

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, GLEESON, JAGOT AND BEECH-JONES JJ

MARK VINCENT DAYNEY

APPELLANT

AND

THE KING

RESPONDENT

Dayney v The King
[2024] HCA 22
Date of Hearing: 19 April 2024
Date of Judgment: 12 June 2024
B69/2023

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

R M O'Gorman KC with J J Underwood for the appellant (instructed by A W Bale & Son Solicitors)

C W Wallis with S L Dennis for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

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CATCHWORDS

Dayney v The King

Criminal law – Appeal against conviction – Self-defence against provoked assault – Where appellant convicted of murder – Where s 272(1) of *Criminal Code* (Qld) affords defence of self-defence against provoked assault – Where s 272(2) identifies cases to which defence does not apply – Where s 272(2) contains three clauses – Where third clause of s 272(2) states that accused will not obtain protection of s 272(1) unless they declined further conflict and quitted it or retreated from it as far as practicable before using force in self-defence – Whether condition in third clause of s 272(2) is an independent condition or modifies effect of first two clauses of s 272(2) – Whether trial judge erred in directing jury that appellant must satisfy retreat condition for defence of self-defence against provoked assault.

Words and phrases – "death or grievous bodily harm", "murder", "necessity", "nor, in either case", "reasonably necessary", "self-defence", "self-defence against provoked assault".

Criminal Code (Qld), s 272.

Introduction

1 Section 272 of the *Criminal Code* (Qld) ("the Code"), headed "Self-defence against provoked assault", affords a defence to all criminal charges involving an assault, spanning common assault to murder. The section provides:

"(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."

2 Section 272(1) affords a protection from criminal responsibility for the use of force in response to a provoked assault and s 272(2) identifies cases to which that protection does not extend.

3 This appeal is concerned with the proper construction of s 272(2). The question is whether, as the Court of Appeal of the Supreme Court of Queensland unanimously held in the decision under appeal in *R v Dayney [No 2]*¹ following the reasoning of the majority in *R v Dayney [No 1]*,² s 272(2) specifies three independent conditions in which the protection given by s 272(1) is not available

1 (2023) 13 QR 650.

2 (2020) 10 QR 638.

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or whether, as Sofronoff P considered in *Dayney [No 1]*, the final clause modifies the effect of the first two clauses.

4 For reasons to be explained, the Court of Appeal was correct, and the appeal must therefore be dismissed. The final clause of s 272(2) specifies an independent condition that operates to deny the protection in s 272(1), in a case where the accused uses force which causes death or in a case where the accused uses force which causes grievous bodily harm, unless the accused first retreated from the conflict before engaging in such force.

The proceedings below

5 In October 2014, the appellant was involved in a violent altercation resulting in the death of Mark Spencer.

6 The appellant first stood trial before Douglas J and a jury in the Supreme Court of Queensland charged with Mr Spencer's murder. The Crown case was that the appellant killed Mr Spencer during a planned burglary of Mr Spencer's home. At trial, the appellant testified that Mr Spencer pulled out a gun immediately after he entered Mr Spencer's lounge room and that everything he did after that point was done for the purpose of saving his own life or that of his girlfriend, who was present at the time.

7 In response to a question from the jury concerning s 272 of the Code, Douglas J instructed the jury in the following way:

"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."

8 The jury convicted the appellant, who appealed the conviction on grounds which included that Douglas J misdirected the jury on the application of s 272(1) of the Code. In *Dayney [No 1]*, the Court of Appeal, comprising Sofronoff P, Fraser and McMurdo JJA, allowed the appeal and ordered a retrial.

9 However, a majority, Fraser and McMurdo JJA, rejected the misdirection ground, concluding that, on the proper interpretation of s 272(2) of the Code, "self-defence [under s 272(1)] ... could be excluded by proof that, as far as was

practicable, the accused person did not decline further conflict, and quit it or retreat from it, before it became necessary to preserve himself or herself".³

10 Sofronoff P would have upheld the misdirection ground. Consistently with reasoning of the Court of Criminal Appeal of the Supreme Court of Western Australia in *Randle v The Queen*,⁴ his Honour construed the third clause of s 272(2) as operating "to deny an accused, whose case fits into the two kinds of cases referred to in the subsection, a legal excuse for killing unless the accused first removes the necessity (which the accused created) for the deceased to use lethal force".⁵

11 At the retrial, before Bowskill SJA and a jury, the appellant was convicted. He appealed that conviction on two grounds, including that Bowskill SJA erred by adopting Fraser and McMurdo JJA's interpretation of s 272(2) in instructing the jury. A differently constituted Court of Appeal (Mullins P, Dalton JA and Boddice J) dismissed the appeal in *Dayney [No 2]*. Dalton JA, with whom Mullins P and Boddice J agreed, held that the interpretation of s 272(2) adopted by Bowskill SJA was correct.⁶

The proper construction of s 272(2)

12 The Code is to be construed "without any presumption that it was intended to do no more than restate the existing law".⁷ Though the parties drew attention to the potential interpretative relevance of the *Draft of a Code of Criminal Law* prepared by Sir Samuel Griffith for the Government of Queensland and the letter from Sir Samuel to the Attorney-General, dated 29 October 1897, under cover of which that draft was submitted, neither party submitted that those documents bore meaningfully on the construction of s 272(2).

3 *R v Dayney [No 1]* (2020) 10 QR 638 at 663 [100].

4 (1995) 15 WAR 26 at 36-37, 48.

5 *R v Dayney [No 1]* (2020) 10 QR 638 at 653 [51].

6 (2023) 13 QR 650 at 656 [4].

7 *Brennan v The King* (1936) 55 CLR 253 at 263; *Stuart v The Queen* (1974) 134 CLR 426 at 437.

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13 The surest guide to the proper construction of s 272(2) lies in a detailed
analysis of its text in the context of s 272 as a whole.

14 Turning first to s 272(1), the defence of self-defence against provoked
assault in s 272(1) applies where: the accused "unlawfully assaulted", or provoked
an assault from, another person; that other person responded with such violence as
to induce in the accused a reasonable apprehension of death or grievous bodily
harm; and the force used by the accused in retaliation was "reasonably necessary
for such preservation [from death or grievous bodily harm], although such force
may cause death or grievous bodily harm".

15 The protection provided by s 272(1) will lead to an accused being found not
criminally responsible for the infliction of injury, including causing death or
grievous bodily harm. The availability of that protection is predicated on the
accused demonstrating that their resort to such force was "reasonably necessary"
for self-preservation from death or grievous bodily harm. Put another way, the
protection is designed to excuse an accused from the use of such force, and the
resultant grave consequences, where the need to use such force was reasonably
necessary for self-defence.

16 Turning then to s 272(2), textually, sub-s (2) comprises three distinct
clauses, each demarcated by semi-colons. As will be seen, each expresses a distinct
category of case to which the "protection" from criminal responsibility afforded
by s 272(1) does *not* "extend".

17 The first clause provides that "[t]his protection [being the protection
provided in sub-s (1)] 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".⁸ This clause is self-explanatory.
The protection does not extend to "a case" in which the accused causes death or
grievous bodily harm and "first begun" the assault (being the initiating assault
described in s 272(1)) with *intent* to kill or to do grievous bodily harm to some
person.

18 The second clause commences with the phrase "nor to a case in which".
Textually, that clause can and should be read so that "nor" encompasses the
opening phrase of s 272(2) – "[t]his protection does not extend". The second clause
then provides, in effect:

8 Emphasis added.

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"[This protection does not extend] 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".

19 Again, this sentence requires little explanation. It provides that the protection does not extend to "a case" in which the accused causes death or grievous bodily harm to another and endeavoured to kill or do such harm "before the necessity of so preserving [themselves] arose". As s 272(2) identifies the cases to which the protection from criminal responsibility afforded by s 272(1) does not extend, it is apparent that the reference to "necessity" here picks up the concept of "necessity" that is introduced by, and provides the foundation of, the protection provided by sub-s (1). Understood in this way, the expression "the necessity of so preserving himself or herself" means the necessity of preserving himself or herself "from death or grievous bodily harm", in s 272(1).

20 Two features are common to both "cases" described in the first two clauses of s 272(2): first, the accused engaged in force that caused death or grievous bodily harm; and second, the accused's use of force before it was strictly necessary for self-preservation was accompanied by relevant intent. In the first scenario, the accused "began the assault" with *intent* to kill or to do grievous bodily harm. The corollary is that such force was not in service of, or necessitated by, self-preservation. In the second scenario, the text is explicit – the accused engaged in such force before the necessity of so doing arose. While the phrase "death or grievous bodily harm" often forms part of a composite phrase used to describe the mental element for the offence of murder, that is not the sense in which that phrase is used in the first two clauses of s 272(2). Those clauses are directed to whether the accused will or will not be exonerated for two classes of offences (or "cases"), namely those where the accused occasioned death in response to the provoked assault and those where the accused occasioned grievous bodily harm in response to the provoked assault.

21 The third clause in s 272(2) commences with the phrase "nor, in either case, unless, before such necessity arose". The drafting of the third clause was variously described by the courts below as "peculiar" and difficult. The peculiarity arises because of the use of the terms "nor" and "in either case" in the opening phrase of the third clause.

22 As already noted, "nor" introduces both the second and third clause. This structure provides strong textual support for reading the third clause as an additional independent condition, rather than as a qualification on the operation of the two exclusions set out in the first two clauses of s 272(2). Consistent with that

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structure, reading "nor" as encompassing the opening phrase of s 272(2) – "[t]his protection does not extend" – can, and should, be adopted.

23 The next phrase, "in either case," is to be read literally, and in context, as referring to the alternative cases addressed in both of the first two clauses of s 272(2), namely a case in which the accused uses force which causes death *or* a case in which the accused uses force which causes grievous bodily harm.

24 The next limb of the third clause is the phrase "before such necessity arose". As noted above, consistent with the two preceding clauses, necessity here refers to the use of such force as is "necessary for the person's preservation from death or grievous bodily harm", even though that force may itself cause death or grievous bodily harm. Put another way, it is a reference to using such force as is reasonably necessary for the purposes of self-defence.

25 Finally, the phrase "unless ... the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable" identifies what the accused must do before obtaining the protection from criminal responsibility. The phrase "the person using such force" is a reference back to "the person" and the words "using force" in both the first and second cases described in s 272(2). In other words, it refers to an accused who uses force which causes death *or* grievous bodily harm.

26 On that construction, the third clause of s 272(2) can be restated in the form of a sentence:

This protection in s 272(1) does not extend:

- to a case in which the person uses force which causes death; or
- to a case in which the person uses force which causes grievous bodily harm,

unless, before the necessity of the person's preservation from death or grievous bodily harm arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

27 On this construction, an accused who has instigated conflict – by assault or provocation – and who causes death or grievous bodily harm cannot avail themselves of the protection in s 272(1) unless, before the necessity of resorting to such force arose, they first, as far as was practicable, sought to neutralise the threat they themselves created. The requirement to decline further conflict and quit or retreat is thus one of de-escalation, as far as is practicable. An accused who creates

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conflict through a provocative act, and then responds with force that causes death or grievous bodily harm, cannot plead self-defence without demonstrating that, as far as was practicable, they first attempted to de-escalate and undo their part in the conflict before resorting to such force. That construction is consistent with the principle of necessity that governs the defence in s 272(1) and the exclusions in the first two clauses of s 272(2).

28 So understood, the third clause in s 272(2) focuses on the accused who instigated the conflict and requires that they interrupt or remove, as far as is practicable, their role in inciting the conflict and thereby their blameworthiness, before the necessity to engage in force which causes death or grievous bodily harm can be relied upon as a defence. Thus, where the accused could have attempted, but did not attempt, to quit the conflict or retreat from it before the necessity of resorting to force in self-defence arose, then their conduct which results in grave consequences cannot be excused, as the conflict was instigated and continued by them.

29 Put another way, if the accused has engaged in force which has provoked the other person to retaliate with equal force, the accused should not get the benefit of self-defence without first retreating. The relevance of retreat, in this context, is that it eliminates the accused's provocation of the other person to engage in such force. In the event that the other person nevertheless proceeds to engage in force so as to cause a reasonable apprehension of death or grievous bodily harm – that is, they re-introduce conflict – they become the primary aggressor, thereby entitling the accused to resort to such force as is necessary to protect themselves against such escalatory action.

30 As is clear, the retreat requirement is confined in two ways. It applies only to the extent that a retreat is practicable. On no view does the third clause necessarily require an accused to retreat in the face of a disproportionate lethal response. Further, consistent with the first two clauses in s 272(2), the clause operates only to limit the availability of the protection in s 272(1) in the most extreme of cases, where the accused's use of force occasions death or grievous bodily harm. However, unlike the first two clauses, the third clause is not concerned with whether an accused had or acquired an intention to kill or cause grievous bodily harm. Instead, it operates to deny the protection in s 272(1) in all cases where the accused uses force which causes death or grievous bodily harm, unless the accused first retreated from the conflict before engaging in such force.

Conclusion

31 The appeal must be dismissed.