HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: MARK VINCENT DAYNEY
Appellant

and

THE KING
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

[1] The respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: Outline of the propositions that are to be advanced in oral argument.

[2] The essential focus of this appeal is whether the *retreat condition* in s. 272(2) of the *Criminal Code (Qld)* is to be understood as a stand-alone imperative to the availability of the protection of the excuse found in s. 272(1) or whether it serves only to qualify the preceding conditions within s. 272(2). That was the question answered by the majority (Fraser and McMurdo JJA) in *Dayney (No 1)* and by the Court in *Dayney (No 2)*; although each by different pathways.

[3] It is accepted, as all six Justices across two intermediate appellate Courts acknowledged, that the retreat condition in s. 272(2) has the capacity to give rise to different interpretations. That there are competing constructions does not however answer the question as to whether five of the Justices in the same jurisdiction are wrong.

[4] Instead to resolve the conflict in the question of construction the argument in this Court is said to turn upon an analysis of what two cases the *retreat condition* in s. 272(2) refers to. If the cases are only those within s. 272(2) itself there was a misdirection on a matter of significance and a miscarriage was occasioned warranting a re-trial. However, if the construction allows for the conclusion arrived at in *Dayney (No 1)* and *Dayney (No 2)* then no miscarriage was occasioned. The appellant must therefore persuade this Court that the *retreat condition* cannot be understood to be an imperative condition untrammeled by the other conditions in s. 272(2). It is not a case of preference.

[5] Despite this, in seeking to elevate a preference to what is contended to be the only construction of the provision, the appellant's argument removes an integral phrase from the language of the *retreat condition* so as to leave only the interpretation favoured by Sofronoff P in *Dayney (No 1)* and the Court in ***Randle v The Queen*** (1995) 15 WAR 26, available. Once that interpretation is assumed then the phrase is reinserted to answer the rhetorical question: "to what other case can the *retreat condition* then refer?" This approach is inconsistent with the proper process of construction and ignores the various observations of this Court and other intermediary appellate Courts.

[6] While it has been acknowledged that a *literal* reading of the *retreat condition* may favour the appellant's contention, that disregards the modern approach to construction including the limitations of doing so in relation to the *Code* itself. Instead, having regard to the text, context, and purpose of the provision, the respondent's construction must be correct.

[7] The text of the *retreat condition* must be read paying regard to the punctuation and language deployed in the whole of s. 272. Doing so reveals that the provision, and ergo the *retreat condition* itself, is to be understood as disjunctive and by reference to the outcome of the force used, and not by reference to a particular state of mind or purpose. So much is supported by the fact that it was clearly considered unnecessary to restate the cases to which the restriction applied because that was already clear by the time one arrives at the *retreat condition* itself.

[8] A review of not only the surrounding provisions, but also the *Code* more broadly supports the contention that the *retreat condition* is to be understood as acting independently to the preceding conditions in s. 272(2). In this regard it must be recognised that s. 272 is found within Chapter 26 in Part 5 of the *Code*. Additionally, within the same Part are Chapters 28 – 30 which separate offences by reference to outcomes in a cascading order rather than by connection with a state of mind or purpose. Further afield, a comparison can be made with the comparable excuse in s. 31. These features reveal a focus broadly on outcome and not a state of mind or purpose. If the outcome is the focus, then in context the *cases* referred to in the *retreat condition* must be understood in the same way.

[9] The terms of s. 272(2) themselves connote a particular purpose understood not only by reference to s. 271 and the successive nature of the drafting but also by reference to the essential difference as between the two provisions. It is of significance that s. 271 is to be understood as a justification where s. 272 is to be understood as an excuse. The distinction turns upon the notion of blame. Where blame is at the centre of the

restriction, conduct cannot be excused unless blame is completely removed. To place such an expectation upon only those cases where death or grave injury are occasioned is consistent with the notions of proportionality in s. 272(1) itself. Further, it would be a rare case in which the appellant's construction might arise, which could not be the intention and as such, the redundancy of the appellant's construction indicates the construction advanced by him is untenable.

[10] Further fortifying the construction, that the *retreat condition* is to be understood to operate independently, is the use across s. 272 of the words "*another*", "*some person*" and "*conflict*". Collectively the provision therefore contemplates blame arising in a situation involving an intervenor, which the appellant's construction would not accommodate.

[11] That the *retreat condition* is to be understood to operate independently is consistent with the common law and the historical features underlying the provision. This is so, notwithstanding the conclusion of the court in ***Randle v The Queen***.

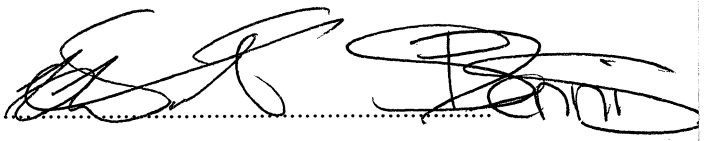
[12] As a consequence of the proper process of construction, not only does the *retreat condition* operate independently, but it is to be understood to apply only, as the majority concluded in *Dayney (No 1)*, to:

1. a case in which force used in self defence causes death; **or**
2. a case in which the force used in self defence causes grievous bodily harm.

[13] This conclusion is not undermined by the different process of reasoning of Dalton JA (with the concurrence of Mullins P and Boddice J) in *Dayney (No 2)*.

[14] There was no misdirection, and the appeal ought be dismissed.

Dated: 18 April, 2024



CW Wallis and SL Dennis

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