



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

NO. B29 of 2023

BETWEEN:

MARK VINCENT DAYNEY
Appellant

and

THE KING
Respondent

**APPELLANT'S
OUTLINE OF ORAL SUBMISSIONS**

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Argument

2. This case turns solely on a question of statutory construction: what is the meaning and effect of the third limb of section 272(2) of the *Criminal Code (Q)* (“retreat condition”)?
3. The appellant submits that the retreat condition is a qualification of the two “cases” mentioned in the first two limbs of section 272(2).
4. There is no dispute that section 272:
 - a. was properly left to the jury; and
 - b. was engaged on the basis that the defendant’s presence in the deceased’s house late at night, dressed as he was, was an assault by a threat of violence or a provocative act for the same reason: CAB 54-55.
5. The issue is whether retreat condition ought to have been left to the jury as a matter for their consideration.

6. For ease of reference, section 272 is in the following terms:

272 Self-defence against provoked assault

- (1) When a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person's preservation from death or grievous bodily harm to use force in self-defence, the person is not criminally responsible for using any such force as is reasonably necessary for such preservation, although such force may cause death or grievous bodily harm.
- (2) This protection does not extend to a case in which the person using force which causes death or grievous bodily harm first began the assault with intent to kill or to do grievous bodily harm to some person; nor to a case in which the person using force which causes death or grievous bodily harm endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable.

7. The meaning and effect of the retreat condition is determined by its text, context, and purpose: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 276 CLR 136.

8. The text and context of the retreat condition support the appellant's construction:

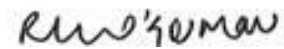
- a. the words "in either **case**" refer to the two "cases" mentioned in the immediately preceding two limbs of s 272(2);
- b. the words in "in **either** case" refer to two alternatives, and those alternatives are the disjunctive cases referred to in the preceding two limbs of s 272(2).

9. The purpose of the retreat condition supports the appellant's construction:

- a. The purpose of the provision is to provide for the defence of self-defence, notwithstanding the accused was the first to use force against the other (or provoked the other's initial use of force), except where the accused person was the first to use lethal force.

10. The text and context of the retreat condition do not support the respondent's construction:
 - a. the words "in either case" do not sensibly refer to alternative cases of death or grievous bodily harm, for the reasons given by Dalton JA in *Dayney (No 2)* at [41];
 - b. the words "in either case" do not sensibly refer to alternative cases of provocation or assault, which are not described as "cases" and appear remotely in section 272(1).
11. Having applied the above rules of statutory construction the meaning of the retreat condition is unambiguous.
12. Accordingly, there is no need to refer to, much less determine, the antecedent common law or Sir Samuel Griffith's subjective intentions as to the retreat condition: see *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 309.
13. Nor is there any need to reconcile the cases which have considered the meaning of the retreat condition over time.
14. The respondent submits that, if the appellant's construction is accepted, it does not invite this Court to consider the application of the proviso: RS[90]. The appellant agrees with that submission.

Dated: 18 April, 2024



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