SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dayney* [2023] QCA 62
PARTIES:	**R** **v** **DAYNEY, Mark Vincent** (appellant)
FILE NO/S:	CA No 338 of 2021 SC No 882 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction: 6 December 2021 (Bowskill SJA)
DELIVERED ON:	6 April 2023
DELIVERED AT:	Brisbane
HEARING DATE:	6 October 2022
JUDGES:	Mullins P and Dalton JA and Boddice J
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the appellant was convicted of murder at retrial – where the trial judge directed that s 272(2) described three independent circumstances in which the protection of s 272(1) of the *Criminal Code* (Qld) would be lost – whether a miscarriage of justice was occasioned by this direction CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where the trial judge directed the jury that the meaning of “before such necessity arose” in s 272(2) of the *Criminal Code* (Qld) was a reference to the time when the defendant was induced to believe, on reasonable grounds, that it was necessary for his or her preservation from death or grievous bodily harm to use force in self-defence – where a single protracted struggle occurred between the appellant and deceased, after the appellant formed the requisite belief – whether the proper focus is the time the necessity arose, not the time when the act causing death occurred *Criminal Code* (Qld), s 271, s 272, s 273

Criminal Code Bill 1880 (UK), s 57
Crimes Act 1961 (NZ), s 48, s 49 (now repealed)

Aubrey v The Queen (2017) 260 CLR 305; [2017] HCA 18, cited
Beckwith v The Queen (1976) 135 CLR 569; [1976] HCA 55, considered
CTM v The Queen (2008) 236 CLR 440; [2008] HCA 25, considered
In Re Terrence Joseph Mellifont, Court of Criminal Appeal, unreported, cited
Lynch v Commissioner of Police [2022] QCA 166, cited
Mellifont v Attorney-General (Qld) (1991) 173 CLR 289; [1991] HCA 53, considered
R v Burnell [1966] Qd R 348, considered
R v Dayney [2020] QCA 264, considered
R v Howe (1958) 100 CLR 448; [1958] HCA 38, considered
R v Howe [1958] SASR 95, considered
R v Johnson [1964] Qd R 1, considered
R v Keith [1934] St R Qd 155, considered
R v Kerr [1976] 1 NZLR 335, considered
R v Martyr [1962] Qd R 398, considered
R v Muratovic [1967] Qd R 15, considered
R v Wilmot (2006) 165 A Crim R 14; [2006] QCA 91, considered
Randle v The Queen (1995) 15 WAR 26, considered
Stuart v The Queen (1974) 134 CLR 426; [1974] HCA 54, considered
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34, considered

COUNSEL: B J Power KC, with J J Underwood, for the appellant
C W Wallis for the respondent

SOLICITORS: AW Bale & Son Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MULLINS P:** I agree with Dalton JA.

[2] **DALTON JA:** Dayney first stood trial in May 2018. A jury found him guilty of murder. He appealed on the grounds that the 2018 trial judge, Douglas J, ought to have left self-defence under s 271 of the *Criminal Code* (Qld) to the jury and secondly, that Douglas J's directions as to s 272 of the *Criminal Code* were erroneous. The appeal was heard in 2020. All members of the Court of Appeal (Sofronoff P and Fraser and McMurdo JJA) agreed that self-defence under s 271 ought to have been left to the jury; that necessitated a retrial. The 2020 Court of Appeal divided over the interpretation of s 272. The President was in the minority. The interpretation of the majority favoured the Crown. Notwithstanding this, lawyers for Dayney did not appeal the 2020 Court of Appeal decision.

[3] Dayney's retrial commenced in November 2021. The facts as to self-defence remained as they had been in the 2018 trial. Bowskill SJA, as she then was, directed the jury, as she was obliged to do, in accordance with the 2020 appeal decision. The jury convicted Dayney of murder. He now appeals because the jury on the retrial was directed in accordance with the 2020 appeal decision as to s 272 which went against him, but which he did not challenge. His counsel argues the s 272 point which did not succeed in 2020, and acknowledges that this argument can only succeed if this Court is of the opinion that the 2020 appeal decision is "plainly wrong".[1]

[4] In my view the 2020 Court of Appeal decision is not plainly wrong. The point is a difficult one, but my view is that the majority view in 2020 was correct.

[5] The appellant raises a second issue as to the direction Bowskill SJA gave to the jury about the words "before such necessity arose" in s 272(2). I think this argument must be rejected.

[6] In those circumstances, I propose an order that the appeal be dismissed. I explain my reasons.

Factual Circumstances

[7] The facts proved by the evidence before Bowskill SJA were materially the same as those proved before Douglas J and it is convenient to set out the summary of factual matters by Sofronoff P in the 2020 appeal:

> "[2] The Crown case relied principally upon the evidence of Ms Lorang-Goubran who was, at the time, in relationship with the appellant. Both she and the appellant were methamphetamine addicts. The appellant was unemployed and they both relied upon Ms Lorang-Goubran's income as a sex worker to live on and for ordinary expenses and, more importantly for them, to buy the drugs they needed. On the night of the murder alleged by the Crown, she and the appellant were short of money. Ms Lorang-Goubran's intended client for that night had reneged and she went to bed. The appellant woke her angrily, showing her that somebody had contacted her on her phone. This person was the deceased, Mr Spencer. Ms Lorang-Goubran advertised her sexual services on the internet under a pseudonym. He was trying to engage her sexual services, not knowing that she was his former lover with whom he had once had an affair. The appellant knew about this and he was jealous. …
>
> [3] Ms Lorang-Goubran had told the appellant that Mr Spencer dealt in drugs, that he always had drugs and money on his premises and that he also kept firearms. The appellant encouraged her to accept Mr Spencer's invitation and while she distracted him, he would enter his home and then find and steal Mr Spencer's drugs. Ms Lorang-Goubran made the necessary appointment and, together with the appellant, she

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1 *Lynch v Commissioner of Police* [2022] QCA 166, [69]-[70], and the authorities cited there.

drove to Mr Spencer's house. The plan immediately went askew.

[4] Ms Lorang-Goubran went into the house where Mr Spencer greeted her in a friendly way. They sat together on his couch cuddling, and Mr Spencer produced a pipe to smoke methylamphetamine instead of the planned "distraction", being Ms Lorang-Goubran's sexual services in another part of the deceased's home. Instead of the appellant sneaking into the house unobserved, he suddenly appeared in the same room as Mr Spencer and Ms Lorang-Goubran. He was dressed in black like a burglar should be dressed and he was masked. Ms Lorang-Goubran did not see him at first but she felt Mr Spencer's shoulder bump into her "really hard". The appellant had hit Mr Spencer, who stood up, and the two men began to wrestle. Ms Lorang-Goubran said that she ran outside and hid. She could hear shouting inside the house. The fight then moved outside.

[5] Mr Spencer's housemate, Mr Daniel McNally, was woken by the noise. He found the appellant standing over Mr Spencer, who was on the ground. The appellant was 'hitting an object down in front' of him in a "swinging hit, like downwards like that" using both hands. The appellant was using what looked to Mr McNally like a metal pole. The appellant noticed Mr McNally and said, 'it's not for you' and then used his weapon to deliver another blow to Mr Spencer.

[6] Ms Lorang-Goubran owned a small baseball bat that she used to keep in her car. This was her personal defence weapon which she said that she carried to protect herself on her professional visits. She had forgotten where it was. As it later appeared from the appellant's own evidence, he used this bat to hit Mr Spencer. The force that he applied was so severe that it broke the bat in two. Part of the bat, stained with Mr Spencer's blood along its length, was later found near his body. So too was a wooden tennis racket that the appellant found and then used to hit Mr Spencer after the bat had given way. He hit Mr Spencer so hard with the tennis racket that its head broke.

[7] Mr McNally had armed himself with a long metal crow bar and he threw this at the appellant. Mr McNally said that it hit the appellant as he was running away.

[8] Ms Lorang-Goubran had told the appellant where Mr Spencer used to hide his drugs. Now she waited outside until the appellant called out to her. He gave her a black backpack and told her to put it in the car. She took it and got into the car and the appellant joined her. He was carrying a long metal bar, no doubt the one Mr McNally had hurled at him, which he put in the back seat and he instructed Ms Lorang-Goubran to drive off. A little later the appellant told her to pull over and he got out of the car and threw the metal bar away. Police later found

it. It was indeed the crow bar that Mr McNally had thrown at the appellant.

[9] The appellant's counsel put to Ms Lorang-Goubran that she had not seen Mr Spencer armed with a gun at any stage during the fight. She accepted this proposition.

[10] A pathologist, Dr Beng Beng Ong, gave evidence. He said that Mr Spencer had suffered numerous blows from a blunt instrument to his back and chest and nine blows to the top and back of his head. There were also defensive injuries on his hands and arms. However, what killed him was a blow across the face which rendered him unconscious, fractured bones which obstructed his airway and stopped his breath.

[11] The Crown, therefore, alleged that the appellant had launched a savage unprovoked attack against an unarmed man using two weapons in succession intending to kill him. The jury could infer from the savagery and persistence of the assault that the appellant intended to kill Mr Spencer or to do him grievous bodily harm.

[12] The appellant gave a different story in his evidence. He said that he knew from Ms Lorang-Goubran that Mr Spencer was a drug dealer who kept guns at his house, including a shotgun and a pistol with an attached silencer. Ms Lorang-Goubran had told him so. He said that it was Ms Lorang-Goubran who suggested that they go to Mr Spencer's home to steal his drugs and money. She had told the appellant how he could sneak into the house to do this while she distracted Mr Spencer. He said that he went into the house as planned but he then unexpectedly found himself in the same room as Mr Spencer and Ms Lorang-Goubran. He said that he saw Mr Spencer sitting on a couch with Ms Lorang-Goubran and he saw Mr Spencer take a small silver gun from between his legs. The appellant said that he immediately jumped forward and punched Mr Spencer as hard as he could. Mr Spencer dropped the gun.

[13] They began wrestling. He saw that Ms Lorang-Goubran was holding the baseball bat. She hit Mr Spencer with it and 'he just collapsed'. Mr Spencer was not holding a weapon. The appellant said that he didn't run away then because he 'didn't want to get shot'. When Mr Spencer went limp he 'just slipped away, and he fell back into a seated position on the couch'. The appellant saw a tennis racket and picked it up and, 'without really thinking of anything, sort of started hitting Zeb on the head with it'. He hit him 'maybe three or four times' and 'maybe [on] the top or towards the back of the head'. Mr Spencer was trying to block the hits. The appellant thought that the tennis racket 'didn't really seem to do anything to him' and so he took the bat from Ms Lorang-Goubran and 'swung it at him'. Mr Spencer was 'still sort of hopping back up off the

couch' and he was 'almost in a seated position'. He was picking himself up off the couch 'with his head down, his hands up around his head' but he 'wasn't stopping coming forward'.

[14] The appellant did not know where the gun was or where any other of Mr Spencer's other guns might be.

[15] He was pretty sure that he hit Mr Spencer in the mouth with the baseball bat. Once, he 'chopped it down on the top of his head'. These blows did not seem to slow him down. When he hit him 'the baseball bat snapped' and he dropped the handle. The appellant said that he picked up the other broken piece and used that 'to sort of slow him down more'. He 'might have maybe got him once more' with this broken piece.

[16] He said that his sole intention was 'to make sure that me and [Ms Lorang-Goubran] both got out of there alive'. He said that at one point the appellant and Mr Spencer both fell to the ground. They were now outside the house on the patio. The appellant kept hitting Mr Spencer who was 'sort of kicking himself up off his left elbow and covering his head'. The appellant hit him on the back of the head. He said that he 'wasn't really aiming the blows' and that he 'was just sort of trying to stop him from getting to another gun'.

[17] The appellant said that at this point Mr McNally appeared and accosted him and threw the crow bar but it missed him and hit Mr Spencer on the head and 'knocked him out cold'. He said that Mr McNally threw a footrest at him and hit him on the right shoulder. Mr McNally was able to retreat into the garage but the appellant followed him. The appellant said that he picked up the crow bar and passed through the garage and he then saw Mr McNally running away down the driveway. The appellant said that he noticed an air rifle on a bench in the garage and he took it. He then went back the way he had come into the lounge room. Ms Lorang-Goubran was still there. She told the appellant that she had collected the broken handle of the bat, 'the gun', a black backpack and a gun case that 'she believed had more guns in it'. She had already put these things into the car. Together they went out the front door to the car. The appellant put the crow bar and rifle into the back seat and they drove off.

[18] The appellant said that at home he had a shower. He had blood over him. He put on fresh clothes and examined the contents of the backpack. It contained a gun case and 'the silver handgun'. On the following day the appellant and Ms Lorang-Goubran went to a friend's house where they burned the backpack, the clothes which the appellant had worn, the jacket that Ms Lorang-Goubran had worn, Mr Spencer's wallet as well as the piece of broken baseball bat. Later, said the appellant, he threw the contents of the black bag taken from Mr Spencer's house into the Logan River. These included the

silver handgun and other weapons parts. He also threw the air rifle into the river."

The Application of s 272 in this Case

[8] Section 272 provides:

> "**272 Self-defence against provoked assault**
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> (1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
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> (2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; <u>nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.</u>" (my underlining).

[9] As to the framework in which s 272 is to be considered in this case, I again extract part of the judgment of Sofronoff P from the 2020 appeal:

> "[56] On the Crown case neither s 271 nor s 272 had any application. The prosecution alleged that the appellant entered the house dressed and armed for robbery. It was the appellant who first assaulted a seated and unarmed Mr Spencer and the appellant killed him for reasons having nothing to do with self-defence against a lethal assault. If the jury disbelieved the appellant's evidence the defences did not apply. It was only if the jury accepted the appellant's version of events, or had a doubt about that version, that these provisions had to be considered.
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> [57] It will be remembered that, according to the appellant's story, he was unarmed and Mr Spencer was the first to commit an assault by pointing a pistol at him. The appellant's immediate response was to punch Mr Spencer and, on the appellant's account, this served to disarm him. ...
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> [58] Under circumstances in which Mr Spencer had produced a gun, and in which the appellant believed that Mr Spencer had other weapons available, the appellant said that he needed to subdue Mr Spencer entirely if he was to effect a safe escape.

> [59] On the appellant's account, even if his appearance in the house dressed for robbery constituted an implicit threat of violence and was, therefore, an assault, the defence in s 272(1) could apply. Section 272 required that, after an initial assault by the appellant, there be an assault upon the accused 'with such violence as to cause reasonable apprehension of death or grievous bodily harm'. I have no doubt that, for the purposes of the section, an assault constituted by a threat to inflict violence accompanied by the evident means to inflict it and the immediate willingness to do so, would satisfy that requirement.
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> …
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> [64] On the appellant's case [as to the applicability of s 272], he was trying to stop Mr Spencer from killing him with an available weapon. On that basis, the appellant claimed to be justified to meet this continued lethal force with his own lethal force. To put it into strict terms, although the appellant was, by his unlawful presence in Mr Spencer's lounge room, the first to commit an assault, his was not a lethal assault and it was Mr Spencer who first assaulted the appellant with such violence as to cause reasonable apprehension of death or grievous bodily harm and induced him to believe, on reasonable grounds, that it was necessary for his self-preservation to use force and that the appellant only used such force as was reasonably necessary for such self-preservation. …"

[10] If they accepted the appellant's version of events, or had a doubt about that version, the jury had to consider whether the Crown had excluded beyond a reasonable doubt the factual matters raised by the terms of s 272(1). There is no complaint about Bowskill SJA's directions to the jury in that regard. As to s 272, at the trial before Bowskill SJA, and on this appeal, counsel for Dayney accepted that the first two cases in s 272(2) did not apply at all and Bowskill SJA did not address the jury on their application. The point of controversy was as to the third clause in s 272(2), underlined above. As required by the 2020 appeal decision, Bowskill SJA instructed the jury by reference to a handout which read:

> "…
>
> [Section 272] raises the following matters for your consideration:
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> 1. whether the defendant unlawfully assaulted Mr Spencer or provoked an assault from him;
> 2. whether the response from Mr Spencer was so violent as to cause reasonable apprehension of death or grievous bodily harm;
> 3. whether the defendant believed, on reasonable grounds, that it was necessary, in order to preserve himself from death or grievous bodily harm, to use force in self-defence;
> 4. whether the force in fact used was such as was reasonably necessary for his preservation from death or grievous bodily harm;

5. whether, before the necessity of so preserving himself arose, the defendant declined further conflict and quitted it or retreated from it as far as practicable." (my underlining).

Ground 1 – Interpreting the third clause of s 272(2)

[11] Bowskill SJA's direction, like Douglas J's direction in the 2018 trial, read s 272(2) as specifying that there were three independent circumstances in which the protection of s 272(1) would be lost.[2]

[12] Section 272(1) offers the protection of self-defence to a defendant who has provoked "an" assault against which defence is made. The protection is more limited than that offered by s 271, where the defendant has not provoked "the" assault against which defence is made. Limitations are found in subsection (2) to s 272. It removes certain factual circumstances from the protection offered by s 272(1).

[13] There is no difficulty understanding that s 272(2) takes out of the protection afforded by s 272(1) a case in which the defendant first began the assault referred to in the initial words of s 272(1) ("unlawfully assaulted another") with an intention to kill or do grievous bodily harm. Likewise, a case where the defendant endeavoured to kill or do grievous bodily harm before the necessity of preserving himself or herself arose. The issue in this case is whether or not the words which have been underlined in s 272(2) above create a third factual circumstance which is outside the protection of s 272(1), or whether those words only provide further description as to the circumstances in which the first two cases operate.

Authority Prior to the 2020 Appeal Decision

[14] This issue has always been unsettled.[3] Before 2020 there was no binding authority on it.

[15] In *R v Keith*[4] Henchman J, in dissent, said:

> "… there was no evidence that the prisoner retreated, or attempted to retreat, before firing the shot, the answer appears to lie in a comparison of the language of s. 271 with that of s. 272. The latter provision (the case of a person who has first assaulted another, or has provoked an assault by another) requires the accused to establish not only his belief, on reasonable grounds, of danger to life or limb, but also that he first declined further conflict and quitted, or retreated from it as far as was practicable. Section 271 says nothing of

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2 Douglas J's direction in the 2018 trial was, "…If you conclude that Mr Dayney's appearance about 3.30 am in Mr Spencer's house, dressed in dark clothes, with his head wrapped in a dark shirt, amounted to provocation of an assault from Mr Spencer, and that Mr Spencer pulled out a gun, then the defence does not apply unless, before Mr Spencer pulled out the gun, Mr Dayney declined further conflict and quitted it, or retreated from it, as far as was practicable." (my underlining, referable to the second ground of appeal, below).

3 Kenny describes the meaning of the provision as "unclear" in *An Introduction to Criminal Law in Queensland and Western Australia* – LexisNexis, 7th edition, [13.98]. O'Regan describes it as "obscure" in *New Essays on the Australian Criminal Codes* – R S O'Regan, Law Book Company, 1988, p 89.

4 [1934] St R Qd 155.

> retreating. Moreover, the common law allowed justification of a killing without any attempt to retreat, if the assault upon the accused was so fierce as not to allow him to yield a step without manifest danger to his life or of great bodily harm. See Russell on Crimes, Vol. I. (7th ed.), p. 810. I think, therefore, that it is not necessary for an accused person, defending under s. 271, to prove that he retreated as far as possible before killing." – p 184.

[16] This passage formed part of the ratio of Henchman J's decision, but the point did not matter to the majority judges in that case.[5]

[17] In 1964, in *R v Johnson*[6] Stanley J discussed the High Court decision in *R v Howe*.[7] That 1958 case was a very significant one as to the common law of self-defence. It established that the Crown bore the onus of excluding self-defence, which was contrary to the Queensland position at that time. It also marked a change in the common law as to retreat:

> "The view of the Supreme Court appears also to be correct as to the position which the modern law governing a plea of self-defence gives to the propriety of a person retreating in face of an assault or apprehended assault before resorting to violence to defend himself. The view which the Supreme Court has accepted is that to retreat before employing force is no longer to be treated as an independent and imperative condition if a plea of self-defence is to be made out." – pp 462-463 per Dixon CJ (my underlining).

[18] Stanley J discussed the limited circumstances in which resort was to be had to the common law in interpreting the *Code* (see below). He acknowledged that there were advantages and disadvantages in having the law in "fixed expression" in the *Code*. He held: "The *Code* fixes the position as from the moment at which it speaks" with the consequence that, "In my opinion, if the proposition [as to retreat] established by [Howe] falls within the language of our *Code* it proclaims the same law; if it does not so fall we must disregard it."[8] As to the "modern law" on retreat Stanley J said:

> "In the case of assaults coming within s. 271 (where the aggressor was killed or suffered grievous bodily harm) I should have thought that the words 'believes on reasonable grounds that he can not otherwise preserve' in its second paragraph were wide enough to include the question of retreat as a relevant consideration—recognising always that a jury should be warned against being wise after the event and that they must consider the matter from the point of view operative on the accused's mind in the stress of the moment. By turning away from an aggressor one might obviously lead to one's own destruction. …

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5 Webb J did make the comment, "Keith made no attempt to retreat, nor does he say or show that he could not have retreated. The implication from s. 272 may be – I do not decide this, however – that there is no need to prove a retreat to secure immunity under s. 271; …" – pp 179-180. Blair CJ expressly did not decide this point, p 168.

6 [1964] Qd R 1, 14.

7 (1958) 100 CLR 448.

8 Pp 10-11. In contrast, he accepted that the common law as to the onus of proof applied in Queensland; it was a question of the administration of the law, rather than the substantive law.

> Section 272 deals with matters in which the accused was initially in the wrong. The section seems to me to free the accused from responsibility only if he has declined further combat or retreated in terms of the section. The language seems imperative, although again on the 'modern law' the Crown carries the onus of proof. However, the present case rests on s. 271 and I leave questions arising under s. 272 open." – pp 13-14.

[19] In *R v Muratovic*[9] Hart J proffered this *obiter* view of s 272(2): "… literally, the last clause only purports to refer to a person who has used murderous violence in the first place or before it is necessary. This being so, I do not think this court should read words into it which take away any defence open on the first paragraph." A little later, when discussing differences between facts giving rise to defences under ss 271 and 272 he said, "Also, there could be another instance coming from the last clause of the second paragraph of s. 272, <u>if</u> it means that a person disqualified from protection by the earlier clauses of that paragraph may re-qualify if he retreats". (my underlining).

[20] The point at issue on this appeal probably did arise at the trial which was the subject of appeal in *R v Wilmot*.[10] However, due to a series of oddities about how the case was dealt with below, consideration of the point did not become part of the *ratio* of the court on the appeal. Jerrard JA did consider it, saying:

> "I consider the third obligation specified in s 272(2), namely that before the necessity for using potentially lethal force in self-defence the person using such force declined the conflict and quitted it or retreated from it as far as was practicable, applies only to the circumstances described in the two preceding clauses in that paragraph. That is, I agree with the view suggested by Hart J in *Muratovic* that those two earlier clauses, respectively describing a person who used murderous violence in the first place or else before it was necessary, and who is thereby disqualified from the protection given by s 272(1), can re-qualify for that protection if that person has retreated before using lethal force. I therefore disagree with the suggestion by Stanley J in *R v Johnson* [1964] Qd R 1 at 14 that s 272(1) applies only if the defendant has declined further combat or retreated. <u>Whichever view is correct</u>, a view of the facts was open to the jury which would have entitled Mr Wilmot to plead s 272(1) ..." – pp 28-29. (my underlining).

[21] Jerrard JA indicated his preference for one interpretation of the third clause, but he did not explain the reasons for his preference, and it seems from the sentence starting, "Whichever view is correct …" that he dealt with the point shortly because (correctly) he regarded it as *obiter* in the circumstances of that appeal.

[22] Thus, all the views expressed in Queensland before the 2020 appeal in this matter were *obiter*, and none was particularly well-developed. There was also a Western Australian case, *Randle v The Queen*.[11] A defence under the analogue to s 272 was left to the jury in circumstances where no-one advanced a case raising the factual

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9 [1967] Qd R 15, 28.
10 (2006) 165 A Crim R 14.
11 (1995) 15 WAR 26.

circumstances in the first two cases of subsection (2). The trial judge directed the jury on the basis that the third clause in the analogue to s 272(2) was an independent element of a s 272 defence of self-defence. That is, on the same basis as both Douglas J and Bowskill SJA in Dayney's trials.[12]

[23] The Court of Appeal in Western Australia rejected this interpretation. Malcolm CJ held that the third clause was to be interpreted as:

> "… a qualification on the proviso in the second paragraph of [the analogue to s 272]. The proviso withdraws the protection of self-defence in two sets of circumstances. The first is where the accused first began the assault with intent to kill or do grievous bodily harm … . The second is when the accused endeavoured to kill or do grievous bodily harm … before the necessity of preserving himself arose. In either of these two cases the protection of self-defence will not apply: '… unless before such necessity arose the person using such force declined further conflict, and quitted it or treated from it as far as practicable.'" – p 33 (Kennedy and Pidgeon JJ agreed).

[24] That is, Malcolm CJ interpreted the third clause of the analogue to s 272(2) as adding, "a qualification which will bring both cases referred to in the first two clauses of the second paragraph, which are otherwise excluded from the protection of the first paragraph, back within that protection" – p 36.

[25] Malcolm CJ's reasoning appears to be that the opportunity to retreat is relevant to the elements of self-defence in the analogue to s 272(1) in any event – p 34. That is (independently of s 272(2)), retreat is relevant to the existence of the belief on reasonable grounds that it is necessary for preservation from death or grievous bodily harm to use force in self-defence. As part of this, Malcolm CJ then spent some considerable time outlining the position in relation to retreat at common law after 1958 when the High Court decided *Howe*. Of course the change to the common law made in *Howe* was that retreat was no longer "an independent and imperative condition" of the defence of self-defence, but something to be considered in determining whether or not the accused had a belief on reasonable ground that the force used was necessary for his preservation from death or grievous bodily harm to use force in self-defence. It seems that Malcolm CJ was using what Dixon CJ called "the modern law" as to this topic to interpret the analogue to s 272(2) of the *Code*. This is the reasoning which Stanley J held to be unavailable, [18] above.

[26] Before the 2020 appeal decision in this case, there was also the opinion of the respected criminal jurist R S O'Regan QC on this point. In *New Essays on the Australian Criminal Codes*,[13] he said:

> "Section 272 applies when the accused was initially in the wrong in unlawfully assaulting or provoking an assault from his victim. Like the second paragraph of s. 271 it affords protection for defensive action taken against major assaults occasioning reasonable apprehension of death or grievous bodily harm. The force must be

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12 I note these are the only three directions ever reported, and they are all on a basis consistent with the 2020 appeal decision.

13 Above.

> limited to that reasonably necessary for preservation. It will be recalled that s. 271 has been interpreted as requiring that the accused believed that [it] was necessary to use the force which he in fact used. There is no like specification in s. 272 which refers to a belief that it is necessary 'to use force in self-defence'. This indulgence towards the accused is only apparent because the second paragraph withdraws much of the protection of the first. It renders the defence unavailable to one who has himself first used force and has done so with intent to kill or to do grievous bodily harm or before the use of such force became necessary. This clearly enough is the meaning of the first two clauses but the meaning of the third and final clause is obscure. The words 'in either case' suggest a reference to the two preceding clauses but where those clauses apply no defence is available anyway. An alternative and, it is submitted, a more sensible interpretation is to apply the final clause to the two cases of the use of force causing death or grievous bodily harm in circumstances where the first paragraph would afford protection. Then the final clause would maintain such protection only when the accused had 'declined further conflict, and quitted it or retreated from it as far as was practicable'." – p 89.

[27] As a footnote to the above passage Mr O'Regan QC said:

> "… It is clear that this is the effect of the proviso in s. 56 of the 1879 English Draft Code upon which Sir Samuel Griffith based this section. That proviso reads: 'Provided that he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm: Provided also, that before such necessity arose he declined further conflict, and quitted or retreated from it as far as was practicable.'"

The 2020 Court of Appeal Decision in this Case

[28] **President Sofronoff's dissent** noted that the words which introduce the third clause of s 272(2) are "peculiar". He said, "On the one hand, the words 'in either case' strongly indicate a reference to the two uses of the same word in s 272(2) to describe each 'case'. On the other hand, the use of the word 'nor' to introduce the whole expression 'nor, in either case, unless' is capable of being read so that the retreat condition is to apply as an additional exclusion … ."

[29] The President's reasons for construing the third clause of s 272(2) as qualifying the first two clauses were, firstly, that the language used in s 272(2) supports such a construction.[14] As discussed below, I think that the language of the section is ambiguous, but there are certainly indications in the language which favour the interpretation adopted by the President.

[30] Secondly, the President relied on *Randle v The Queen*.[15] The President says that he sees "no reason to doubt the correctness of that decision". He does not however,

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14 [46] and [47] of the 2020 decision.

15 [54] and [55] of the 2020 decision.

attempt to analyse the reasoning in it, which I regard as problematic – see [25] above.

[31] Thirdly, the President's judgment contains some purposive reasoning:

> "[47] Subsection (2) provides that '[t]his protection', namely the protection offered by subsection (1), does not apply in the first case or in the second case. That must be so for these two cases are ones in which it is the accused who first brought the risk of lethality into play so that it is the *deceased* who, being the victim of a lethal assault, is alone justified under s 271(2) to use lethal force in self-defence.
>
> [48] Is there any case in which an accused who has in this way initiated the use of lethal force might still justify the use of lethal force for self-preservation? …"

[32] With respect, that reasoning assumes the interpretation the President gives to s 272(2), rather than analysing the legislation to discover its meaning. The first sentence in [47] expressly assumes it, and the question posed at [48] is one which does not arise unless one assumes the interpretation the President prefers.

[33] The last reason given by the President in his judgment is an even broader statement:

> "However, in my respectful opinion the final qualification in subsection (2) has no work to do in subsection (1). There is no reason consistent with the principles of self-defence enunciated in the *Code* why an accused who has assaulted a victim by the use of force which threatens neither death nor serious injury should have to retreat before trying to save his or her life in the face of a disproportionate lethal response." – [53] (my underlining).

[34] The appellant's counsel before us made a similar submission and used similar or identical words to those underlined above. I deal with this at [58]ff below.

[35] **The reasons of the majority in the 2020 appeal** admit that the language of the third clause of s 272(2) is difficult,[16] but find textual indications in favour of the third clause having an independent operation to exclude a defence of self-defence under s 272(2):

> "[109] At first sight, the expression 'in either case' might well appear to refer to the two cases which are respectively the subject of the first and second exceptions. However, on closer analysis, the respondent's construction is also consistent with the text of s 272(2).
>
> [110] An immediate difficulty with the appellant's construction is that by the terms of the two preceding clauses, no defence is available anyway in a case to which either relates.[17] The appellant's construction requires this third clause to operate as a means of restoring the protection of self-defence, which,

[16] [102] of the 2020 decision.

[17] The majority judgment footnotes a reference to the passage from O'Regan (above) at this point.

according to one or both of the preceding clauses, was to be denied. …

[111] The operation of the third clause, in that way, seems at odds with the structure of sub-section (2). The structure of sub-section (2) is to deny the protection of self-defence, otherwise conferred under sub-section (1), in three sets of circumstances, the second and third of which are defined by text which commences with the word 'nor'. The structure suggests that there are not two, but three exceptions to the protection conferred by sub-section (1). …"

[36] The majority judgment refers to some of the history lying behind s 272, which supports the idea that the third clause has an independent operation.[18]

[37] The majority also looked at indications of purpose or legislative intent in s 272(2) as against the meaning of ss 271 and 272(1), and the wider case law:

"[112] The [Crown's] construction leads to an effect of s 272 which, in our opinion, was more likely to have been intended. It is logically consistent with the distinction between cases within s 271 and those within s 272, that this final clause of s 272(2) should qualify the protection afforded by s 272 in every case. In cases of both unprovoked and provoked assaults, it may be relevant to consider whether the accused person sought to withdraw from the conflict, because that may be relevant to a consideration of whether he or she reasonably believed that it was necessary to use force in self-defence. But the absence of a withdrawal, when that would have been practicable, has a particular relevance where the accused person was the instigator of the conflict.

[113] That particular relevance is recognised under the common law. For example, in *Viro v The Queen*, Gibbs J said:

> 'In my opinion, in Australia the fact that the person raising self-defence was the aggressor is an important consideration of fact, but not a legal barrier to the success of the plea. The matter may be regarded in a similar light to a failure to retreat. It is obvious enough that a person cannot rely upon the plea of self-defence unless the violence against which he sought to defend himself was unlawful. If, therefore, one man makes a violent attack upon another with intent to rob him, and the man attacked defends himself, using no more force than is reasonably necessary, the original assailant cannot be said to be acting in self-defence in trying to overcome the other's resistance, since that resistance was lawful. However, if the original assailant has desisted from his attack, and his intended victim no longer needs to defend himself, and can not reasonably

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[18] [115]-[116] of the 2020 decision.

> > believe that he is still in danger, but nevertheless takes the offensive and out of anger or revenge himself becomes the attacker, the original assailant is not obliged to let himself be killed or injured without any attempt at resistance. *Nevertheless, in such a case it is difficult to see how, as a matter of fact, the conduct of the aggressor, which commences as a criminal assault with an intent to commit a serious crime, can become transmuted in split seconds into lawful self-defence, unless the aggressor has clearly broken off his attack. In such circumstances the fact that he did not retreat when he had the opportunity to do so assumes a special significance.*' (Emphasis added.)
>
> Similarly, in *Zecevic v Director of Public Prosecutions*, Wilson, Dawson and Toohey JJ said:
>
> > 'There is, however, one situation which requires particular mention. It should, we think, be regarded as raising only evidentiary matters to be considered in arriving at an answer to the ultimate question, although in the code States it is treated as raising matters of law: see s. 272 of the *Criminal Code* 1899 (Q.); s. 249 of the *Criminal Code* 1913 (W.A.); s. 47 of the *Criminal Code* 1924 (Tas.). Where an accused person raising a plea of self-defence was the original aggressor and induced or provoked the assault against which he claims the right to defend himself, it will be for the jury to consider whether the original aggression had ceased so as to have enabled the accused to form a belief, upon reasonable grounds, that his actions were necessary in self-defence. For this purpose, it will be relevant to consider the extent to which the accused declined further conflict and quit the use of force or retreated from it, these being matters which may bear upon the nature of the occasion and the use which the accused made of it.'
>
> [114] It is less likely that the intended operation of this third clause should apply only to cases within the first and second clauses, and not to other cases (where death or grievous bodily harm was caused) when the accused person was the instigator of the conflict."

This Court's Task on Appeal

[38] The issue to be resolved is one of interpretation of the *Criminal Code*. In *SZTAL v Minister for Immigration and Border Protection*[19] Kiefel CJ, Nettle and Gordon JJ said:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time,

[19] (2017) 262 CLR 362, 368.

> regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

[39] In accordance with the approach endorsed in that paragraph, I first examine the text of s 272. I conclude it is ambiguous. I turn to examine its historical context, and then its legislative context, most importantly, its interaction with s 271.

The Text of s 272

[40] It is plain in my view that something went a little astray in the drafting of the first few words of the third clause of s 272(2), "nor, in either case, unless, …". I say this because whichever interpretation is proposed, the words are not entirely apt to convey a clear meaning. The appellant's contention requires reading those words as if they said, "unless, in either case, …". The respondent's construction obliges a disregard of the words, ", in either case," or alternatively requires that some sensible meaning be given to these words. The latter task is difficult. The majority in the 2020 appeal suggested that the two cases were: (i) the use of force which caused death, and (ii) the use of force which caused grievous bodily harm.[20] R S O'Regan QC (above) suggested that the two cases were: (i) a case where a person has unlawfully assaulted another, and (ii) a case where a person has provoked an assault from another.

[41] Neither suggestion is convincing. The first suggestion seems unlikely given the composite nature of the phrases "death or grievous bodily harm", and "to kill or to do grievous bodily harm" used in ss 271 and 272. There is no suggestion anywhere in the sections that a different result flows from a consideration of death (or killing) on the one hand, and grievous bodily harm on the other. As to the second suggestion, it seems undoubted that the first two cases described by s 272(2) each apply both when the initial aggressor has unlawfully assaulted another, and where they have provoked an assault from another. It therefore seems odd that only in the third case would Sir Samuel Griffith have decided to make that express. This latter point also arises in respect of the first suggestion.

[42] As noted in the 2020 appeal decision, the use of the word "case" three times in quick succession in s 272(2), where it is used nowhere else in ss 271 or 272 supports the idea that the two cases being spoken of "in either case" are the two cases just mentioned. The appellant additionally relied upon the phrase "such force", in the underlined part above. It was said to be a reference back to the words "using force" in both the first and second cases described in s 272(2). I find this less persuasive, because the words "such force" also appear in s 272(1).

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20 [104] of the 2020 decision.

[43] My conclusion from the language alone is that s 272(2) does not permit an entirely literal construction; that is, it is ambiguous.

Historical Context

[44] It is legitimate to look to the antecedent common law for the purpose of interpreting a *Code* only where the *Code* is ambiguous, *Stuart v The Queen*.[21] In *Mellifont v Attorney-General (Qld)*[22] the High Court said of the ambiguity necessary:

> "… That ambiguity must appear from the provisions of the statute; in other words, it is not permissible to resort to the antecedent common law in order to create an ambiguity. Nor, for that matter, is it permissible to resort to extrinsic materials, such as the draft Code and Sir Samuel Griffith's explanation of the draft Code, which are referred to in the dissenting judgment of Cooper J in the Court of Criminal Appeal, in order to create such an ambiguity." – p 309.

[45] Here the ambiguity in s 272(2) is inherent in the text itself. It seems to me legitimate to look both at the legislative history of the *Code* and the common law in order to interpret it.

Legislative History of the Code

[46] In 1897 Sir Samuel Griffith wrote to the Attorney-General enclosing his draft *Criminal Code*. That letter and the draft were published by the Government Printer and presented to both Houses of Parliament. That is, they are public documents.[23] The draft *Code* is set out in two columns. The covering letter explains, "… the proposed provisions of the *Code* being printed in the right-hand column, and the sources from which they are derived, or other analogous provisions, being stated or referred to in the left-hand column. When the source is Statute Law, the corresponding provisions of the Statute are reprinted from my Digest of 1896 … When, however, the proposed provision is undoubted Common Law, I have not thought it necessary to do more than say so."

[47] In Sir Samuel Griffith's notes to the draft *Code*, against the provision which became s 272, is the notation, "Compare Bill of 1880, s 57". In the context of Sir Samuel Griffith's letter, the notation shows that he did not use the common law as the direct source for s 272, but the Bill of 1880.[24] Nonetheless, further examination shows that the Bill of 1880 was meant to state the common law.

[48] There are cases, which are now somewhat dated, which prohibit resort to Griffith's notes on the draft *Code* in order to interpret it.[25] However, there is a deal of High Court authority to the contrary. Without aiming to be comprehensive, in *Mellifont* (above) Gibbs J did not criticise Cooper J's resort to those notes, and it can be seen

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21 (1974) 134 CLR 426, 437.

22 (1991) 173 CLR 289, 309.

23 These documents are available in facsimile in the Supreme Court Library and (along with many other such materials) on a very comprehensive website owned by the Queensland University of Technology, digitalcollections@qut.edu.au, under the tab Queensland Criminal Code 1879-1899.

24 Cf footnote 3 on p 337 of "Self-Defence in the Griffith Code" by R S O'Regan QC [1979] 3 Crim LJ 336, and the majority judgment in the 2020 appeal decision in this case, [110].

25 *R v Martyr* [1962] Qd R 398, pp 412-413 and *R v Burnell* [1966] Qd R 348.

from the judgment of Cooper J in the Queensland Court of Criminal Appeal[26] that Cooper J made quite an extensive examination of those notes, and of Griffith's Digest of 1896 which preceded his draft *Code*. The draft *Code* and the letter to the Attorney-General were used in the judgment of Gleeson CJ, Gummow, Crennan and Kiefel JJ in *CTM v The Queen*,[27] as context to the interpretation of (ironically) the common law, as to honest and reasonable mistake. Use was made of Griffith's marginal notes in *O'Dea v Western Australia* by Gordon, Edelman and Steward JJ.[28]

[49] I cannot see any difficulty with having regard to the notation referred to at [47] above and the part of the letter extracted at [46] above to understand that Sir Samuel Griffith used the 1880 Bill as a model when drafting ss 271 and 272; so much appears from a comparison of the texts of the two provisions.

[50] The Bill of 1880 was presented to the English Parliament in an attempt to codify the Criminal Law of England and Ireland. The Bill was put before parliament but it was never passed.[29] It contained two sections which closely resemble ss 271 and 272. The latter is:

> "57 Self-defence against provoked assault.
>
> Every one who has without justification assaulted another, or has provoked an assault from that other, may nevertheless justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked, and in the belief on reasonable grounds that it is necessary for his own preservation from death or grievous bodily harm: Provided that he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm: Provided also, that before such necessity arose he declined further conflict, and quitted or retreated from it as far as was practicable.
>
> Provocation within the meaning of this and the last preceding section may be given by blows words or gestures."

[51] The provisions of the 1880 Bill were based on a draft produced by a Royal Commission headed by Lord Blackburn. The Report of the Royal Commission included the following paragraph:

> "Sections 25 to 66, both inclusive, contain a series of provisions as to the circumstances which justify the application of force to the person of another against his will. To these we have already referred at some length. We believe that in the main these provisions embody

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[26] 8 August 1990, CA No 76 of 1990.

[27] (2008) 236 CLR 440, [1]-[4] and [15].

[28] [2022] HCA 24, [59].

[29] There was a change of government, but also Chief Justice Cockburn wrote a letter, 12 June 1879, to the Attorney-General of the day which, although it began with an assurance that the Chief Justice approached the subject "in no hostile spirit", contained very negative views about the Bill.

> the common law, though on some points they lay down a definite rule where the law is at present doubtful, and in others correct what appear to be defects in the existing law. We have noticed in marginal notes the points in which we conceive the law to be altered by these sections."

There are no marginal notes against the self-defence sections in the annotated draft. Thus, the provisions as to self-defence in the 1880 Bill were based on what the committee believed to be the common law at the time.

[52] The New Zealand Parliament adopted a Criminal Code very much in line with the 1880 English Bill. That *Code* included s 57:

> "57. Every one who has without justification assaulted another, or has provoked an assault from that other, may nevertheless justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked, and in the belief on reasonable grounds that it is necessary for his own preservation from death or grievous bodily harm :
>
> Provided that he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm :
>
> Provided also that before such necessity arose he declined further conflict, and quitted or retreated from it as far as was practicable."[30]

[53] In 1961 the New Zealand *Code* was replaced by the *Crimes Act* which contained a section very like s 57 of the preceding legislation:

> "49. Self-defence against provoked assault – Every one who has assaulted another without justification, or has provoked an assault from that other, may nevertheless justify force used after the assault if –
>
> (a) He used the force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked and in the belief, on reasonable grounds, that it was necessary for his own preservation from death or grievous bodily harm; and
>
> (b) He did not begin the assault with intent to kill or do grievous bodily harm and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm; and

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30 *Criminal Code 1893* (NZ), No 56.

(c) Before the force was used, he declined further conflict and quitted or retreated from it as far as was practicable."[31]

This section remained in this form until 1 January 1981.

[54] There are two things to be drawn from the above review. First, the provision at s 272 was (indirectly) based on the common law. Secondly, the English Bill of 1880 and the New Zealand legislation contain analogues to the third clause of s 272(2) and they plainly impose an independent limit on the defence of self-defence in the analogue to s 272(1). It is possible that in departing from the words of the 1880 Bill Sir Samuel Griffith was intending to change this position.[32] And in this regard it must be noted that the Griffith Code in Queensland did not attempt merely to declare the existing criminal law but to "declare, consolidate and amend" it.[33] However, it seems to me unlikely that there was a deliberate change. Why would Griffith, who could write so clearly, deliberately embark on making a significant change to the common law, but use ambiguous language to do so? Why would he not signal or explain the change in his marginal notes, but instead reference the 1880 Bill? And lastly, why would he make a change which, in its substance, complicated the existing common law? These other legislative provisions are a substantial indication in favour of the third clause of s 272(2) being interpreted as an independent circumstance precluding the availability of a defence of self-defence.

Common Law

[55] In line with the indication at [51] above, it seems tolerably clear that, at the time both the English draft *Code* of 1880 was written, and at the time Griffith drafted the Queensland *Criminal Code*, the common law required a defendant raising self-defence as a defence to homicide to prove "as an independent and imperative condition"[34] of such a plea that they had retreated from the conflict before employing force, not in every case[35] but in cases where the defendant was not "blameless from the first" because there had been a "fight or quarrel".[36]

[56] In *Russell on Crimes and Misdemeanours* (5th ed),[37] the distinction between excusable and justifiable homicide is explained in terms similar to the summary of Bray QC's argument in the South Australian Full Court in *R v Howe*, 107ff. Justifiable homicide was a defence "where no shadow of blame can be attached to the party killing", whereas excusable homicide imported "some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilt of felony …". That text describes that when a person was assaulted "in the course of a sudden brawl or quarrel" they would be excused on the ground of self-defence, but to be entitled to such a plea in defence the defendant had to have made the attack "on a sudden occasion, and not premeditated, or with

31 *Crimes Act 1961* (NZ), No 43.
32 [116] of the 2020 decision.
33 Preamble to the *Criminal Code* (Qld).
34 *R v Howe* (1958) 100 CLR 448, 463.
35 *R v Howe* [1958] SASR 95, 109, "if blameless from the first, the self-defendant is *not* bound to retreat if possible, before killing ...".
36 *R v Howe* [1958] SASR 95, 108-109 and *R v Howe* (1958) 100 CLR 448, 463.
37 1877, chapter 1, pp 843-850.

malice"; killed through "mere necessity, in order to avoid immediate death" and, "before a mortal stroke given he had declined any further combat" – p 845.

[57] That this was the common law at the time the Queensland *Criminal Code* was written is a strong indicator in favour of interpreting the third clause in s 272(2) as an independent proviso to s 272(1). It also gives insight into how ss 271 and 272 of the *Code* were modelled on the common law. At common law there was a distinction between a defendant who was blameless (cf s 271) and acted in self-defence, and a defendant who was not initially blameless (cf s 272). Persons in the second of these classes had to show that their fault was relatively "trivial" and also had to show retreat.

Interpretation of s 272 *in situ* with s 271

[58] When s 272 is interpreted having regard to the provisions of s 271, the appellant's counsels' submissions based on an interpretation in accordance with subjective notions of justice can be seen to be ill-founded.

[59] For convenience I set out sections 271 and 272 of the *Criminal Code*:

> "**271 Self-defence against unprovoked assault**
>
> (1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
>
> (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.
>
> **272 Self-defence against provoked assault**
>
> (1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
>
> (2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using

> force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable." – (my underlining).

[60] In *Muratovic* Hart J outlined what he called the key to understanding ss 271 and 272:

> "Sections 271 and 272 are successive and it will be noted that the first purports to deal with self-defence against unprovoked assault, and the second self-defence against provoked assault. The key to their understanding is, in my view, the use of the words 'has not provoked *the* assault' in s 271 and 'has provoked *an* assault' in s 272. These words draw a distinction between provoking *the* assault actually made and provoking *an* assault; the natural inference is that it is possible to provoke an assault without provoking the assault actually made and this is the way I think the sections should be interpreted." – p 27. (my underlining; italics in the original).

[61] The importance of Hart J's observation that s 271 and s 272 are "successive" cannot be understated. Difficulty is encountered in understanding the operation of s 272 if interpretation starts with the words of s 272(1); as Hart J said in *Muratovic*, "to be understood [ss 271 and 272] must be considered together" – p 25. A failure to recognise this underlies much of the appellant's counsels' submissions as to broad (subjective) ideas of justice which it is said, by their nature, require s 272 to be interpreted as they contend. In this vein, the appellant's counsel submitted that, "The effect of the majority's decision in *Dayney (No 1)* is that any person who offers a minor assault or verbal provocation to another is forbidden from defending himself or herself against an immediate, seriously violent or murderous attack, unless they have first *'declined further conflict, and quitted it or retreated from it as far as was practicable.'* This interpretation radically restricts the scope of the defence."[38]

[62] To illustrate the point of Hart J's analysis by reference to the facts in this case, it has first to be remembered that the jury was instructed that, if they accepted the appellant's version of events, or had a doubt about that version, they were to consider both s 271 and s 272. Dayney's evidence was that he used force in reaction to the deceased's drawing a gun and pointing it at him. This was a serious assault, threatening death or serious injury to Dayney. To determine whether Dayney was entitled to a defence of self-defence, the jury would look first to s 271. If they believed that Dayney had not provoked "the assault" offered by Mr Spencer and accepted that Dayney believed on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm, then it was lawful for Dayney to use such force by way of defence to the deceased man's pointing a gun at him as was necessary for his defence, even though that force might kill Mr Spencer – s 271(2). He was not obliged to have retreated as an independent condition of that defence being available.

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[38] Appellant's written submissions on appeal, paragraph 20, italics in the original.

[63] It was only if the jury took the view that Dayney had provoked Mr Spencer to make the assault which Mr Spencer did make (a deadly assault) that they needed to consider s 272. If they did reach that point, there is nothing inherently unjust about a requirement that Dayney had declined further conflict and quitted it or retreated from it as far as practicable. The jury at this point would have determined that Dayney had provoked a deadly assault and, having done so, killed Mr Spencer when Mr Spencer made an assault of the very type which he, Dayney, had provoked.

[64] To deal directly with the factual situation postulated at paragraph 20 of the appellant's counsels' submissions, [61] above, a person who offers a minor assault or verbal provocation to another and is met with a murderous attack will have a defence under s 271 because they have not provoked "the assault" offered in response to their minor assault or verbal provocation; retreat will not be an independent requirement of the defence.

[65] That this is so was recognised by O'Regan (above), "For instance if the accused used mildly insulting language to his victim who retaliated with force likely to cause death or grievous bodily harm the accused's response to that attack would be assessed according to s 271 and not s 272" – p 76. And later:

> "It is significant to note that the first paragraph [of s 271] applies when the accused has not provoked 'the assault' made upon him by the person against whom he acts in self-defence. In other words he may still have the protection of the paragraph if he has provoked *an* assault but not the one actually made. As Hart J pointed out in the leading Queensland case of *Muratovic,* 's 271 applies if there is either no provocation at all or no provocation for the assault actually made, although there may have been provocation for an assault'. Thus if A has given B a minor insult and B has retaliated with disproportionate force (so that a defence of provocation would not be available to him) A may still rely on s 271 because he has not provoked *the* assault. If s 271 were not read this way A would have had no right to resist unless s 272 became applicable because the force used by B was such as to cause reasonable apprehension of death or grievous bodily harm." – p 79.

[66] For completeness I would add that the other fault in the appellant's counsels' submissions as to the broad justice of the matter was that the third clause of s 272(2) only obliges a defendant to retreat "as far as was practicable". If it was impossible to decline, quit or retreat from conflict because of the suddenness and ferocity of the attack made by the deceased, a defence under s 272 would be available to a defendant notwithstanding that the third clause of s 272(2) operated as an independent condition of that defence.

Ambiguity in a Criminal Statute

[67] Lastly as to ground 1, the appellants relied upon the principle in *Beckwith v The Queen*:

> "The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute

> remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences … The rule is perhaps one of last resort."[39]

[68] I do not think this is a case calling for the application of a rule of last resort. While the words of s 272(2) alone do exhibit ambiguity, that is resolved when resort is had to the historical and legislative context.

Ground 2 – "Before Such Necessity Arose"

[69] The appellant argued that if this Court came to the above construction of s 272(2), a second issue arose as to the time when the defendant must have retreated. It was submitted that the time when "such necessity arose" was a reference to the time when the defendant was induced to believe, on reasonable grounds, that it was necessary for his or her preservation from death or grievous bodily harm to use force in self-defence, to use the words of s 272(1). I think that construction is correct.

[70] In the present case the jury was instructed that they were to consider whether or not the appellant had declined further conflict, quitted or retreated as far as practicable, "before Mr Spencer pulled out the gun" – AB 106. I note that Douglas J gave the same instruction in the 2018 trial. The appellant's evidence was that it was from the time that Mr Spencer pulled out the gun, that he believed that he needed to act to protect himself from death or grievous bodily harm.

[71] Nonetheless, the appellant submitted that the above direction was incorrect. It was said that after Mr Spencer pulled out the gun there was a protracted struggle (on the appellant's evidence) which involved the appellant moving from the living room to the hall, to the back patio. It was submitted, "If the directions had allowed it, the jury could potentially have seen this as a retreat by the appellant by trying to get out of the house …".[40] Thus, it was argued, if the jury concluded that the fatal blows were struck, say, on the patio, rather than beforehand, the jury might have thought that the defendant had retreated as far as practicable before the fatal blow was struck. It was submitted that the jury ought to have been instructed first to determine when the fatal blow was struck, and then to determine whether or not the defendant had declined further conflict, quitted or retreated from the conflict as far as practicable before striking this blow.

[72] It seems to me this argument disregards the evidence in the case and the words of s 272(1). As to the former, the appellant's evidence that, "everything he had done [after Mr Spencer produced the gun] during the reasonably protracted struggle with Mr Spencer had been to prevent Mr Spencer from firing the pistol at him, or Mr Spencer regaining the pistol or another firearm and using it to kill him".[41] That is, there was just one protracted struggle after the appellant formed the requisite belief in terms of s 272(1).

[73] As to the words of s 272(1), once a jury accepts that a defendant has come to believe on reasonable grounds that it is necessary for his preservation from death or

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39 (1976) 135 CLR 569, 576. This rule, and its being one of last resort, were referred to in the majority judgment in *Aubrey v The Queen* (2017) 260 CLR 305, [39].

40 Paragraph 41, appellant's Outline of Argument on appeal.

41 Paragraph 6, appellant's Outline of Argument on appeal.

grievous bodily harm "to use force in self-defence, [he or she] is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm". The plain and natural meaning of this provision is that once the accused has formed the necessary belief on reasonable grounds, he is not criminally responsible for use of force thereafter which is reasonably necessary for his preservation. Thus, if he causes bodily harm to the other party to the conflict he is not responsible for it. The last words of s 272(1), "although such force may cause death or grievous bodily harm" make it clear that even if death or grievous bodily harm is caused, there is still no criminal responsibility, if the terms of the section are otherwise met.

[74] There is no warrant to start dissecting or compartmentalising the results of the force used in self-defence during the course of one continuous struggle. Nor is there any necessity to attempt to discover when the ultimate harm is caused to the recipient of the accused's use of force and treat that harm, and that time, separately to what has gone before. The proper focus is the time the necessity arose, not the time the act causing death occurred. Well before the appellant here struck the blow which caused Mr Spencer's death, he struck blows which must have caused him bodily harm and grievous bodily harm. If the jury decided that the appellant formed the requisite belief, on reasonable grounds, his use of force thereafter was something for which he was not criminally responsible, provided he was otherwise within the terms of s 272.

[75] In my view, the direction of the trial judge as to the time relevant to the jury's consideration of the third clause of s 272(2) was correct.

Reform to the Law of Self-Defence

[76] As discussed, the New Zealand provisions as to self-defence originally derived from the 1880 English Bill. In 1975, in *R v Kerr*,[42] the New Zealand Court of Appeal said:

> "*Palmer v The Queen* … was an appeal to the Privy Council, apparently from a common law jurisdiction. In a passage from which we have already quoted a part Lord Morris said:
>
> > 'In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it.
> >
> > Only common sense is needed for its understanding …'
>
> … Regrettably the same thing cannot be said of ss 48 and 49 of the *Crimes Act.* We feel sure that many juries must find the varying tests and distinctions laid down by s 48(1), s 48(2) and s 49 quite incomprehensible: and, further, that they would in that situation tend to deal with the case in the commonsense way described by Lord Morris. We would strongly urge that ss 48 and 49 be replaced by some simpler form of legislation. This question is currently in the hands of the Criminal Law Reform Committee. It has been a source of concern to the judges for a considerable number of years."

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[42] [1976] 1 NZLR 335, 343-344.

Fifty years on, the same comment could be made as to the state of the law of self-defence in Queensland. I note that New Zealand now has one sentence which does the work of our ss 271, 272 and 273, namely, "Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use" – s 48(1) *Crimes Act 1961* (NZ).

[77] **BODDICE J:** I agree with Dalton JA.