

PICKERING v THE QUEEN (B68/2016)

Court appealed from: Supreme Court of Queensland, Court of Appeal
[2016] QCA 124

Date of judgment: 6 May 2016

Special leave granted: 16 November 2016

At a party on the evening of 19 December 2012 Mr Ivan Owens was fatally stabbed during an altercation with his friend Mr Rodney Pickering. Mr Pickering later stood trial on a charge of having murdered Mr Owens.

Mr Pickering gave evidence that he had gone to the party to rescue his son from a potential fight with Mr Owens. He took a knife in order to keep Mr Owens away from him, as he had been challenged to a fight by Mr Owens at a hotel earlier in the evening. At the party, Mr Owens aggressively confronted Mr Pickering, who feared for his safety. Mr Pickering testified that he had tried to fend off Mr Owens and that he did not know how the knife had left his hand and ended up in Mr Owens' chest.

The trial judge, Justice Henry, left for the jury's consideration various defences raised by Mr Pickering. These included accident, self-defence and mistaken belief as to a fact. The jury found Mr Pickering not guilty of murder but guilty of manslaughter. Justice Henry then sentenced Mr Pickering to imprisonment for seven and a half years.

Mr Pickering appealed against his conviction, on the ground that a miscarriage of justice had occurred because the defence prescribed by s 31(1)(c) of the *Criminal Code* (Qld) ("the Code") had not been left for the jury's consideration. Section 31(1)(c) relevantly provides as follows:

- (1) A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances ...
 - (c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person ...

Mr Pickering submitted that an exclusion, set out in s 31(2) of the Code, applied to s 31(1)(d) but not to s 31(1)(c). The Crown did not oppose that submission. Section 31(2) relevantly provides as follows:

- (2) However, this protection does not extend to an act or omission which would constitute the crime of murder, or an offence of which grievous bodily harm to the person of another, or an intention to cause such harm, is an element ...

The Court of Appeal (Holmes CJ, Fraser & Gotterson JJA) unanimously dismissed Mr Pickering's appeal. Their Honours found that the defence under s 31(1)(c) of the Code was fairly raised upon the evidence and that the verdict may have been affected by Justice Henry's failure to direct the jury about that defence. The Court of Appeal held however that s 31(2) operated to exclude

the defence. This was after their Honours had held, upon considering both the structure of s 31 and its context (being relevant provisions of the Code), that s 31(2) applied to s 31(1)(c). The Court of Appeal then rejected an argument by Mr Pickering that s 31(2) should not apply in his case because the offence he faced was manslaughter, of which the causing of grievous bodily harm was not an element. Their Honours considered that the word “act” in s 31(2) encompassed Mr Pickering’s stabbing of Mr Owens because that act, when combined with the requisite state of mind and the injury to the victim, would constitute an offence of unlawfully doing grievous bodily harm.

The ground of appeal is:

- The Court of Appeal erred in concluding that s 31(2) of the *Criminal Code* (Qld) was not confined to the offence charged and to any alternative charge established by the evidence.