*Privy Council Appeal No. 4 of 1970*

**Sigismund Palmer** – – – – – – – *Appellant*

*v.*

**The Queen** – – – – – – – – *Respondent*

FROM

**THE COURT OF APPEAL OF JAMAICA**

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# REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD NOVEMBER, 1970

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*Present at the Hearing:*

LORD MORRIS OF BORTH-Y-GEST
LORD DONOVAN
LORD AVONSIDE

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(*Delivered by* LORD MORRIS OF BORTH-Y-GEST)

The appellant was indicted for the murder on 14th May 1968 of a man named Cecil Henry. After a trial before Robotham J. in the Supreme Court he was convicted by the jury and he was sentenced to death. He made application to the Court of Appeal, Jamaica for leave to appeal. His application was heard by Waddington Ag. P., Eccleston J. A. and Edun J. A. on 8th and 9th May 1969. By their judgment in which all the grounds of appeal were fully examined the application for leave to appeal was refused. By special leave appeal is now brought from the judgment of the Court of Appeal. The only question that is raised for determination is whether in cases where on a charge of murder an issue of self-defence is left to the jury it will in all cases be obligatory to direct the jury that if they found that the accused while intending to defend himself had used more force than was necessary in the circumstances they should return a verdict of guilty of manslaughter. It is necessary to set out the facts in relation to which the question is raised. The case for the Crown at the trial was summarised in the judgment of the Court of Appeal. It was that

> "on the 14th May, 1968, the accused and two other men, George Wilson and Valentine Wilson, who were brothers, went to the home of Dahlia Campbell at Simm's Run in the parish of Saint Ann to purchase ganja. According to the evidence of George Wilson, who was called as a witness for the Crown, before they got to Dahlia Campbell's home he had seen the accused with a shot gun and he had asked the accused to give him the gun, which the accused did. At Dahlia Campbell's yard, George Wilson told her that he heard that she was selling ganja and he asked her to sell him some. Dahlia Campbell was a bit reluctant, believing that they were police, but after some persuasion she brought them a sample of the ganja which they all three tested and approved. Dahlia Campbell then brought out a bag of ganja which they started to

weigh. Whilst this was going on, Fedley Brown and Augustus Johnson came to the yard also bringing some ganja with them, and they also offered to sell their ganja to the Wilsons and the accused. Brown and Johnson's ganja was then weighed and after the ganja was weighed George Wilson remarked, 'What a way oonu have ganja in the country legge, legge and it is against the law.' On his saying this, Dahlia Campbell, Fedley Brown and Augustus Johnson ran away. George Wilson then took up the ganja and a machete belonging to Dahlia Campbell, and fired two shots from the gun. They all three then left with the ganja, Valentine Wilson carrying one bag, the accused carrying another bag and George Wilson carrying the gun and machete. They went along the road toward Higgin Land, and after they had gone a little distance the accused demanded back the gun from George Wilson. There was some argument over the gun but eventually George Wilson handed the gun back to the accused and took the bag of ganja which the accused had been carrying. By this time it appears that an alarm had been raised that the three men had taken the ganja and had not paid for it, and so they decided to turn off the main road and go up into the hills in order to avoid contact with the crowd. George Wilson said that they heard the sound of walking coming towards them, and the accused fired a shot and the people ran. They then went to another hill nearby, where all three of them stooped down when they heard more people coming. George Wilson said that the accused then made an attempt to fire the gun but he (George Wilson) held his hand and told him that he did not want anyone to get shot in the country because it was his (George Wilson's) country. He heard some of the men who were pursuing them say that they were still up there in the bush, and thereupon the accused made another attempt to fire the gun and this time Valentine Wilson stopped him, telling him that he should not fire the shot as it might shoot someone in the bush whom they had not seen. George Wilson said that while they were stooping in the bush they heard a walking coming from the direction from which they had come. The people were near to them and he heard someone saying, 'Palmer, Palmer, come and carry your gun.' George Wilson said he then saw a shadow, and he took his machete and started to chop his way out of the bush. He then saw the accused leaning on a tree with the gun in his hand and saw him fire two shots in the direction where he had seen the shadow. Wilson then ran out of the bush followed by Valentine Wilson. George Wilson said he heard them both saying that a man had got shot. They were still being followed by some of the people, and the accused spoke out loudly so that the people following could hear, saying, that he had a pack of shots and if they followed him until night he would shoot them because dead men tell no tales. Eventually, they threw off their pursuers and returned to Kingston, from whence they had come, with the ganja."

The evidence of Valentine Wilson who was called for the Crown was substantially in agreement with that of George Wilson. Evidence was given by Dahlia Campbell. She gave a different account as to the events at her home. She denied that she had agreed to sell any ganja or that she had had any ganja at her home. She said that the two Wilsons and the accused had come to her home whilst Fedley Brown and Augustus Johnson were there and that George Wilson had asked her about ganja. In the course of the events which took place George Wilson, she said, had fired a shot at Johnson's head. She said that later he fired a shot at Brown: Brown ran away and she followed. When she returned, she said, George Wilson fired at her. She ran away again. On her later return she found that a sum of £60 which she had had in

a grip in her room was no longer there. Evidence was also given by Fedley Brown and Augustus Johnson. In the main their evidence agreed with that of Dahlia Campbell. They denied that they had brought ganja or had agreed to sell any. Brown described how after he had raised an alarm he saw the three men going towards Higgin Land. Brown and some others trailed the three men who branched off up a hill. Brown with others remained on the level and some men went around the hill. Brown heard four gun shots on the hill and later after going up the hill he saw the body of the deceased man: it was lying at the spot from whence the sound of firing had come.

Another witness was a man named Granville Fearon who lived about two miles from Dahlia Campbell's house. He saw three men running past his field: they had come from the direction of her house and were going towards Higgin Land. One of them was the accused who had a gun in his right hand and a bag over his shoulder: a second man had a bag: the third man had a handbag over his shoulder. After the three had passed Brown and Johnson and another man came from the direction of Dahlia Campbell's house. They spoke to Fearon and the four of them went towards Higgin Land after the three men. They met Cecil Henry. Henry and Fearon went on together and there was the sound of a gun. Before going up the hill Fearon had heard two shots. He heard three more after he went on the hill and after the second of these shots he saw Cecil Henry fall. At that moment he saw the accused and two other men: they were some six to seven yards away: the accused had the gun in his hand and it was pointing towards where Fearon and Henry were. Henry had called out on being hit and another shot had then been fired. Later Fearon heard the appellant say that they had trailed him too far and that while he had no powder left he did have a dagger for dead men tell no tales.

Evidence was also given by two men Joseph Lawrence and George Parry who, being amongst those who were trailing the three men, said that after hearing the shots they saw the three men going down the hill and that the accused had a gun in his hand.

When interrogated by the police on 9th June 1968 the appellant denied all knowledge of the killing of Cecil Henry: being confronted with the two Wilsons he suggested that Valentine Wilson had shot the deceased. At the trial he did not give evidence but he made an unsworn statement. In the course of it he said that he accompanied the two Wilsons on a visit to their father's land and that on the way Valentine Wilson took out a gun from a bag and loaded it. He described the visit of the three of them to Dahlia Campbell's yard giving an account of the ganja transaction which substantially agreed with the account given by the two Wilsons but as regards the shooting which then took place giving an account of it which was substantially in accord with what had been said in evidence by Dahlia Campbell, Fedley Brown and Augustus Johnson. In a long statement as to subsequent movements he said that Valentine Wilson put more shots into the gun, that he (the accused) heard talking coming closer up the hill, that he saw two men coming, that Valentine Wilson fired two shots, that later after the three of them had gone to another hill there was a noise of tearing through the thicket, that Valentine Wilson fired some shots, that stones were thrown, that Valentine Wilson fired until there were no shots left, that they were being followed by three men who threw stones but that eventually they got away from their pursuers. The statement was in some respects imprecise but implicit in it and essential to it was a denial that he the appellant had fired the gun.

In addition to the evidence that showed that the three men were being trailed there was some evidence that suggested that those pursuing had sticks for the purpose of beating the three men had they been caught,

that stones were thrown, that the three were put in fear, and that a remark which was made (and which was heard by the appellant) to the effect that Palmer must come with his gun was or may have been an exhortation not to the appellant but to a man of that name who lived nearby.

In the course of a long and careful summing-up the learned judge fully reviewed all the evidence. No question save that above-mentioned is now raised as to the adequacy or fairness of the summing-up. The learned judge gave directions to the jury on the basis that the evidence of the two Wilsons was the evidence of accomplices. He left the question of self-defence to the jury even though it was never suggested by or on behalf of the appellant that he had killed the deceased man in self-defence. It was his case that he was not responsible for the firing that killed the deceased man. As however there was evidence that made possible the view that whoever it was who fired might have done so in self-defence the learned judge very fairly left the matter to the jury. It is always the duty of a judge to leave to the jury any issue (whether raised by the Defence or not) which on the evidence in the case is an issue fit to be left to them. There was a very clear direction that the onus remained upon the prosecution to satisfy the jury beyond doubt that the killing was not done in self-defence. (As to which see *Chan Kau v. R.* [1955] A. C. 206.)

In the course of his direction the learned judge said:

> " A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily harm, may use such force as on reasonable ground he believes is necessary to prevent and resist the attack. And if in using such force he kills his assailant he is not guilty of any crime even if the killing was intentional. And in deciding in a particular case whether it was reasonably necessary to have used such force as in fact was used regard must be had to all the circumstances of the case including the possibility of retreating without danger or yielding anything that he is entitled to protect. Now self-defence, members of the jury, consists of the following; this is what you have to consider; one, that there was an attack upon the accused and that as a result the accused must have believed on reasonable ground that he was in imminent danger of death or serious bodily harm. The force used by the accused must have been used to protect himself either from death or serious bodily injury intended toward him by his attacker or from the reasonable apprehension of it induced by the word and conduct of his attacker even though the latter may not have in fact intended death or serious bodily injury. So it is not a question of what the attacker intended but did he have a reasonable apprehension that he was in danger of death or serious bodily harm—imminent danger, impending. Furthermore, members of the jury, the force used must not be by way of revenge and he must have believed that on reasonable ground that the force used by him was necessary to prevent or resist the attack and in deciding whether it was reasonably necessary to have used as much force as was used regard must be had to all the circumstances of the case."

Having referred to the possibility of retreat by one who is attacked the learned judge said:

> " There is no duty to retreat if there is a forcible or violent felony being attempted upon you or manifestly attempted against you, you must consider the nature and the extent of the force used upon the accused and the force which was in turn used by him to repel it. If excessive force was used, members of the jury, the act might

not have been done necessarily in self-defence and the plea would not be to any avail, but in all this you must bear in mind that the onus remains throughout on the prosecution to satisfy you that he was not acting in self-defence and if under consideration of all the evidence you are left in doubt as to whether the killing may or may not have been done in self-defence the proper verdict would be one of not guilty."

Towards the end of the summing-up the learned judge said:

"Now, members of the jury, I have deliberately refrained from giving you any direction on manslaughter because in my view, and the responsibility is mine, if I don't see where the evidence lies to sustain manslaughter not to direct you upon it. I have given you no direction on manslaughter in this case and indeed neither counsel for the defence or the Crown has made any reference to manslaughter in this case at all. There are only two verdicts which are open to you in this case; guilty of murder or not guilty. Those are the only two verdicts open to you. A verdict of not guilty can arise in any one of four circumstances. If you are satisfied that it was Valentine and not the accused who fired the shot then you have to find him not guilty. If you are in a state of doubt as to whether it was Valentine or the accused who fired the shot then equally you would have to find him not guilty. Thirdly, if you find that it was the accused who fired the shot but that when he fired the shot that killed Henry he was acting in lawful self-defence, then again your verdict would be not guilty. If you are in a state of doubt as to whether he fired the shot in self-defence or not, then bearing in mind that there is no onus on the accused to prove his innocence, even when self-defence is raised, then if you are in a state of doubt as to that then your verdict would be also not guilty because then the Crown would not have discharged the onus placed upon it. You can only find him guilty if the Crown has so satisfied you so that you can feel sure that it was the accused who deliberately and intentionally fired the shot that killed Henry if, with the intention at the time of so doing either to kill or inflict grievous bodily harm and further that at the time of doing so he was not acting in lawful self-defence. That is the only premise on which you can find him guilty; that he intended to fire the shot deliberately and intentionally and at that time when he did so he intended to kill or inflict grievous bodly harm and was not acting in self-defence. Once you are satisfied as to that, members of the jury, if you are so satisfied, then your bounden duty would be to return a verdict of guilty of murder. In any other case, then your verdict would have to be not guilty."

It would seem to be clear that the jury were satisfied that it was the appellant who without justification had fired the fatal shot with the intention either of killing or of inflicting serious bodily harm. Their Lordships conclude that there is no room for criticism of the summing-up or of the conduct of the trial unless there is a rule that in every case where the issue of self-defence is left to the jury they must be directed that if they consider that excessive force was used in defence then they should return a verdict of guilty of manslaughter. For the reasons which they will set out their Lordships consider that there is no such rule.

In support of the submission on behalf of the appellant their Lordships were referred to observations made in certain cases where an accused person had been charged, not with murder, but with manslaughter. Thus in *R. v. Scully* (1824) 1 Car. & P. 319, where the only charge was manslaughter the learned judge told the jury that if the accused considered that his life was in actual danger he was justified in shooting the deceased as he had done. The jury acquitted. The judge had

further told the jury that if the accused had not considered his own life in danger but had " rashly shot " the deceased then the accused would be guilty of manslaughter. No occasion arose in that case for a fuller or more critical examination of the law. In *R. v. Odgers* (1843) 2 M & Rob. 479, the charge was one of malicious wounding with intent. In his summing-up the learned judge told the jury that they would be bound to find the accused guilty if they believed he really intended to do grievous bodily harm. The jury did not so believe and only found the accused guilty of an assault. In adverting to the law of homicide the learned judge said that on the facts of the case it could not be contended that the accused was driven to use his weapon to avoid his own destruction so that if death had ensued the offence would have amounted to manslaughter though not an aggravated one.

In neither of these cases nor in *R. v. Symondson* 60 J. P. 645 (where Counsel explained why the prosecution had decided to charge manslaughter and not murder) do their Lordships find any firm support for the submission now made on behalf of the appellant. In *R. v. Patience* (1837) 7 Car. & P. 775 where there was an acquittal on charges of wounding with intent to murder or to do grievous bodily harm the wounding having taken place in resisting an illegal and unlawful arrest Parke B. is reported as saying that if a person received illegal violence which he resisted with anything that he happened to have in his hand and death ensued that would be manslaughter. In *R. v. Whalley* (1835) 7 Car. & P. 245 where there was an acquittal on various charges of wounding, the accused, being confronted with an illegal warrant to appear, took up stones and struck the prosecutor and otherwise assaulted him. The learned judge in directing an acquittal said that on the facts as opened if death had ensued the offence would have been manslaughter. The observations made in these cases show that if someone acting unlawfully or without justification but with no intent to kill or to cause serious injury causes a death he would be guilty of manslaughter. It is clear that if in any case such a conclusion is possible it will always be the duty of a judge to direct a jury accordingly. Thus in *R. v. Weston* (1879) 14 Cox C. C. 346 where there was a charge of murder the explanation of the accused (given by his Counsel for he himself could not give evidence) was that the deceased had threatened him and that he had fled from apprehended violence and that he had raised his rifle (forgetting that it was loaded) against the deceased but had not intended to fire it but only to frighten the deceased. The jury held that the raising of the gun by the accused was unnecessary but that he had had no intention of discharging it and that it went off accidentally. Accordingly there was a verdict of guilty of manslaughter. There was a sentence of six months imprisonment. If in any of the above cases there is a suggestion that a measure of dispensation or tolerance, where a death is intentionally and unnecessarily caused, is to be found in the circumstance that someone is acting on an illegal warrant or is (as in *Cook's case* Cro. Car 537) executing process unlawfully it is not one that commends itself to their Lordships. Though as Lord Goddard C. J. pointed out in *R. v. Wilson* [1955] 1 W.L.R. 493 if a person is purporting to arrest another without lawful warrant the person arrested may use force to avoid being arrested " he must not use more force than necessary ". If more force than necessary is used it is not justified.

In *The King v. Biggin* [1920] 1 K.B. 213 the appellant, who had been charged with murder and whose case was that he had acted in self-defence, was convicted of manslaughter and was sentenced to imprisonment for 12 months. He appealed to the Court of Criminal Appeal where his conviction was quashed. That however was on the basis that inadmissible questions had been put to the accused man. The arguments on the appeal related solely to that matter. The judgment records that at the trial the

jury had been directed that if the appellant used more violence than was really necessary in the circumstances that would justify a verdict of manslaughter. The terms in which this direction was given are not set out and the Court had no need to examine it. In his judgment Lord Reading C. J. said that if the defence put forward by the accused, i.e. that he killed the deceased in self-defence was true he was entitled to be acquitted.

In a case in 1963, *R. v. Hassin* (*The Times* 3 October 1963) the appellant, who was convicted of non-capital murder, had said that the deceased man had first drawn a knife and that he (the appellant) had struck in self-defence. There was evidence that the deceased had no weapon. On appeal complaint was made that the learned judge had not dealt with the position of a man who in defending himself had exceeded the violence necessary for self-defence: it was urged that the learned judge should have put it to the jury that if the appellant intended to defend himself but used excessive force that would be manslaughter. In dismissing the appeal Lord Parker C. J. described that principle as novel at the present time. He regarded it as inconceivable that the jury's verdict meant anything other than that the appellant's story should be disbelieved. The learned judge had been quite right in not entering into the refinements of self-defence.

A consideration of the above cited cases does not lead their Lordships to conclude that in the present case there was any necessity to leave manslaughter to the jury. Nor do their Lordships consider that a jury should have any difficulty in deciding whether an accused person has acted in self-defence or may have done so. If the jury are satisfied by the prosecution beyond doubt that an accused did not act in self-defence then it may be that in some cases (of homicide) they will have to consider whether the accused acted under the stress of provocation. (See for example *Mancini's* case [1942] A.C. 1 and *Bullard's* case [1957] A.C. 635.) If the jury are satisfied by the prosecution that the accused did not act in self-defence and was not provoked then the jury will have to decide whether the accused had the intent that is necessary if the crime of murder is to be proved. If on the evidence in a case the view is possible that though all questions of self-defence and of provocation are rejected by the jury it would be open to them to conclude that though the accused acted unjustifiably he had no intent to kill or to cause serious bodily injury then manslaughter should be left to the jury. But it is not every fanciful hypothesis that need be presented for their consideration.

On behalf of the appellant it was contended that if where self-defence is an issue in a case of homicide a jury came to the conclusion that an accused person was intending to defend himself then an intention to kill or to cause grievous bodily harm would be negatived: so it was contended that if in such a case the jury came to the conclusion that excessive force had been used the correct verdict would be one of manslaughter: hence it was argued that in every case where self-defence is left to a jury they must be directed that there are the three possible verdicts viz. Guilty of Murder, Guilty of Manslaughter, and Not Guilty. But in many cases where someone is intending to defend himself he will have had an intention to cause serious bodily injury or even to kill and if the prosecution satisfy the jury that he had one of these intentions in circumstances in which or at a time when there was no justification or excuse for having it—then the prosecution will have shown that the question of self-defence is eliminated. All other issues which on the facts may arise will be unaffected.

An issue of self-defence may of course arise in a range and variety of cases and circumstances where no death has resulted. The tests as to its rejection or its validity will be just the same as in a case where death

has resulted. In its simplest form the question that arises is the question: Was the defendant acting in necessary self-defence? If the prosecution satisfy the jury that he was not then all other possible issues remain.

It was claimed that support for the contention of the appellant could be found in the judgments of the High Court of Australia in *The Queen v. Howe* 100 C.L.R. 448—judgments to which their Lordships pay the highest respect. They therefore feel that the facts should be set out in some detail.

On 13th November 1957 Howe had killed a man named Millard. He did so after a bout of drinking at the end of which Millard made an alleged indecent assault upon Howe which Howe repelled. They had driven to the scene of these events in a car. After the alleged indecent assault and its repulse, there was some slight scuffle between the two, at the end of which Howe took a rifle out of the car, and shot Millard dead. He was standing some eight or nine paces away from Howe at the time, and with his back to him. Thereafter Howe took Millard's wallet from Millard's pocket, abstracted the money from it and threw the wallet away. His evidence as to his reason for shooting Millard was that he thought that Millard was about to attack him sexually and that he did not think that he could keep Millard off with his hands. "I intended to stop him from further attacks. That's what I say now. I didn't think at all about whether I was likely to kill him. The thought never came into my mind. I was afraid of him. I was angry with him. I didn't think about what I was going to do. It all just came as soon as he grabbed me." (100 C.L.R. at p. 459.)

It is to be noted that in this account there is no suggestion made that Howe considered that it was essential to his own self-defence that he should kill Millard. He didn't think about it. He was afraid. He didn't think about what he was going to do. Had he done so the obvious solution would have occurred to him—to get into the car and drive away. Nor was any explanation given for taking Millard's money. Small wonder is it in these circumstances that *Taylor J.* in the High Court of Australia thought the evidence in support of a plea of self-defence "flimsy in the extreme" (p. 466).

The course which the proceedings against Howe took were these:

He was tried for murder before a judge and jury in the Supreme Court of South Australia. He pleaded not guilty and pleaded self-defence against a sodomitical attack by Millard. The defence of provocation was also raised. The jury found him guilty, adding a recommendation to mercy. The judge sentenced him to death.

Howe appealed to the Full Court of the Supreme Court of South Australia sitting as a Court of Criminal Appeal. That Court allowed the appeal, quashed the conviction and ordered a new trial. They did so on the ground that the following direction to the jury given by the trial judge was a misdirection in law:

> "Where a person charged with the murder of an assailant relies on self-defence, he cannot succeed, and has no defence at all, if the jury are satisfied that the killing took place either (1) when the accused has not retreated as far as possible having regard to the attack; or (2) if he has used more force than is necessary for mere defence, the result in both cases being that the person who kills is guilty of murder." (100 C.L.R. at p. 460.)

The Full Court gave guidance to the effect that a failure to retreat is only an element in the considerations upon which the reasonableness of an accused's conduct is to be judged: and in regard to the matters now relevant stated their view of the law as follows:

> " We have come to the conclusion that it is the law that a person who is subjected to a violent and felonious attack and who in endeavouring, by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary in the circumstances, is guilty of manslaughter and not of murder."

The Crown appealed to the High Court of Australia against this ruling. It was natural enough that the Crown should emphasise the requirement of the ruling that the accused should be acting in self-defence, and that the evidence in the case showed that Howe was not. But the High Court declined to entertain the question of the applicability of the principle to the case before it, and treated the appeal as raising an abstract point of law.

*Dixon C.J.* agreed in substance with the opinion of the Full Court: and *McTiernan J.* and *Fullager J.* did the same without delivering separate judgments.

*Taylor J.* recognised that the ruling of the Full Court might justifiably be thought to pose a somewhat unreal or artificial question of fact for the jury. " Indeed " he said " it may be thought only remotely possible that a jury, having satisfied itself beyond reasonable doubt that an accused person had used more force in self-defence than he could reasonably have thought necessary, would, thereafter, be prepared to entertain the view that the degree of force used was no greater than the accused, in fact, honestly believed to be necessary." It was not surprising in his view, therefore, that there was no expressed authority on the point. Favouring the view that the test should be whether what the accused did was done primarily for the purpose of defending himself he stated his final conclusion thus:

> " . . . I prefer to state the test as being whether the respondent used more force than on reasonable grounds he could have believed to be necessary and not whether he used more force than on reasonable grounds he actually believed to be necessary."

*Menzies J.'s* view was:

> " . . . I have reached the conclusion that the law is that it is manslaughter and not murder if the accused would have been entitled to acquittal on the ground of self-defence except for the fact that in honestly defending himself he used greater force than was reasonably necessary for his self-protection and in doing so killed his assailant."

He was of the opinion that it would be a very unusual case in which a jury would come to the conclusion that an accused person in defending himself from a violent and felonious attack killed his attacker by the use of force which notwithstanding his honest belief that it was necessary for his self-protection was force in excess of that which on reasonable grounds he could have believed was necessary for that purpose.

It will thus be seen that the Full Court of South Australia had posed two questions as being the relevant questions where a plea of self-defence would succeed *in toto* but for the use of excessive force by the person attacked:

1. Was more force used than a reasonable man would consider necessary?
2. If so, did the accused nevertheless honestly believe that such excessive force was necessary?

and both questions would have to be answered in the affirmative to justify a verdict of manslaughter.

Three members of the High Court of Australia (Dixon C.J. McTiernan J. and Fullager J.) agreed in substance with the Full Court.

On the assumption that an attack of a violent and felonious nature, or at least of an unlawful nature, was made or threatened so that a person under attack or threat of attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage so that occasion had arisen entitling a person to resort to force to repel force or apprehended force, then *Dixon C.J.* stated (see pp. 460–1) that the law was as follows: "Had he used no more force than was proportionate to the danger in which he stood, or reasonably supposed he stood, although he thereby caused the death of his assailant he would not have been guilty either of murder or manslaughter. But assuming that he was not entitled to a complete defence to a charge of murder, for the reason only that the force of violence which he used against his assailant or apprehended assailant went beyond what was needed for his protection or what the circumstances could cause him reasonably to believe to be necessary for his protection, of what crime does he stand guilty? Is the consequence of the failure of his plea of self-defence on that ground that he is guilty of murder or does it operate to reduce the homicide to manslaughter? There is no clear and definite judicial decision providing an answer to this question but it seems reasonable in principle to regard such a homicide as reduced to manslaughter, and that view has the support of not a few judicial statements to be found in the reports."

*Taylor J.* and *Menzies J.* expressed themselves independently. It would appear as though they favoured the single objective test implied in Question No. 1.

Their Lordships must disregard for present purposes the obvious deficiencies in Howe's plea of self-defence. The question for them now is simply whether the majority or minority view in the High Court of Australia represents the English Common Law, or whether neither does.

In the year before *Howe* was decided occurred the case of *Regina v. McKay* [1957] V.R. 560. This was a trial for murder in the State of Victoria though no issue as to self-defence arose in the case. McKay was caretaker of a poultry farm outside Melbourne belonging to his father. For a considerable time there had been nightly thefts of fowls from the farm, and a system of alarm bells was installed which would ring in the farmhouse if an intruder entered the pens. The bells did so ring on the morning of 9th September 1956 as daylight was breaking. McKay rose, took a loaded rifle with him, and saw a man named Wicks some 50 yards away carrying away some fowls. He fired one shot at him, intending he said, to hit Wicks in the leg. Wicks ran away, and when he had run some five yards McKay fired another shot at him. Wicks thereupon dropped the fowls, but continued running. McKay fired another three shots, and later discovered Wicks behind a hedge either dead or in a dying condition. It seemed probable that one of the last three shots had killed him by penetrating the heart. To a neighbour who by this time had joined him, McKay said "Serve him right. He was pinching fowls." He added that when he fired he did not care whether he killed the man or not. To the police however he said that he only meant to wound the man and not to kill him, and he fired because he did not want the man to get away. He again made this assertion in a statement from the dock at his trial.

The trial judge directed the jury that if they thought that McKay fired with the intention of killing Wicks and that when he fired he did so out of feelings of revenge or a desire to punish, he was guilty of murder. But that if McKay was honestly exercising his legal right to prevent the escape of a man who had committed a felony, and that the killing was

unintentional, but the means used were far in excess of what was proper in the circumstances, then McKay was guilty of manslaughter. He was convicted of manslaughter.

McKay appealed to the Supreme Court of Victoria alleging a misdirection upon the law which had deprived him of the chance of an acquittal. The appeal was, by a majority of 2 to 1 dismissed. An application by McKay to the High Court of Australia for special leave to appeal was also dismissed.

In giving the leading judgment in the Supreme Court of Victoria *Lowe J.* formulated six propositions dealing with the law relating to justifiable homicide. The sixth was in these terms:

> "If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter—not murder."

This proposition was quoted with approval by the High Court in *Howe's* case. *Taylor J.* however pointed out that the proposition so formulated was not in any way limited to cases where it appears that the accused entertained an honest belief that the force used, though excessive on any reasonable view, was necessary.

> "This distinction" he added "is of significance and reflection upon it provides grounds for thinking that the test proposed by the Full Court is erroneous."

A wholly different line was taken in the case of *De Freitas v. R.* (1960) 2 W.I.R. 523 which was an appeal from the Supreme Court of British Guiana to the Federal Supreme Court. After a review of many authorities the Court preferred not to follow the development of the law propounded in *Howe's* case. They sought to avoid the necessity of requiring a jury to go through a complicated and difficult process. An accused who has done no more than was in the opinion of the jury reasonably necessary in self-defence was entitled to be acquitted. If he has gone further then considerations as to provocation may reduce an offence so that the verdict should be one of manslaughter. In 1966, *Howe's* case and *De Freitas* case were considered in the careful judgment, in *Johnson v. R.*, in the Court of Criminal Appeal of Trinidad and Tobago (1966) 10 W.I.R. 402. That case was followed in *R. v. Hamilton* in the Court of Appeal of Jamaica (1967) 11 W.I.R. 309.

Because of the conclusion which their Lordships will express it does not become necessary for them to refer fully to these and to various other cases which were cited.

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 commonsense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be commonsense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in

imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lorships consider in agreement with the approach in the *De Freitas* case that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then that matter would be left to the jury.

For the reasons which they have set out their Lordships have humbly advised Her Majesty that the appeal should be dismissed.

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**In the Privy Council**

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**SIGISMUND PALMER**

*v.*

**THE QUEEN**

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DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

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