ms Tuleca's evidence, the appellant was right beside Ms Major. The appellant then punched the deceased, telling him (on Ms Major's evidence) not to put his hand around Ms Major's throat. The deceased fell to the ground. He died about a week later.

[17] The only other eyewitness who gave evidence of these events was a Mr Foster. His evidence was that there was a "two on one" situation, the one being the appellant, and the other two people being Mr Falala and the deceased. His version is not relevant for this appeal.

[18] There was evidence that the deceased person was obviously affected by alcohol.

[19] The summing up included directions in relation to accident (s 23 of the *Code*); self-defence (s 271 of the *Code*); defence of another (s 273 of the *Code*); and mistake of fact (s 24 of the *Code*). However, no direction was sought, nor was one given, in relation to s 270.

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5 Ms Major; Ms Joana Navosa; Ms Latonia Navosa.

6 Ms Latonia Navosa; Ms Joana Navosa.

Manslaughter and s 270 of the *Code*

[20] The availability of s 270 when a person is charged with manslaughter was not in issue between the parties in this appeal. However, neither identified any authority which had considered the question.

[21] The offence of manslaughter is constituted by the combined effect of three sections of the *Code*. Section 300 provides that any person who unlawfully kills another person is guilty of a crime, either of murder or manslaughter. Section 303 provides that a person who unlawfully kills another person under circumstances which do not constitute murder, is guilty of manslaughter. Finally, s 291 of the *Code* provides as follows:

> "**291 Killing of a human being unlawful**
>
> It is unlawful to kill any person unless such killing is authorised or justified or excused by law."

[22] Mention should also be made of s 293 of the *Code*, which provides that any person who causes the death of another, whether directly or indirectly, and by any means whatever, is deemed to have killed the other person.

[23] Section 270 of the *Code* is in the following terms:

> "**270 Prevention of repetition of insult**
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> It is lawful for any person to use such force as is reasonably necessary to prevent the repetition of an act or insult of such a nature as to be provocation to the person for an assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm."

[24] Where the circumstances of a case are such as to make the use of force lawful under s 270, the language of the section suggests it makes the use of force lawful even where it causes the death of another person (provided the death were neither intended nor likely). The same may be said of the use of force which causes grievous bodily harm.

[25] Section 271 of the *Code* deals with self-defence. It makes the use of force lawful in certain defined circumstances. There have been cases where the view was taken that its provisions are not available to a person charged with manslaughter[7]. However, in *R v Prow*, a decision of this State's Court of Criminal Appeal, it was held that a defence was available under s 271 on a charge of manslaughter. There, Thomas J said[8]:

> "The effect of s 271 (both limbs) is to make lawful the accused's act *whether or not it results in death*."

[26] His Honour continued[9]:

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7 *R v Martyr* [1962] Qd R 398, 414 per Philp J; *R v Williams* [1971] Qd R 414, 425; both cited in *R v Prow* [1990] 1 Qd R 64; see also *Prow* at 75, line 30.

8 At p 68.

9 At p 68.

> "Having regard to the structure of the Code I find it very difficult to understand how a man can be convicted of manslaughter for delivering a blow which the Code declares to be lawful."

[27] Similarly, Williams J said[10] (with reference to a blow causing death, in circumstances where it had not been demonstrated that s 271 did not apply):

> "But if that blow was lawfully struck, for example because such force was reasonably necessary to make effectual defence against assault, I can see no reason why such a lawful blow should have criminal consequences."

[28] The statements taken from *Prow*, set out above, provide strong support for the view that the use of similar language in s 270, making lawful use of force in certain circumstances, should have the consequence that the section is available in respect of a charge of manslaughter.

[29] Section 271 makes lawful the use of force in two different circumstances, identified by the seriousness of the initial assault, and the prospect that the response will cause death or grievous bodily harm. No similar approach appears in s 270. However, the difference between the structure of the two sections is not sufficient, it seems to me, to alter the effect of the operative part of s 270, which would make lawful the use of force in the circumstances identified in the section, even in a case where death was the result.

[30] Section 267 of the *Code* makes the use of force lawful by a person in possession of a dwelling, to prevent entry into the dwelling of a person who, the defendant believes, intends to commit an indictable offence there. In *R v Cuskelly*[11], it was held that the section should have been the subject of a direction to the jury in a case of murder. In so far as it was held that the section might authorise the use of force which results in death, this decision is consistent with *Prow*.

[31] Section 270 is found in Chapter 26 of the *Code*, dealing with assaults and violence to the person; and with justification and excuse. It has not been suggested that there is anything in the structure of this chapter, or in its other provisions, which would make the section inapplicable in a case of manslaughter.

[32] The section expressly excludes from its scope the use of force which is intended or is likely to cause death or grievous bodily harm. In my view it is inappropriate to introduce another limitation to its scope, so as to exclude the use force which does in fact cause death (or, perhaps, grievous bodily harm).

[33] I would therefore conclude that manslaughter is not outside the scope of offences to which s 270 may be relevant.

Availability of s 270 in the present case

[34] The conditions on which s 270 makes the use of force lawful may be summarised as follows:

(a) the force is used to prevent repetition of an act or insult of such an nature as to be provocation to the person for an assault;

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10 At p 90.

11 [2009] QCA 375.

(b) the force is reasonably necessary to prevent the repetition of the act or insult;

(c) the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.

[35] Because the onus rests on the prosecution to prove that the act of the appellant was unlawful, that is, not authorised, justified or excused by law, it is required to disprove at least one of those conditions beyond reasonable doubt, provided the evidence raises a question whether the section applies[12].

[36] For the respondent it was submitted that s 270 was only available where there is evidence raising a reasonable possibility that the provocative act or insult would be repeated; and in the present case, there was no evidence of any relevant conduct by the deceased after he removed his hand from Ms Major's throat. Reliance was placed on a statement from *R v Johnstone*[13].

[37] It seems to me that it is important to focus on the language of s 270. The relevant words are "force … to prevent a repetition of an act … of such a nature as to be provocation to the person …". That language draws attention to a previous act of provocation, and the use of force to prevent its repetition. Evidence of conduct by the person against whom the force is used, and which amounts to a threat of a repetition of the provocation, is of assistance in the application of the section. However the statute, in terms, does not make it a requirement.

[38] The equivalent provision in Western Australia is s 247 of its *Criminal Code*. *Howe v The Queen*[14] was an application for special leave to appeal to the High Court by a person who had been convicted of assaulting a police officer acting in the execution of his duty. The prosecution case was that, after an incident in a hotel, the applicant went to the Geraldton Police Station where he was arrested. He reacted most violently, and was placed in a cell. He was subsequently taken out of the cell and escaped. He was then pursued to a transport yard, where he locked himself in the cabin of a truck. After a time, he emerged from the truck with a piece of timber with which he aimed a blow at a police officer; and when the piece of timber was taken from him, he struck the police officer with his fist, and then grappled with him on the ground.

[39] The applicant's case was that he went to the police station, and on entering, he was violently assaulted. He ran away at the first opportunity, and hid in the cabin of the truck, but was soon discovered. When he emerged from the truck he was again assaulted by police officers.

[40] The trial judge had told the jury more than once that the applicant's evidence of assaults at the police station really had nothing to do with the case[15]. In the Court of Criminal Appeal, the view was taken that the verdict carried with it a finding that no excessive force was used, which was enough to show that the failure to direct on s 247 did not result in any miscarriage of justice. However, the High Court considered that if the applicant's account of the assaults at the police station was not

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12 Compare *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161-162, and cases there cited.
13 [2003] QCA 559, p 5.
14 (1981) 55 ALJR 5.
15 *Howe* at p 7.

entirely rejected by the jury, it could have founded a defence based on s 247. The conviction was quashed.

[41] The assaults at the police station were separated, both as to time and place, from the events when the applicant emerged from the truck at the timber yard. The reasoning of the High Court does not depend on some further conduct of the police officer who was assaulted, relevant to whether a further assault would occur.

[42] The passage from *Johnstone* is not inconsistent with this approach. It simply reflects an assessment of the evidence of the case. The passage (for which no further explanation is set out in the reasons) was as follows:

> "But in any case it does not appear to me that the trial Judge was bound to put a defence of section 270 to the jury. There was no basis to infer that the appellant was attempting to prevent a repetition of an insult."

[43] It follows that, in so far as the respondent's submission suggests that it is necessary to demonstrate some further relevant conduct by the deceased, after he removed his hand from Ms Major's throat, demonstrating the possibility of a further assault, it should not be accepted.

[44] In my view, there is evidence which, if accepted by the jury, might raise a reasonable doubt about whether the prosecution had excluded the operation of s 270. Obviously, there is the fact that the deceased had held Ms Major by the throat. That occurred, in response to her intervention, when the deceased had approached the appellant in an aggressive manner, shortly after the deceased indicated that he did not want to fight Mr Falala. It should be viewed against the background of the evidence that the deceased was obviously affected by alcohol; and that the assault on Ms Major followed the assault, a short time earlier, on Ms Joana Navosa, and the appellant's warning to him at that time. Moreover, the statement attributed to the appellant by Ms Major, though consistent with an act of retribution, is by no means inconsistent with an action intended to prevent a repetition of the deceased's conduct.

[45] I consider that, subject to the question whether the deceased's conduct amounted to provocation as defined in the *Code*, there was evidence which, if believed, may have left the jury with a reasonable doubt whether the appellant's punch was made lawful by s 270, and accordingly that evidence and the operation of the section should have been left to the jury.

The "presence element" of provocation under s 268

[46] Under s 268, the conduct of the deceased could amount to provocation only if it was done "in the presence of" the appellant[16]. The respondent submitted that although the appellant was physically present when the deceased took Ms Major by the throat, his attention was directed elsewhere, so that he was not aware of that act at the time it happened; and in that sense he was not present.

[47] The respondent's submission pointed out that the language of s 268 had not changed from the draft originally proposed by Sir Samuel Griffith in 1897. On that basis it

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16 See s 268(2).

was submitted that the section could be construed by reference to the common law at the time when the section was first adopted. Reference was then made to cases which had considered the early common law (*R v Terry*[17] and *R v Arden*[18]). Reference was also made to *R v Quartly*[19], which, though based on s 23 of the *Crimes Act* 1900 (NSW), was said to give effect to the common law. It was said to limit provocation to circumstances where the accused person was present when the provocative conduct occurred; and to exclude a case where the accused person learned of that conduct through another person. It was then said that the condition relating to presence in s 268 was not satisfied by physical presence, but required at least an awareness on the part of the accused on the provocative conduct, often through seeing it or perhaps through hearing it. It was submitted that the evidence showed that the appellant learnt of the fact that the deceased had taken his sister by the throat, because she told him that, having to attract his attention to do so.

[48] There are a number of difficulties with these submissions. It may be doubted whether s 268 is to be regarded as expressing the common law at the time when the *Code* was drafted. Section 304 of the *Code* has the effect of reducing what would otherwise be an offence of murder, to manslaughter, when committed under circumstances of provocation. It has been held that for s 304, provocation is determined by reference to the common law; and not by reference to s 268[20]. This makes it unlikely that s 268 is to be regarded as expressive of the common law. Indeed, in *Kaporonovski*, McTiernan ACJ and Menzies J said[21]:

> "Section 268 is a definition of provocation differing substantially from the provocation which at common law serves to reduce to manslaughter a killing which would otherwise amount to murder."

[49] Early statements of the common law required the accused person to see the provocative conduct[22]. The language of s 268 is not so restricted, and seems to be intended to give provocation a broader application.

[50] The correctness of *Quartly* has subsequently been doubted[23].

[51] The cases to which reference was made for the position at common law do not deal with a situation like the present case. The concern which they reflected is identified by a statement in *Terry*[24] based on *R v Fisher*[25], as follows:

> "If a father *see* a person in the act of committing an unnatural offence with his son, and instantly kill him (probably) it is only manslaughter; but if he only *hear* of it, and go in search of the offender – and that with a deadly weapon – and kill him, it will be murder."

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17 [1964] VR 248.
18 [1975] VR 449.
19 (1986) 11 NSWLR 332.
20 See *Kaporonovski v The Queen* (1973) 133 CLR 209, 219; *Pollock v The Queen* (2010) 242 CLR 233 at [46].
21 At 216.
22 *R v Fisher* (1837) 8 C & P 182, quoted in *Terry* at 249; see also *Pearson's Case* (1835) 2 Lew CC 216; 168 ER 1133, where Parke, B, limited the applicability of provocation to a case where the accused had "ocular" inspection of the act, and only then.
23 *Davis v The Queen* (1998) 73 ALJR 139; *Clarke v R* [2008] NSWCCA 36 at [16].
24 At 249.
25 (1837) 8 C & P 182.

[52] The present case shows the difficulty of introducing the concept of awareness to the definition of provocation in s 268. The circumstances in which the appellant punched the deceased person were described by Mr Heaton SC for the appellant as "dynamic", a description accepted by Mr Byrne SC for the respondent. It will be recalled that Ms Major intervened when the deceased was behaving in an aggressive fashion towards the appellant. Shortly thereafter, Mr Falala became involved with the appellant. The respondent's approach would require careful scrutiny of the extent to which the defendant was aware of the conduct of the deceased in relation to Ms Major, in a "dynamic situation". Questions would arise as to whether the jury would have to consider whether the appellant was aware of the full extent of the conduct of the deceased towards Ms Major; or whether it was sufficient that he was aware that at some point the deceased's hand was on Ms Major's throat; or simply that he was aware of some aggressive conduct by the deceased towards Ms Major. Moreover, it is clear that Ms Major's statement to the appellant about the conduct of the deceased was made in the deceased's presence. The concern about the entry of the element of "belief" referred to in *R v Arden*[26] is unlikely to arise in such circumstances.

[53] Ms Major gave evidence that the deceased had held her by the throat for a couple of minutes (though Ms Tuleca said it was for less than three seconds). On the basis of this evidence, and the relative location of the parties, the jury may well have considered that the appellant was aware of that the deceased held Ms Major by the throat, even if at times his attention was directed to Mr Falala.

[54] It seems to me that there is no substantial reason to read down the expression "in the presence of" found in s 268 of the *Code*. In any event, it would be for the jury to determine whether or not the appellant was aware of the deceased's assault on Ms Major, before she told him that it had occurred.

[55] I am therefore of the view that the fact that Ms Major made a statement to the appellant, describing the deceased's conduct, is not a reason for concluding that s 270 was not available for the jury's consideration in the present case.

The verdict and s 270

[56] For the respondent, it was submitted that the jury's rejection of those matters which had been left to it meant that it would not have acquitted the defendant had it been directed to consider the effect of s 270. The respondent's case at trial, as identified in its submission on appeal, was that the defendant did not act in defence of Ms Major, as the attack by the deceased had finished; and that the force used by the defendant was more than was reasonably necessary to make a defence against the deceased's assault.

[57] Under s 273, it is lawful for a person acting in good faith in the aid of another to use such force as the other person might have used lawfully by way of defence against an assault. In the present case, that made it necessary to consider whether Ms Major might lawfully have struck the deceased person, in order to defend herself against an assault by him.

[58] The sections of the *Code* relating to self-defence and defence of another are not intended to cover the same ground as s 270. The concept of making a defence

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26 [1975] VR 449, 452.

against an assault is not the same as the concept of preventing the repetition of a provocative act, even when the act is constituted by an assault. In the present case, I have referred to evidence which the jury could take into account in determining whether the appellant was acting to prevent further action by the deceased. The jury may well not have considered that relevant in determining whether the appellant was acting in the defence of Ms Major. At least, I cannot be satisfied to the contrary.

[59] Accordingly, it seems to me that it does not follow from the verdict of the jury, convicting the appellant that it would have also have convicted him, if directed in respect of s 270.

Conclusion

[60] Although the question of the application of s 270 was not raised at the trial, that does not determine the outcome of the appeal[27]. In my view, it is reasonably possible that the failure to direct the jury about this provision may have affected the jury's verdict[28].

[61] Accordingly, I would order that the appeal be allowed, the appellant's conviction be set aside, and there be a new trial of the charge of manslaughter.

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27 Compare, for example, *R v Howe, supra*.

28 See *Dhanhoa v The Queen* (2003) 217 CLR 1 per McHugh and Gummow JJ at [49] and [60], citing *Simic v The Queen* (1980) 144 CLR 319, 332.