

# PRIVY COUNCIL DECISIONS IN AUSTRALIA: THE LAW OF EXCESSIVE FORCE IN SELF-DEFENCE

*VIRO v. THE QUEEN*

The Privy Council — “an eminent relic of colonialism”<sup>1</sup>

The Law of Self-Defence — “Detached reflection cannot be demanded in the presence of an uplifted knife”.<sup>2</sup>

## Introduction

In the space of fifteen years the High Court has taken two large steps towards the assertion of the independence of the Australian judicial system. In both cases the vehicle of change was the criminal law. In 1963 the High Court, led by Dixon, C.J. in *Parker v. The Queen*,<sup>3</sup> for the first time categorically refused to follow a decision of the House of Lords. In 1977 in *Viro v. The Queen*<sup>4</sup> the High Court found that all decisions of the Privy Council were no longer binding on the High Court.

The changes made in *Viro* cannot be understood without a brief background of the relevant substantive law, that of self-defence.

The right of self-defence is by no means a recent innovation in the common law.<sup>5</sup> Any force so used is required to be reasonable, or reasonably necessary.<sup>6</sup> In contemporary terms, the test is an objective one, *viz.*, taking into account all the external circumstances of the situation whether the accused, acting as a reasonable man, believed his actions to be necessary.<sup>7</sup>

If the accused kills in self-defence he is entitled to an acquittal if the prosecution cannot convince the jury, beyond reasonable doubt, that the death was not reasonable in the circumstances.<sup>8</sup> The corollary to this

<sup>1</sup> *Viro v. The Queen* (1978) 18 A.L.R. 257 at 319 *per* Murphy, J.

<sup>2</sup> *Brown v. United States of America* (1920) 256 U.S. 339 at 343 *per* Holmes, J.

<sup>3</sup> (1963) 111 C.L.R. 610.

<sup>4</sup> (1978) 18 A.L.R. 257.

<sup>5</sup> See *Cockcroft v. Smith* (1705) 2 Salk. 642 and *Kenny's Outlines of Criminal Law* (19th ed. 1966) p. 143.

<sup>6</sup> *Halsbury's Laws of England* (4th ed. 1976) Vol. 11 p. 630; *R. v. Rose* (1884) 15 Cox C.C. 540; *R. v. Green* (1847) 11 J.P. 246; *R. v. McInnes* [1971] 3 All E.R. 295; *Palmer v. R.* [1971] 1 All E.R. 1077.

<sup>7</sup> R. M. Perkins, *Criminal Law* (1969) p. 994; *Viro v. The Queen* (1978) 18 A.L.R. 257 at 310 *per* Jacobs, J.

<sup>8</sup> Note that the accused does not have to prove anything. The onus of proof is always on the prosecution: *Woolmington v. D.P.P.* [1935] A.C. 462 at 481.

principle is that if the jury is convinced that the accused was not reasonable in his behaviour, then any honest belief he may have had at the time in the necessity of his acts is irrelevant, and the accused is guilty of murder, provided all other elements of the crime are proved.

The above may be termed the "basic" defence of self-defence.

The "qualified" defence of self-defence<sup>9</sup> was formulated by the High Court in *R. v. Howe*<sup>10</sup> in answer to the law's disregard of the subjective belief of the accused as to the necessity or reasonableness of his acts. Under this doctrine it became possible for a jury, while believing beyond reasonable doubt that the accused had not acted reasonably in his own defence, to find him guilty only of manslaughter as long as two criteria were satisfied. These were:

- (i) that the only bar to an acquittal on the ground of self-defence was that the force used was excessive;<sup>11</sup> and
- (ii) that the accused believed at the time that the force he was using was necessary or reasonable.<sup>12</sup>

This doctrine grew apace in Australia and other British Commonwealth countries,<sup>13</sup> although occasionally it encountered judicial opposition.<sup>14</sup> In 1971 it received a heavy blow from the Privy Council in *Palmer v. R.*<sup>15</sup> in which *Howe*, and any concept of a qualified defence of self-defence, were rejected. The accused was either acting in self-defence, *viz.*, he was doing that which was "reasonably necessary", or he was not.<sup>16</sup> The place for the subjective belief of the accused, according to the Privy Council, is not in the operation of a qualified defence, as an extension of the traditional defence, but rather as "most potent evidence", in the basic defence, that his acts were reasonable.<sup>17</sup> The Privy Council reiterated its views in *Edwards v. R.*<sup>18</sup>

Thus, from 1971 onwards the views of the High Court and the Privy Council were in direct conflict.

### Facts in *R. v. Viro*

Frederick Viro, in company with three others, and pursuant to a plan, attempted to rob a drug trader, John Rellis, by assaulting him

<sup>9</sup> Also commonly referred to as "excessive force in self-defence".

<sup>10</sup> (1958) 100 C.L.R. 448; see also the decision of the South Australian Supreme Court [1958] S.A.S.R. 95.

<sup>11</sup> (1958) 100 C.L.R. 448 at 462 *per* Dixon, C.J.; *R. v. Enright* [1961] V.R. 663.

<sup>12</sup> (1958) 100 C.L.R. 448 at 471 *per* Menzies, J.; at 462 *per* Dixon, C.J. where he approves in general of the judgment of the South Australian Supreme Court which required this element (see [1958] S.A.S.R. 95 at 122).

<sup>13</sup> See the Australian cases cited in C. Howard, *Criminal Law* (3rd ed. 1977) p. 90 nn. 2 and 4, p. 91 n. 8. See also the West Indian, East African, Rhodesian and Canadian cases cited by C. James, "The Queensbury Rules of Self-Defence" (1972) 21 *International and Comparative Law Quarterly* 357 at 357 nn. 6 and 7, and at 358 nn. 20, 21, 22 and 23. See also *The People v. Dwyer* [1972] I.R. 416.

<sup>14</sup> *De Freitas* (1960) 2 W.L.R. 523.

<sup>15</sup> [1971] 1 All E.R. 1077.

<sup>16</sup> *Id.* 1088.

<sup>17</sup> *Ibid.*

<sup>18</sup> [1973] A.C. 648 at 658.

with a jackhandle. The robbery attempt, in the confined space of a motor vehicle, allegedly miscarried and, according to Viro, he felt it necessary to stab Rellis in self-defence as Rellis had retaliated with his own knife. Viro's stabbing of Rellis proved fatal.

Viro alleged that all relevant times he was under the influence of heroin.

Viro was convicted of murder and appealed to the New South Wales Court of Criminal Appeal on the grounds of lack of direction by the trial judge on the following questions:

- (i) drugs and the defence of intoxication; and
- (ii) excessive force in self-defence.

This appeal was dismissed and Viro applied to the High Court for special leave to appeal.

### The High Court

Originally a bench of five justices was assembled to hear Viro's application.<sup>19</sup> This bench heard argument on the question of drugs and the defence of intoxication. It became apparent in argument on the correct law as to self-defence that the court would have to decide between the conflicting views of the Privy Council and the High Court. It was therefore thought desirable that the whole court should decide the following questions:

- (i) Is the High Court bound by decisions of the Privy Council?
- (ii) If not, what is the correct position of the common law regarding self-defence in Australia?<sup>20</sup>

### The Precedent Question

#### (1) *The High Court and Privy Council Decisions*

The court was unanimous in finding that Privy Council decisions, even those on appeal from Australia or from elsewhere in the Commonwealth expressing a general point of law, are no longer binding on the High Court.<sup>21</sup> Thus, *Palmer* did not have to be followed in preference to *Howe*.

This radical shift in the law of precedent was held to be the effect of the Privy Council (Appeals from the High Court) Act 1975 (Cth.)<sup>22</sup> together with the Privy Council (Limitation of Appeals) Act 1968 (Cth.), primarily of the 1975 Act. The result of these Acts was held to be that, apart from matters concerning the limits *inter se* of the Constitutional

<sup>19</sup> Gibbs, Stephen, Jacobs, Murphy and Aicken, JJ.

<sup>20</sup> Note that all the comment and analysis of the qualified defence of self-defence which follows would seem only to apply to the non-Code areas of Australia: C. Howard, *op. cit. supra* n. 13 p. 90, citing *Johnson* [1964] Qd. R. 1; *Masneq v. The Queen* [1962] Tas. S.R. 254.

<sup>21</sup> (1978) 18 A.L.R. 257 at 260 *per* Barwick, C.J.; at 282 *per* Gibbs, J.; at 289 *per* Stephen, J.; at 294 *per* Mason, J.; at 306 *per* Jacobs, J.; at 317, 318 *per* Murphy, J. and at 325 *per* Aicken, J.

<sup>22</sup> Note that the High Court in *A.-G. v. T. & G. Mutual Life Society Ltd.*, 15th June 1978, held that this Act was a valid exercise of the power given to Parliament by s. 74 of the Constitution in "limiting" appeals to the Privy Council.

powers of the Commonwealth and the States for which a certificate has been granted by the High Court pursuant to s. 74 of the Constitution, no appeal can be taken from the High Court to the Privy Council.<sup>23</sup> Almost all justices explicitly state that fundamental to the law of precedent was that a tribunal, if it is to be bound by the decisions of another tribunal, must be subject to review by that other tribunal.<sup>24</sup> Thus, the High Court should not be bound by the Privy Council, a court to which there is now no appeal from the High Court. In the words of Barwick, C.J.:

... this Court is no longer bound by decisions of the Privy Council whether or not they were given before or after the date when the Privy Council (Appeals from the High Court) Act 1975 became effective.<sup>25</sup>

The abolition of the binding effect of *all* Privy Council decisions, whether before or after the 1975 Act, is inherent in all the justices' decisions since all found *Palmer*, a decision before 1975, not binding on the High Court.<sup>26</sup>

(2) *State Supreme Courts in Relation to the High Court and the Privy Council*<sup>27</sup>

Barwick, C.J., Gibbs, Stephen, Mason and Aicken, JJ. implicitly and explicitly find that appeals to the Privy Council from the State Supreme Courts still exist after the 1975 Act.<sup>28</sup> Thus the State Supreme Courts are now faced with the position of dual appellate forums from their decisions, each of which has traditionally been binding on them. To use the logic of the Court in this case *both* must still remain binding, since State Supreme Courts are subject to review by both courts.

<sup>23</sup> (1978) 18 A.L.R. 257 at 260 *per* Barwick, C.J.; at 281-82 *per* Gibbs, J.; at 289 *per* Stephen, J.; at 294 *per* Mason, J.; at 306 *per* Jacobs, J.; at 316-17 *per* Murphy, J.; at 324-25 *per* Aicken, J.

<sup>24</sup> *Id.* 260, 282, 289, 294, 306, 325. (Although Murphy, J. does not explicitly state this principle it is implicit in his reasoning.)

<sup>25</sup> *Id.* 260.

<sup>26</sup> *Id.* 260, 283, 289, 294, 306, 319, 325.

<sup>27</sup> A distinction must be made between State courts when exercising Federal jurisdiction and when exercising non-Federal jurisdiction. Parliament is empowered by s. 77(iii) of the Constitution to vest in State courts jurisdiction to hear Federal matters. State courts have been invested by s. 39(2) of the Judiciary Act, 1903-1976 (Cth.) with jurisdiction to hear all matters in actual and potential original jurisdiction of the High Court, except as provided in ss. 38 and 38A of the Judiciary Act. This grant of Federal jurisdiction in the State courts is subject to the condition that no appeal shall lie from a decision of a State court, exercising Federal jurisdiction, to the Privy Council: s. 39(2)(a) Judiciary Act. See generally W. A. Wynes, *Legislative, Executive and Judicial Power in Australia* (5th. ed. 1976) pp. 497-503; P. H. Lane, *The Australian Federal System* (1972) pp. 549-568, esp. pp. 562-68; C. Howard, *Australian Federal Constitutional Law* (2nd ed. 1972) pp. 230-249. Thus remaining appeals from State courts to the Privy Council must be in matters of non-Federal jurisdiction.

<sup>28</sup> (1978) 18 A.L.R. 257 at 290 *per* Stephen, J. and at 325 *per* Aicken, J. where both explicitly recognise the continued existence of State appeals; at 260 *per* Barwick, C.J. and at 295 *per* Mason, J. where it is implicit in the reasoning of both that such appeals continue; at 283 *per* Gibbs, J. where it is a necessary inference from the language used that such appeals continue.

Jacobs and Murphy, JJ. find that no longer do appeals exist from State Supreme Courts to the Privy Council.<sup>29</sup>

The seven justices broke into various groups in their views on the position of State Supreme Courts in a situation of conflict between the Privy Council and the High Court. The views expressed on this point were *obiter dicta*; however the position of the State courts may turn out to be one of great practical complexity, and for this reason deserves some treatment.

Barwick, C.J. holds that State courts are bound by Privy Council decisions when "this Court has not spoken".<sup>30</sup> However, when such courts are faced with conflicting decisions of the High Court and the Privy Council they must follow the High Court decision whatever its age.<sup>31</sup>

Gibbs and Mason, JJ. note that State courts are still bound by the Privy Council.<sup>32</sup> However, they find that a State court should follow a High Court decision when such is in conflict with the Privy Council decision.<sup>33</sup> Yet their Honours are not as unequivocal as Barwick, C.J. in such views. They point to the following situations when it would be proper for a State court to follow the Privy Council when that court is in conflict with the High Court.

- (i) If the Privy Council directs it so to do;<sup>34</sup> or
- (ii) If the Privy Council, after considering the High Court decision, has decided not to follow it, but not if the Privy Council decision is based on considerations which are not relevant to Australian circumstances or conditions.<sup>35</sup> By this method the High Court is able to "correct" a decision of the State Supreme Court in which the Privy Council was properly followed. (This is precisely the situation in this case — the Supreme Court followed the Privy Council decision which had considered and rejected the High Court decision.)
- (iii) If the High Court decision is an "old one and obviously out of line with principles more recently established".<sup>36</sup>

Stephen and Aicken, JJ. state the unique and intractable position in which the State courts have been placed by being bound by two possibly

<sup>29</sup> *Id.* 307, 317-18. This view is contrary to that of the bulk of commentators. See W. A. Wynes, *op. cit. supra* n. 26 p. 520; H. S. Nicholas, *The Australian Constitution* (2nd ed. 1962) pp. 357-58; E. St. John, "The High Court and the Privy Council; the New Epoch" (1976) 50 *A.L.J.* 389 at 397-98 n. 40; G. Nettheim, "The Power to Abolish Appeals to the Privy Council from Australian Courts" (1965) 39 *A.L.J.* 39.

<sup>30</sup> (1978) 18 *A.L.R.* 257 at 260.

<sup>31</sup> *Id.* 260-261.

<sup>32</sup> *Id.* 282, 295.

<sup>33</sup> *Id.* 283, 295.

<sup>34</sup> *Id.* 283 *per* Gibbs, J. Note that Gibbs, J. does NOT limit such direction to express direction, therefore the Privy Council may be able to direct a State court by necessary implication. (The headnote of the relevant *A.L.R.* would seem to be wrong in its limiting of such direction to express direction.)

<sup>35</sup> (1978) 18 *A.L.R.* 257 at 295 *per* Mason, J.

<sup>36</sup> *Id.* 283 *per* Gibbs, J. (Note that the three situations noted by nn. 34, 35 and 36 are ascribed jointly to Mason and Gibbs, JJ. by the headnote of the relevant *A.L.R.* This would also seem to be incorrect.)

conflicting courts and they point out that a unilateral declaration by either the High Court or the Privy Council cannot solve the difficulty.<sup>37</sup> "The vice lies in the decisive power which the present situation confers on appellants to select the forum of their choice".<sup>38</sup> Thus both decline to join any unilateral declaration of the correct approach for State courts to take. Aicken, J., however, does give one direction to State courts — when a case has been returned to the State court from the High Court, the State court *must* follow the High Court.<sup>39</sup> In all other cases both Stephen and Aicken, JJ. recognise the breakdown in the system of precedent and allow the State Supreme Courts to choose between conflicting decisions.<sup>40</sup>

Jacobs and Murphy, JJ. find that State courts should always follow decisions of the High Court in preference to the Privy Council.<sup>41</sup> This is the result of their finding no basis for appeals from State Supreme Courts to the Privy Council in any matter since 1975, thus making the High Court the single appellate forum for State Supreme Courts (*see supra*).

In commenting on the effects of the 1975 legislation neither Murphy, J. nor Jacobs, J. makes clear the attitude State courts should now take to Privy Council decisions not in conflict with the High Court. By the general reasoning of the whole Court with regard to the High Court and Privy Council decisions (*supra*), State courts would not be bound by any Privy Council decision since there is, according to both justices, no appeal to the Privy Council. Murphy, J. partly covers the above situation by saying that previous decisions of the Privy Council, on appeal from the High Court, "should be treated for the present as equivalent to a High Court decision".<sup>42</sup> Thus, according to Murphy, J., at least some Privy Council decisions are to remain binding on State courts for "the present". Yet this fails to make clear the attitude a State court should take to a Privy Council decision on a general point of law on appeal from elsewhere in the Commonwealth, when there is no conflicting High Court decision.

### (3) *Summary of the Views on the Precedent Question*

*Ratio decidendi (per curiam)*. The High Court is no longer bound by any decision of the Privy Council because of the abolition of appeals to that Court. If there is no review of High Court decisions by any court, then the High Court cannot be bound by any court.

*Obiter dicta*. Barwick, C.J., Gibbs, Stephen, Mason and Aicken, JJ. find:

- (a) expressly or impliedly that there are appeals to the Privy Council from State Supreme Courts exercising non-federal jurisdiction;

<sup>37</sup> (1978) 18 A.L.R. 257 at 290-291, 326-327.

<sup>38</sup> *Id.* 290 *per* Stephen, J.

<sup>39</sup> *Id.* 327.

<sup>40</sup> *Id.* 291, 327.

<sup>41</sup> *Id.* 306, 318-319.

<sup>42</sup> *Id.* 318.

(b) that State courts are still bound by Privy Council decisions when such are not in conflict with High Court decisions.

Jacobs and Murphy, JJ.:

(a) find there to be no appeals from State courts to the Privy Council since 1975;

(b) say little regarding the attitude State courts should take to Privy Council decisions not in conflict with High Court decisions, though Murphy, J. partly covers the situation.

Barwick, C.J., Jacobs and Murphy, JJ. unequivocally state that State courts should follow the High Court when the latter is in conflict with the Privy Council (though the reasons of the latter two are doubtful, see *supra* n. 29).

Gibbs and Mason, JJ. feel that State courts should generally follow the High Court when such is in conflict with the Privy Council, but with certain exceptions.

Stephen and Aicken, JJ. allow State courts to choose between Privy Council and High Court decisions, with one exception.

#### (4) Conclusion

Far from being an eminent relic of colonialism the Privy Council may well assume a more prominent position in the State judicial structures than it had before 1975. If significant differences develop in various areas of the law between the High Court and the Privy Council more unsuccessful litigants may choose the Privy Council as an appellate forum if they think they will fare better there. Thus, ironically, an Act of Parliament designed to decrease appeals to the Privy Council may actually increase them, and strangely, there may be tactical advantages in losing at the Supreme Court level to facilitate a favourable choice of appellate forums.

Unfortunately space prevents an analysis of the view of Murphy, J. that no appeals lie from State courts to the Privy Council (Jacobs, J., on different and somewhat vague grounds, concurs).<sup>43</sup> Murphy, J. repeats the argument he put forward in *The Commonwealth v. Queensland*.<sup>44</sup> He sets up parallel reasoning between, first, the limitation of "inter se appeals" from the High Court by s. 74 of the Constitution and, secondly, the exercise of the power, given by s. 74 of the Constitution, by Parliament to limit any appeal from the High Court. The former, he argues, could never be validly circumvented by allowing appeals direct from a State Supreme Court to the Privy Council.<sup>45</sup> By parallel reasoning the latter should not be able to be circumvented by allowing appeals direct from a State Supreme Court to the Privy Council.<sup>46</sup>

However unfashionable such a view might appear now, if the effect of the existence of dual and possibly conflicting forums of appeal from

<sup>43</sup> *Supra* n. 29.

<sup>44</sup> (1976) 50 A.L.J.R. 189.

<sup>45</sup> Yet precisely this happened in *Webb v. Outrim* (1907) 4 C.L.R. 356.

<sup>46</sup> (1978) 18 A.L.R. 257 at 317 and (1976) 50 A.L.J.R. 189 at 201-202.

the State Supreme Courts is chaotic, then this is one argument which could obviate the difficulties to be encountered in abolishing Privy Council appeals by the States.<sup>47</sup> Murphy, J.'s view may well be a "reflection of the changing times".<sup>48</sup>

### The Question of Self-Defence and Excessive Force Therein

The leading judgment is that of Mason, J. with whom Gibbs, Stephen and Aicken, JJ. concur.<sup>49</sup>

Mason, J. fundamentally disagrees with the Privy Council in *Palmer* and accepts the principle on which *Howe* is based.<sup>50</sup> He strongly states the rationale of the qualified defence of excessive force in self-defence:

. . . the moral culpability of a person who kills . . . in defending himself but who fails in a plea of self-defence only because the force which he believed to be necessary exceeded that which was reasonably necessary falls short of the moral culpability ordinarily associated with murder.<sup>51</sup>

The core of Mason, J.'s judgment lies in his formula of six principles in which he sets out "the issues which arise for determination by the jury according to *R. v. Howe*".<sup>52</sup> In the preamble to the six principles he differentiates between "cases involving threatened violation of or indecent or insulting usage to the accused's person" and cases to which his six principles apply — "where death or grievous bodily harm to the accused is in question".<sup>53</sup> The former cases are "put to one side".<sup>54</sup> To the latter cases the following six principles apply:

1. (a) It is for the jury first to consider whether when the accused killed the deceased the accused reasonably believed that an unlawful attack which threatened him with death or serious bodily harm was being or was about to be made on him.
- (b) By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself.
2. If the jury is satisfied beyond reasonable doubt that there was no reasonable belief by the accused of such an attack no question of self-defence arises.
3. If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.
4. If the jury is not satisfied beyond reasonable doubt that more

<sup>47</sup> See G. Nettheim, *op. cit. supra* n. 29.

<sup>48</sup> E. St. John, *op. cit. supra* n. 29 at 398 n. 40 therein.

<sup>49</sup> (1978) 18 A.L.R. 257 at 288, 293 and 330.

<sup>50</sup> *Id.* 302.

<sup>51</sup> *Id.* 297.

<sup>52</sup> *Id.* 302.

<sup>53</sup> *Id.* 302-303.

<sup>54</sup> *Id.* 302. Mason, J. similarly at 301 leaves open other unresolved questions as issues to be settled by the development of the common law.



force was used than was reasonably proportionate it should acquit.

5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder, that depending upon the answer to the final question for the jury — did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced.

6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.<sup>55</sup>

Accordingly, Mason, J. with Gibbs, Stephen and Aicken, JJ. concurring, and Jacobs, J. (for different reasons) allowed the appeal on this ground against the decision of the New South Wales Court of Criminal Appeal which had followed *Palmer*. Hence the words of Mr. Justice Holmes, quoted at the beginning of this note, have particular relevance to the law of self-defence in Australia.

### Comments and Explanation

#### *Principle 1*

(a) Before any question of self-defence (either the basic defence in principles 3 and 4 or the qualified defence in principles 5 and 6) arises, the jury must first consider whether the accused reasonably believed that a situation of a certain quality existed, *viz.* threat of death or grievous/serious bodily harm.<sup>56</sup>

Such a preliminary question for the jury would not seem to limit in any way the opportunities of the accused to use the basic defence. If the prosecution is able to negative beyond reasonable doubt any question that the accused reasonably believed that a situation threatening at least grievous bodily harm existed (on the generous test provided by Mason, J. in principle 1(b), see *infra*), then the jury would hardly find, if asked, that the act of the accused in killing was reasonably proportionate.

The preliminary question, however, limits the practical application of the qualified defence. If the reasonable man would have believed that an unlawful attack threatening *less* than grievous bodily harm was being made or was about to be made on him, but the accused believed in the necessity to inflict grievous bodily harm, the qualified defence would *not* be available to him.<sup>57</sup> A reasonable belief in the necessity of *some* defence is insufficient to make available the qualified defence. The accused must reasonably believe in a situation of a serious quality.<sup>58</sup>

Mason, J. draws support for the limiting effect of his preliminary question from the judgments in *Howe*. He notes<sup>59</sup> that Menzies, J. in

<sup>55</sup> *Id.* 303.

<sup>56</sup> The terms are used synonymously in the preamble and the first principle.

<sup>57</sup> (1978) 18 A.L.R. 257 at 300.

<sup>58</sup> Similar views are put forward in *Enright* [1961] V.R. 663, *Tikos* (No. 1) [1963] V.R. 285 and *Tikos* (No. 2) [1963] V.R. 306.

<sup>59</sup> (1978) 18 A.L.R. 257 at 299-300.

*Howe* restricts the use of the qualified defence to "a case of self-defence against serious though not felonious violence".<sup>60</sup> Yet Menzies, J. concurred in the decision of the High Court in *Howe* in allowing the application of the qualified defence to a situation which threatened sodomitical attack. It is doubtful that such an attack could be classified as grievous bodily harm. (In fact, Mason, J. specifically excludes such situations from his principles, see *supra*). Mason, J. construes the leading judgment in *Howe*, that of Dixon, C.J., to support the limiting effect of the preliminary question.<sup>61</sup> Dixon, C.J. in *Howe* states:

. . . it is assumed that *an attack* of a violent and felonious nature, or *at least of an unlawful nature was made or threatened so that the person under attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage.* This would mean that *an occasion had arisen entitling (the accused) to resort to force to repel force or apprehend force.*<sup>62</sup> (Italics added)

Mason, J.'s statement that "there is scarcely any justification for thinking that the Chief Justice contemplated that the doctrine would apply to trivial or minor assaults",<sup>63</sup> hardly sits squarely with the Chief Justice's words above. Surely an "unlawful attack" is any attack whether it be minor or such that the accused reasonably believes he is threatened with death or grievous bodily harm; surely "injury" is not necessarily synonymous with grievous bodily harm.

Professor Howard has similarly argued that there is no warrant for interpreting *Howe* in a manner which restricts the operation of the qualified defence to situations in which the accused is faced with very serious violence.<sup>64</sup>

(b) Mason, J., while restricting the application of the qualified defence by his preliminary question, sets a generous test by which the jury is to judge the accused's reasonable belief. The belief is not determined purely objectively (the reasonable man); rather it is a "subjective test on reasonable grounds". It would seem that the accused only has to be able to point to evidence, to some reasonable or objective factors, on which his subjective belief was based, even if such factors would not have been sufficient to convince a reasonable man in the circumstances.

### *Principle II*

This merely emphasises that in considering the first principle there is no probative burden of proof on the accused. It is always for the prosecution to negative beyond reasonable doubt any evidential matter raised by the defence.

<sup>60</sup> (1958) 100 C.L.R. 448 at 471; yet Menzies, J. at no stage uses the term "serious" synonymously with "grievous", the latter being a term which has assumed a special place in the law of murder—s. 18 Crimes Act (N.S.W.) and see C. Howard, *op. cit. supra* n. 13, pp. 50-51.

<sup>61</sup> (1978) 18 A.L.R. 257 at 299, 300.

<sup>62</sup> (1958) 100 C.L.R. 448 at 460.

<sup>63</sup> (1978) 18 A.L.R. 257 at 299.

<sup>64</sup> C. Howard, "Two Problems in Excessive Defence" (1968) 84 L.Q.R. 343 at 346-351.

*Principles III and IV*

If the preliminary question has been determined in favour of the accused the proportionality of the force used must be judged. When Mason, J. says the force must be "reasonably proportionate", he presumably means that which a reasonable man would judge proportionate, since he makes no attempt, as in principle I, to define the term "reasonably" more closely.

Mason, J. gives no hint as to the relevance of all the surrounding circumstances in assessing the proportionality of the force. One of Barwick, C.J.'s main criticisms of the qualified defence is its isolation of force as a factor to be examined separately.<sup>65</sup> If the jury is not to take into account all the circumstances in judging the proportionality of the accused's force then perhaps Barwick, C.J.'s criticism is most telling here.

**Other Judgments**

Neither Barwick, C.J. nor Murphy, J. sees any room for the operation of a qualified defence of self-defence.

Barwick, C.J.'s views are in essence very similar to those of the Privy Council in *Palmer*. He finds the test of the accused's behaviour to be one based on "reasonableness in all the circumstances" and he sets out a number of factors to be considered in any such assessment,<sup>66</sup> one of which is the subjective belief of the accused. Although including such a subjective element he emphasises that it is only a factor to be considered in what is, in the end, an objective test.<sup>67</sup>

Murphy, J. finds that the only relevant question is whether the accused acted in self-defence.<sup>68</sup> Within this question there is no place for an objective test. In fact, although a subjective belief of the accused in the necessity of his acts will be sufficient for an acquittal, even this is not necessary — the accused may act instinctively and have no "belief" at all and still be acquitted.<sup>69</sup> However, for certainty in criminal trials he feels that a trial judge should follow *Howe* "until this Court expresses a different view".<sup>70</sup>

Jacobs, J. embarks upon a detailed examination of the basic test of self-defence.<sup>71</sup> He concludes that the basic test, as expressed in *Palmer*, needs to be supplemented with a qualified defence by which the accused may be guilty of manslaughter if, while a reasonable man would not have believed in the necessity of his acts, a *rational* man *could* or *might* have so believed.<sup>72</sup>

Gibbs, J., although agreeing with Mason, J. to form a majority (as noted *supra*), expresses his personal view that *Howe* is too obscure in

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<sup>65</sup> (1978) 18 A.L.R. 257 at 264, 265-266.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Id.* 265.

<sup>68</sup> *Id.* 322.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Id.* 323.

<sup>71</sup> *Id.* 308-312.

<sup>72</sup> *Id.* 312.

its enunciation of the qualified defence to be accepted.<sup>73</sup>

### The Question of Intoxication

On this question Stephen, Jacobs, Murphy and Aicken, JJ. concur in the views expressed by Gibbs, J.<sup>74</sup>

Intoxication by drugs is to be treated no differently to intoxication by alcohol.<sup>75</sup>

As to the correct test to be put to the jury, Gibbs, J. agrees with the New South Wales case of *R. v. Gordon*<sup>76</sup> and the Privy Council in *Broadhurst v. The Queen*<sup>77</sup> in their rejection of any notion which could be drawn from *D.P.P. v. Beard*<sup>78</sup> that there is an onus on the accused to prove incapacity to form intention.<sup>79</sup> Gibbs, J. states the true test:

... the state of intoxication of an accused person is one of the matters to be considered by the jury in deciding whether they are satisfied that he had the requisite intent.<sup>80</sup>

Gibbs, J. is careful not to enter directly into an analysis of the recent House of Lords authority on intoxication, *D.P.P. v. Majewski*.<sup>81</sup> He distinguishes that case as one where "the crime was not one involving a special intent, and the present question did not fall for direct decision".<sup>82</sup>

However, he indirectly enters the difficult area of *Majewski* by distinguishing crimes of "special intent" from crimes without such intent.<sup>83</sup> This has some similarities with, and perhaps will encounter the same criticisms as, the attempts of their Lordships in *Majewski* to define "specific intent".<sup>84</sup>

On the facts of this case, Gibbs, J. felt that the jury should have been directed on the question of drugs and intoxication and thus the Court allowed the appeal on this point also.

### The Interrelationship of Excessive Force in Self-Defence and Intoxication

The accused may have an alternative method of using evidence of intoxication in his defence. If there is evidence of intoxication, it may well be easier to raise a doubt that the accused had an honest, if unreasonable belief in the necessity of his acts in self-defence, rather than to attempt to raise a doubt as to whether he had the requisite intention. Thus, for the qualified defence of self-defence, there would seem to be

<sup>73</sup> *Id.* 286-288.

<sup>74</sup> *Id.* 289, 303 and 323. (Murphy, J. participated in the order on this point, but made no reference in his judgment to it.)

<sup>75</sup> *Id.* 273 approving *R. v. Lipman* [1970] 1 Q.B. 152 and *D.P.P. v. Majewski* [1976] 2 W.L.R. 623, on this point.

<sup>76</sup> [1963] S.R. 631 at 635.

<sup>77</sup> [1964] A.C. 441 at 461.

<sup>78</sup> [1920] A.C. 479 at 499-505.

<sup>79</sup> (1978) 18 A.L.R. 257 at 274-275.

<sup>80</sup> *Id.* 275.

<sup>81</sup> [1976] 2 W.L.R. 623.

<sup>82</sup> (1978) 18 A.L.R. 257 at 275.

<sup>83</sup> *Id.* 273.

<sup>84</sup> See [1975] *Crim. L.R.* 570 and [1976] *Crim. L.R.* 374, the latter esp. at 376-378.

nothing in the judgments of this case, or any other, to suggest that an intoxicated, unreasonable belief in the necessity of acts should be judged differently from a sober unreasonable belief.

### Further Comment on the Doctrine of Excessive Force in Self-Defence

#### (1) *The Restrictive Effect of Mason, J.'s First Principle*

Mason, J. seems hesitant to enunciate the qualified defence in any but restrictive terms. He says the restriction to situations threatening at least grievous bodily harm is "but a reflection of the questions, still unsolved, which arise in relation to the limits of the doctrine of self-defence itself".<sup>85</sup>

Mason, J. and judges in such cases as *R. v. Enright*,<sup>86</sup> *R. v. Tikos (No. 1)*<sup>87</sup> and *R. v. Tikos (No. 2)*,<sup>88</sup> who took a similar restrictive line, seem worried that, without any restriction of the doctrine to cases of serious violence only, the stage will be set for the use of the qualified defence by people who kill after the most trivial of incidents. Perhaps this fear overlooks the point that the triviality of the original incident will be evidence either that no situation of self-defence arose in the first place, *viz.* that it would not have been reasonable to apply any force, or that the accused did not believe in the necessity or reasonableness of that which he was doing.

The qualified defence has been grafted upon the long-standing common law right of self-defence. If there is to be any restriction on the accused's subjective belief reducing his culpability surely the most coherent restriction would be that the accused reasonably believes that a situation of self-defence has arisen.<sup>89</sup>

#### (2) *How Do Viro and Howe Stand Together?*

As noted (*supra*) Mason, J. construes Dixon, C.J. in *Howe* to bring him into line with his own view that the qualified defence should only be available in cases of serious violence. However, as noted there would seem to be grave difficulties in interpreting Dixon, C.J. in this fashion. If there is a difference on this point between the two, has Mason, J. a majority in *Viro* for a reformulation of the law as expressed for the majority in *Howe* by Dixon, C.J.?

Stephen, J. certainly agrees with the views of Mason, J. as "a formulation of the issues . . . falling for determination (regarding) self-defence".<sup>90</sup>

<sup>85</sup> (1978) 18 A.L.R. 257 at 300.

<sup>86</sup> [1961] V.R. 663.

<sup>87</sup> [1963] V.R. 285.

<sup>88</sup> [1963] V.R. 306.

<sup>89</sup> This view would seem to have the support of *Bufalo* [1958] V.R. 363 at 364, *McNamara* [1963] V.R. 32, *Yugovic* [1971] V.R. 816 at 821-822, *Olasjuk* [1973] 6 S.A.S.R. 255, M. Sornarajah, "Excessive Self-Defence in Commonwealth Law" (1972) 21 *International and Comparative Law Quarterly* 758 at 765-766 and I. D. Elliott, "Excessive Self-Defence in Commonwealth Law: a Comment" (1973) 22 *International and Comparative Law Quarterly* 727 at 734-736.

<sup>90</sup> (1978) 18 A.L.R. 257 at 293.

Aicken, J. would also seem to agree with Mason, J. in preference to Dixon, C.J. if it is accepted that there is a difference between the two, though such an interpretation of Aicken, J. is far from clear. He says:

. . . I agree with their (Stephen and Mason, JJ.'s) reasons for preferring to adhere to this Court's decision in *Howe* . . . In particular I agree with the formulation of the issues which arise in the application of the decision in *Howe* . . .<sup>91</sup>

Gibbs, J., however, would seem to concur with Mason, J. only in a limited fashion. He says:

. . . we should accept as correct the statement of Dixon, C.J. in *R. v. Howe* . . . Mason, J. . . . has stated the task of the jury where threat of death or grievous bodily harm is in question and the issue of self-defence arises. In future that statement should be accepted as correct.<sup>92</sup>

Admittedly the last sentence could be taken as concurrence with the views of Mason, J. alone; however, the first sentence explicitly supports Dixon, C.J. in *Howe*. If there is a difference between the two views, how is such contradictory concurrence to be reconciled? Perhaps Gibbs, J.'s second sentence above provides the clue. He may be agreeing with Dixon, C.J. whose judgment is to apply where there is a situation of self-defence, while he may also agree with Mason, J.'s formulation which is to apply where, on the facts existing, threat of death or grievous bodily harm is in question. Accordingly, Gibbs, J. may well be interpreted as not requiring the existence of a situation threatening death or grievous bodily harm to make available the qualified defence.

Thus if a difference exists between Mason, J. and Dixon, C.J., Mason, J. may well not have a majority of the Court for any such change. If no such difference exists then there is a clear majority for Mason, J.'s views as the current interpretation of the principle first enunciated in *Howe*.

The resolution of the above difficulty is important to place the views of Murphy, J. in context. While he espouses his own views as to the correct law (see *supra*), he feels that for certainty in the administration of the criminal law trial judges should follow the majority in *Howe*, viz. the views of Dixon, C.J., "until this Court expresses a different view".<sup>93</sup> Thus, if there is a difference between Dixon, C.J. and Mason, J., and if Mason, J. has the support not only of Stephen and Aicken, JJ., but also of Gibbs, J. for any such change (contrary to the opinions of the writers, *supra*), then Murphy, J. must be added to this majority since the above four Justices in *Viro* would be a decision of "this Court" expressing a different view to the majority opinion in *Howe's Case*. On the other hand, if there is a difference between Dixon, C.J. and Mason, J., and Gibbs, J. is taken to support the views of the former as the

<sup>91</sup> *Id.* 330.

<sup>92</sup> *Id.* 288.

<sup>93</sup> *Id.* 323.

correct statement of the general principle, then there is no clear majority to support any change in the law by Mason, J. In this case Murphy, J. would still direct a trial judge to follow Dixon, C.J. in *Howe*.

If there is no clear majority for Mason, J.'s change of the law (if it is such) then the decision in *Viro*, as far as it does change the law as expressed by *Howe*, may not be authoritative. Thus the question as to whether the accused has reasonably to believe in a situation requiring some self-defence or in a situation requiring self-defence against an attack of a certain seriousness may still be in doubt.

(3) *Does the Qualified Defence Extend to Situations Other than Self-Defence?*

Professor Howard feels that the qualified defence extends to all situations in which an accused can lawfully resort to force, e.g., in defence of others or in the defence of one's property or in the apprehension of a felon.<sup>94</sup> Two Australian cases extend to such situations: *R. v. McKay*<sup>95</sup> (the apprehension of a felon); *R. v. Turner*<sup>96</sup> (protection of property). In *McKay*, Lowe, J. bases his view of the wide range of the qualified defence on certain old authorities.<sup>97</sup> In *Howe*, Dixon, C.J. merely quotes the relevant extract of Lowe, J. as concluding authority for the enunciation of his principle.<sup>98</sup> Thus, one can say that Dixon, C.J. expresses no disapproval of such an extension. Also, there is nothing in the judgments of Menzies, J. or Taylor, J. in *Howe* which could be taken to prevent such an extension.

In *Viro* only Mason, J. adverts to this question. He does not decide the issue, but leaves it to the future development of the common law.<sup>99</sup>

### Conclusion

The High Court, in a landmark case, has clearly decided the following:<sup>100</sup>

- (a) that the High Court is no longer bound by Privy Council decisions;
- (b) that the qualified defence of excessive force in self-defence is part of the criminal law of the common law areas of Australia;
- (c) that drugs and alcohol leading to intoxication are to be dealt with in identical fashion.

A majority of the High Court has clearly expressed the view *obiter dicta* that State courts are bound by Privy Council decisions when such are not in conflict with the High Court.

The following areas of the law are in doubt:

- (a) the position that State courts should take as to conflicting High Court

<sup>94</sup> C. Howard, *op. cit. supra* n. 13 p. 90.

<sup>95</sup> [1957] V.R. 560.

<sup>96</sup> [1962] V.R. 30.

<sup>97</sup> [1957] V.R. 560 at 563.

<sup>98</sup> (1958) 100 C.L.R. 448 at 462.

<sup>99</sup> (1978) 18 A.L.R. 257 at 301.

<sup>100</sup> Note that this casenote has not attempted to analyse at least two issues canvassed in this case (a) felony murder (b) malice where self-defence is pleaded to a charge of murder.

and Privy Council decisions (partly from the disparity of the judgments in this case and partly from the inherently intractable situation); and

- (b) the exact extent of the qualified defence of self-defence, whether it extends to such situations as the defence of others or the protection of property.

The following areas may be in doubt:

- (a) the question as to whether Mason, J.'s judgment is an alteration of the law as expressed by the majority in *Howe* led by Dixon, C.J.; and
- (b) if there is such an alteration, whether Mason, J. has a majority to make it authoritative.

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