SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 846 of 2008

THE QUEEN

v

MAGID SAID

JUDGES:	MAXWELL P, ASHLEY JA and COGHLAN AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	20 October 2009
DATE OF JUDGMENT:	20 October 2009
MEDIUM NEUTRAL CITATION:	[2009] VSCA 244
JUDGMENT APPEALED FROM:	*R v Said* (Unreported, County Court of Victoria, Judge Williams, 24 September 2008)

CRIMINAL LAW - Conviction - Recklessly causing serious injury - Self-defence - Whether Judge misdirected jury - Proportionality - Appeal allowed.

APPEARANCES:	Counsel	Solicitors
For the Crown	Mr C J Ryan, SC	Mr C Hyland, Solicitor for Public Prosecutions
For the Appellant	Mr P J Matthews	Stary & Associates

MAXWELL P:

1 I will invite Ashley JA to deliver the first judgment.

ASHLEY JA:

2 The applicant was found guilty by a jury in the County Court of causing serious injury recklessly. He was convicted and 24 September 2008 he was sentenced to 2 years' imprisonment, one year to be cumulated on all other sentences which he was then serving. The learned judge fixed a new non-parole period of 16 months' imprisonment.

Ground of Application

3 Now the applicant seeks leave to appeal against his conviction. He relies, unusually, upon a single ground.

> The Learned Trial Judge erred in law in his directions to the jury as to self-defence, thereby giving rise to a substantial miscarriage of justice.
>
> Particular
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> His Honour erred by repeatedly characterising the test which the jury was required to apply as one of 'proportionality' rather than the test prescribed by the High Court in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645;

Circumstances

4 The applicant was presented on three counts: (1) Affray at St Kilda on 1 January 2006; (2) Intentionally causing serious injury to Kieran Moore on that date and at that place; and (3) Recklessly causing serious injury to Kieran Moore on that date and at that place.

5 He was acquitted on Counts 1 and 2 and found guilty on Count 3.

6 On New Year's Eve, the complainant celebrated with friends at Brighton Beach. Then he travelled to St Kilda Beach and met his girlfriend and her female cousin. He had been drinking and on his own account was not sober.

7 The applicant was also at St Kilda Beach. He knew the complainant's girlfriend. Apparently she had been his girlfriend in the past.

8 The complainant gave evidence that, after some unpleasantries between them, the applicant pulled out a knife and approached him. He, the complainant, ran away. Then, on his account, they ran into the sea baths restaurant and, because the applicant was chasing him, he picked up and threw two glasses at the applicant as hard as he could. One of them, he thought, hit the applicant on the head. But, according to the complainant, the applicant kept running after him, caught up, and stabbed him in the neck and left forearm. The wounds required many stitches.

9 The complainant's girlfriend gave evidence generally along the same lines. So did her cousin, and so did several independent witnesses.

10 One independent witness, however, gave a significantly different account. She said that the applicant acted provocatively towards his former girlfriend and that the complainant responded by acting aggressively. The applicant then ran off, followed by the complainant. Then they were seen to throw glasses and bottles at each other. Eventually the complainant cornered the applicant near the awning of the restaurant, and that was when the applicant stabbed him.

11 Still another witness stated that she saw a man - who must have been the complainant – 'pitching' bottles. He wasn't trying to defend himself.

12 The applicant did not give evidence or call witnesses. As Coghlan AJA remarked in argument this morning, his case seemed to be advanced by way of puttage, some of which was accepted and much of which was rejected.

Written Aide-Memoire

13 Before counsel's final addresses, the learned judge provided jurors with a written aide-memoire. With respect to self-defence, which was the issue pressed on behalf of the applicant, the document said this:

1. The test is – did the Accused believe upon reasonable grounds that it was necessary for him in self-defence <u>to do what he did.</u>

2. If he had that belief and if in all the circumstances it was reasonable for him to have that belief, he is entitled to an acquittal.

3. The burden of proof being on the Crown, the Crown must have you reject the self-defence proposition beyond reasonable doubt. Therefore, if you are left in reasonable doubt about the question posed in 1 and 2, you must acquit.

4. The words in 1 are underlined because it is those words which require you to consider the proportionality between the threat offered by the situation and the amount of force with which the Accused responds. Those words require a practical degree of proportionality – though not necessarily measured with undue nicety.

The Pre-Addresses Charge

14 Then, still before counsel's final addresses, his Honour spoke to the document. This is some of what he said:

> I propose to use some of the balance of the day in explaining what the legal principles are in relation to what we call the elements of the offences and the particular emphasis in this case on the legal meaning of self defence, which is obviously highly significant in this case.
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> …
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> So you have to understand what acting in self-defence means at law. It's set out there in paragraphs 1, 2, 3 and 4 under the heading Self-Defence.
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> …
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> Now the law doesn't require response with total and utter exactitude. I mean the law may be said to be an ass, but it's not an ass in all respects. The law doesn't require calm deliberation about, 'All right, he's threatening me to level 4.5 on the Richter scale so I have to respond with no more than 4.5 on the Richter scale'. It doesn't require that sort of exactitude obviously.
>
> *All that is required, however, is a general broad proportionality between the level of threat posed on the one hand and the extent of the response on the other.* If you think what was done was within the same broad level of significance, if I can use that expression, well then that should be passed by you – accepted by you. If you think it was disproportionate in the circumstances, well then you shouldn't accept it. Of course, in the end it's a matter of being satisfied of these matters beyond reasonable doubt. That's really an explanation of those four paragraphs. [Emphasis added]

15 Pausing for a moment and to anticipate a submission advanced for the applicant, it was common ground before us that the direction that I have emphasised

in the passage last cited, which purported to be a direction of law, was wrong.

The Charge

16 The learned judge adopted what he had said in his pre-address charge. He gave these further directions to the jury:

> But when it comes down to you picking up your presentment and saying - and that sheet of paper that I gave you yesterday which sets out the elements and sets out the self defence proposition which the Crown have to have you reject - those are the things which when you agree, in whatever way you agree, on a set of facts, it is those elements and that rejection of self defence. They are the things that have to be proven beyond reasonable doubt.
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> …
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> I might say in passing that [Counsel for the accused] never put to [the complainant] that he had a weapon. That he had any sort of weapon at that time. He never had the opportunity to provide an answer to you on that particular point. That may have been an oversight. It is still within your hands to make a decision on that proposition. I mean, that is one point. It would become quite significant because it might have a significant bearing on the issue of proportionality. That is one factor.
>
> Another factor in dispute is whether - no doubt Mr Said had - either had a knife or a bottle or some weapon. It is clear that he must have had some weapon he could not have done it with his fingernails. He presumably had a knife or a bottle or a broken bottle or a broken glass.
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> Again, it may have some significance in relation to proportionality but your decision on those matters may not be determinative of the charges.
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> …
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> Proportionality may vary depending whether he had a knife or a bottle or you may not think it does. It is a matter for you. I do not know that that matters all that much. Whether [the Complainant] was armed or not may be quite important, of course, and that is something you will have to bear in mind.
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> …
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> I have explained self defence yesterday. It is set out for you there. You must remember the Crown must have you reject it beyond reasonable doubt. Did he believe on reasonable grounds that it was necessary for him and his self defence to do what he did? The answer to that question is going to depend, of course, on what you find happened, and that is very much in argument between counsel; you may disagree, but it seems to me not to matter too much, maybe marginally, but not too much, whether it was a knife or a bottle. I suppose both are capable of causing wounds of significance. As I say, it is a matter for you, you may disagree, but it may not matter much to you whether the accused had a knife or a bottle. So that is one of the

decisions you will have to look at, but whether it has great significance to you is a matter entirely for you; it is not for me.

Whether [the complainant] was armed or not is, I would think again it is a matter for you, but to my way of thinking that is a far more important matter because it affects the extent to which the accused might be entitled to act in a certain way. You may well think what is proportionate, what is reasonably proportionate in response, may vary considerably, depending on whether [the complainant] is armed or not. It is entirely a matter for you.

Of course it is unnecessary, I know, I hardly need say it, but if there is to be some sort of confrontation, fight, between two young people, and if [the complainant] is unarmed, I would expect a jury, any jury, to at least think that the other person would be entitled to throw some punches; whether he is entitled to use some arms to inflict injury is another matter, it is a matter for you.

As I said, under No.4, when you are considering the proportionality of the response, you have got to look at the threat posed, and that will vary depending on whether [the complainant] was armed or not, of course, but you look at the threat posed, and you look at the response. Well, the response was to wound him, as we know, he was wounded with either a bottle or a knife, one would think, so you look at the threat posed, you look at the response, and you ask yourself, well, in all the circumstances, was that generally proportionate? It does not have to be identical, it does not have to be weighed up with undue nicety, but was it, viewing it in a practical way, was that a proportionate response, or was it going over the top in all the circumstances; that is what you would have to ask yourself.

As I say, that will vary depending on what your ultimate view of the surrounding facts is, as I indicated yesterday in the analysis that I gave you, which is not binding on you, but I mean if [the complainant] was always the chaser/aggressor, of course - and particularly highlighting the period when the confrontation under the awning occurred, if [the complainant] was always the chaser and aggressor and was still the chaser/aggressor at that point, I would expect you would say to yourselves, well, he is entitled to do something in his self defence, the accused, and the only issue then really is, well, is what he did, which we know what he did, perhaps not what with, but generally we know what he did; is his response proportionate to the threat of it?

…

If you accept the other version of the facts, if you accept the version put forward by [the complainant], the two girls, and by Mr Boyle, that the accused was the chaser/aggressor and that [the complainant] was being chased and that he tried to respond, firstly by throwing the glasses to slow him down to try and get away, but that failed and then in the ultimate confrontation, he is still the one being chased and the accused is still the aggressor; if that is the view you take, well, it is hard to see that self defence arises at all in those circumstances because you are not dealing with the situation of a threat being posed by [the complainant] at all if you accept that version of the facts. Then, of course, I gave you the hybrid version but in the end it really comes down to who was the aggressor at that final

> confrontation. That may depend on your view about who was the chaser earlier but it really comes down to who was the aggressor at the last confrontation. If it was [the complainant] bailing the accused's up, your question then is, well, was the accused's response proportionate to any threat posed by [the complainant]. You have to be satisfied beyond reasonable doubt that it was not, it was not proportionate before you could convict. If you are satisfied that it was a disproportionate response beyond reasonable doubt then you should convict. If you are not satisfied that it was a disproportionate response beyond reasonable doubt then you should acquit.
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> …
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> You could accept that [the complainant] was the aggressor and chased the accused and still convict if you are satisfied, as I have explained, that ultimately the response that the accused's came up with was disproportionate and I have been through that.
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> …
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> In relation to the injury counts they relate to the stabbing incident or the wounding incident. You have to - there is no issue that the wound was caused by the accused. The first thing you have to decide is whether the Crown has discounted or have you reject self defence beyond reasonable doubt. Either because it does not arise at all - that is one basis on which you may reject it, that it does not arise at all because [the complainant] was never a threat to Said. It was Said who was the aggressor or alternatively, if you do not accept that, if you accept that Said was entitled to do something in his self-defence because of [the complainant's] behaviour then, the issue for you to consider is the proportionality.

17 The learned judge was persuaded to give a redirection. It had to do in two different ways with the proportionality of the response. Particularly his Honour said this:

> … when dealing with this question of the proportionality of the response, of course I said to you, it was an important matter whether the victim, that is [the complainant], was armed or not because it would affect the proportionality of the response. In other words, if he was not armed, in certain circumstances, if he was the aggressor but he was not armed, you might find a certain level of response to be proportionate and you might find a certain level of response to be beyond what was proportionate. I do not resile from that either.
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> One thing I may not have made clear is that, of course, you have got to consider it from the proportionality from the accused's point of view. It is his belief about whether [the complainant] was armed or not which is important, more important than the actual fact. Because we are looking at his criminality in this, of course, his mens rea, his state of mind, it is his understanding of what is proportional by way of response that is important when you are dealing with question 4 on the piece of paper.

18 Following a jury question and answer concerning the count of affray, the learned judge gave a further direction concerning self-defence in that context:

> When I said to you he was either acting in self defence or he wasn't - and by acting in self defence I meant of course, as I said, a circumstance where the Crown have failed to have you reject self defence beyond reasonable doubt. Are you with me still. There's always this double negative sort of thing.
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> What I didn't go on a moment ago to repeat, which I did earlier, was that you've got to keep in mind that it's always subject to the proportionality concept whereby you won't uphold a self defence proposition if you consider that the Crown satisfies you that the response was disproportionate to the threat without judging it to too finer a nicety as I have set out in the sheet. You don't balance it with a fine tooth comb. In general terms if the response was not proportionate to the threat, if you are satisfied of that beyond reasonable doubt, then the Crown have succeeded in having you reject self defence. Is that clear?

Submissions for the Parties

19 Before us, counsel for the applicant pressed three submissions. First, that the judge when instructing the jury had raised proportionality to the status of a principle of law, as a separate and determining question. Second, that his Honour had given proportionality undue prominence as a factual consideration in circumstances where a number of factual considerations were important. Third, that the judge did not make it clear that the question of proportionality, so far as it was relevant, involved consideration whether the applicant's action had been demonstrated to be out of all proportion or plainly disproportionate to any attack upon him.[1]

20 Counsel for the Crown, in characteristically frank and helpful submissions, agreed that:

(1) The learned judge had charged the jury in a way as might have created the impression that proportionality was a necessary part of the legal conception of self-defence;

(2) His Honour had given great prominence to proportionality in his

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[1] Counsel referred to *R v Portelli* (2004) 10 VR 259, 273 [29] (Ormiston JA, with whom Winneke P and Charles JA agreed).

directions to the jury;

(3) His Honour had directed the jury in terms of proportionality, not demonstration of marked or plain disproportionality;

(4) The main area of dispute had been whether this could have ever been a case of self-defence; and

(5) The jury may have been left with the impression that, absent proportionality, the defence must fail.

21 Counsel sought, however, to sustain the judge's charge on the footing that his Honour had posited the self-defence test correctly in his written aide-memoire and in his oral directions, this including a correct direction that it was for the Crown to establish beyond reasonable doubt either that the applicant did not believe that it was necessary for him to do what he did in self-defence, or else that there were no reasonable grounds for him holding such belief.

Resolution of the Application

22 As can be seen, there was in the end a limited area of disagreement between the parties as to the content of the aide-memoire, the pre-address charge and the charge. Counsel for the Crown was reduced to contending that a number of serious flaws in the judge's directions were sufficiently answered by the written instruction and the oral charge getting the requisite direction correct at some points. Even if, which need not be decided, the judge did get the direction right on one or more occasions, I consider that the charge overall was so affected by error as to create a serious risk that a miscarriage of justice occurred. Notwithstanding that the case was very likely a strong one for the Crown, it cannot be said that the jury was bound to find the applicant guilty on all versions of the evidence. In that context, a repeated misdirection, in more than one respect, upon the only issue which was agitated at trial was a serious matter.

23 In the event, the Crown not contending that this is a case in which the proviso

could apply (because there was a fundamental irregularity in the conduct of the proceeding), the application should in my opinion be granted and the appeal should be allowed.

24 It is regrettable that, although this case was conducted over a short period and was in a short compass, the learned judge did not follow the charge book when directing the jury. Counsel for the applicant agreed, in answer to a question asked by the President, that had the charge book been followed, the problems of which he complained would not have arisen. This charge can be contrasted with the charge in *R v Hendy*.[2] There the judge followed the charge book carefully and the only question was whether, in effect, the charge book itself contained something that could have been improved upon in accordance with the authorities.

25 So, as I have said, in circumstances where error has been demonstrated, the result must be in my opinion that this appeal succeeds.

MAXWELL P:

26 I agree that the appeal should succeed, for the reasons which his Honour has given. I wish only to add something in relation to the matter last dealt with, concerning the departure from the form of charge which appears in the charge book.

27 Ashley JA has referred to *R v Hendy*. He and I were both members of the court in that matter and, like him, I was struck by the contrast between this case and that. In *R v Hendy*, I said:

> The language of the directions on self-defence indicates that the learned judge was, prudently, utilising the Charge Book prepared and published by the Judicial College of Victoria. The Charge Book is an invaluable resource for trial judges. The detailed guidance which it provides is a powerful safeguard against error.[3]

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2 [2008] VSCA 231.

3 Ibid [18].

28 As Ashley JA has already noted, none of the complaints which we are upholding in respect of the charge in the present case would have been sustainable had the charge book charge been used. It is most unfortunate that this appeal was made necessary because of what were avoidable errors. Not only has the appeal involved time and cost for the court and the parties, but the conviction must be quashed and a retrial ordered.

29 This case illustrates just how important a resource the charge book is for trial judges, and how important it is that it be used for its intended purpose, that is, to minimise the risk of appealable error. The charge book contains much more than the model charges. Each part of the charge book provides references to relevant decisions, and guidance as to when and how particular topics need to be addressed (depending always on the circumstances of the particular trial). The charge book is accessible on-line and there is every reason to think that judges can – and should – avail themselves of the assistance which it provides.

30 The charge book is a living document. For example, following comments which the Court made in *Hendy*, the model charge on self-defence was modified to remove the passage which had given rise to debate in that case. It is also important to emphasise that it is not an academic document. The model charges are reviewed and edited by experienced trial judges and experienced appeal judges, who have worked very hard with the Judicial College of Victoria, over several years, to arrive at formulations which are both faithful to the requirements of the law and cognisant of the practicalities of running trials. I want to express this Court's appreciation of the work that has gone into the charge book, and to reiterate the hope that that work will continue to pay dividends.

31 Every time appealable error is avoided, every time the community is saved the time and expense of an appeal and a retrial, the vital importance of the charge book is reinforced.

COGHLAN AJA:

32 I agree with the reasons given by Ashley JA and endorse the remarks of the President about the charge book.

33 I cannot help but observe that after the pre-charge had been given by his Honour and the aide-memoire provided by him to both the jury and counsel, counsel had every opportunity to deal with the matters in the aide-memoire and in the pre-charge. His Honour was given no assistance.

34 From the point of view of the accused, self-defence was the real and to a large degree sole issue in the trial. In that context it was incumbent on both counsel to assist the learned trial judge to get this aspect of the law correct. I can only reiterate the importance that counsel be aware of the legal principles and the importance of counsel giving detailed attention to the charge, here including the pre-charge, and giving assistance to the trial judge.

MAXWELL P:

35 The orders of the Court are as follows:

1. Application for leave to appeal against conviction is granted;

2. The appeal is treated as instituted and heard *instanter* and is allowed;

3. The conviction sustained by the appellant in the Court below is quashed and the sentence passed thereon is set aside; and

4. The Court directs that a new trial be had.

36 Thank you, Mr Matthews. We grant a certificate pursuant to s 14 of the *Appeal Costs Act*.

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