



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

BETWEEN:

BIANNCA EDMUNDS
Appellant

and

THE KING
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION AS TO PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF ISSUES

2. The appellant was convicted of murdering Michael Caposiena ('MC') on the basis that she was complicit in his killing by her husband, Glen Cassidy ('GC'). As her criminal liability was derivative, it was necessary for the prosecution to prove GC's own conduct constituted murder.
3. At trial the appellant contested whether the evidence was sufficient to establish her derivative liability. The issue on appeal concerned the trial judge's refusal to direct the jury on self-defence and whether the evidence raised a reasonable possibility that GC killed MC in self-defence – because if it did, the issue had to be left for the jury's consideration under s 322I of the *Crimes Act 1958* (Vic).
4. Three judges of the Court of Appeal held, unanimously, that the evidence did not meet that threshold. Having concluded that section 322L did not operate as an *automatic* bar – the Court held that there was a reasonable, if weak, possibility that MC's own use of the knife was unlawful¹ – the Court of Appeal determined that the trial judge was nonetheless correct to refuse to leave self-defence for the jury's consideration. The

¹ This finding is the subject of the Respondent's Notice of Contention.

evidence did not allow for the reasonable possibility that GC believed shooting MC was necessary in self-defence.

5. The appellant raises three arguments: i) that the 'original aggressor rule' has been abolished by statute; ii) that self-defence does not require an exclusive belief; and iii) that the Court of Appeal was wrong to find no reasonable possibility that GC held the belief required.
6. On the first two propositions, the appellant's arguments are misplaced – they do not arise from the Court of Appeal's reasoning, properly understood, or otherwise do not fall for determination given the particular facts of this case.
7. As to the first two arguments, section 322K(2)(a) of the *Crimes Act 1958* (Vic), properly construed, carries forward the *Zecevic* 'original aggressor' reasoning – as a question of degree, not exclusivity of motive – and the Court of Appeal applied it correctly.
8. The third argument fails on the facts. There was no evidence capable of showing GC's fatal act had anything to do with what MC did. Three appellate judges reached that conclusion unanimously, after careful review of the evidence. They were correct to so find.
9. The judgment in the Court below was the result of the unanimous and carefully reasoned evaluative judgment of three judges, applying settled principle to an unusual – if not unique – set of facts. The appeal should be dismissed.

PART III: NOTICE OF CONSTITUTIONAL MATTER

10. No constitutional matter arises.

PART IV: FACTS

12. The respondent adopts the appellant's account of the facts at Appellant's Submissions (AS) [9]–[24] to the extent that it is consistent with what follows. The following sets out, in order, the evidence going to GC's state of mind before, during and immediately after he killed MC. It shows that GC's intention to kill MC was already fixed and fully formed before he arrived, and that nothing which happened inside the house changed it.

A. The plan

13. GC's phone held a 'to-do' list, prepared in advance: 'getting him alone', 'one bullet', 'body transport', 'knife', 'bike or car that's not mine'.² Each item matches a step in the killing that actually happened.
14. GC drove to MC's house in a car that was not his and parked a block away. He walked past the house first – the Court of Appeal found this appeared to have been done for preliminary surveillance³ – then went back to the car for a bag containing a loaded sawn-off shotgun, two knives and gaffer tape. Given how quickly he produced and fired the gun once inside, it must already have been loaded and readily accessible. He also carried a hand-drawn map of the property, marking the doors and the lighting.⁴
15. It can be accepted – because the appellant's own trial counsel said as much – that this was (at least) GC's plan. It can be accepted that GC unambiguously intended to travel to MC's house on the occasion in question for the purpose of killing him. Trial counsel told the jury GC had 'his own motive and plan' to kill MC.⁵ Whatever that submission meant for the case against the appellant at trial, it confirms, from her own side of the case, that GC's intention to kill MC was formed and complete before anything happened at the house.
16. The Court of Appeal's own view of this evidence was unequivocal: it 'strongly bespoke of Cassidy being irretrievably fixed on a course of conduct to kill Caposiena. Cassidy was not there to engage in any way with Caposiena or to respond to anything which Caposiena did. He was there to kill him'.⁶ That finding is not challenged on this appeal.

B. The entry

17. GC's request to shake MC's hand was, the Court of Appeal found, 'a pretext to get Caposiena to open the safety door'.⁷ MC had said nothing hostile. Twice he told GC, 'I'm really sorry, there's nothing I can do for you', before opening the door at GC's request. He held a kitchen knife concealed behind the door the whole time – GC could

²Judgment [259] (CAB 190–191).

³Judgment [259] (CAB 190–191).

⁴Judgment [259] (CAB 190–191).

⁵Judgment [261] (CAB 191).

⁶Judgment [260] (CAB 191).

⁷Judgment [262] (CAB 191).

not see it, and there is no evidence MC ever showed it to him or threatened him with it before GC forced his way in.⁸

18. The moment MC opened the door, GC grabbed his hand and forced him inside. A struggle began immediately and did not abate.⁹

C. The struggle

19. Ms Silva's unchallenged evidence was that the whole thing – from GC grabbing MC's hand to the gunshot – took 'a matter of seconds'.¹⁰ The two men stayed 'joined together' the entire time, in what the Court of Appeal called 'one fluid movement' that was 'uninterrupted', and was, on the whole of Silva's evidence, 'a single, short, continuous and rapid attack by [GC] against [MC]'.¹¹ There is no evidence GC ever paused, hesitated, pulled back, retreated, or showed the slightest concern for his own safety.¹²
20. MC died instantly. It was common ground he could not have stabbed GC after he was shot, so he must have done it beforehand.¹³ GC was stabbed four times, to the buttock, loin and back. Wounds to the back and buttock point to a chaotic, shifting struggle – not a moment where GC was facing MC and could see and weigh up a threat.¹⁴ GC did not die instantly. His death, from the stab wound to his liver, took time, through blood loss. He had both the time and the physical capacity to act deliberately when he produced and fired the gun.

D. The aftermath

21. Immediately after shooting MC, GC turned on Ms Silva and assaulted her. A neighbour, Garry Walker, heard him say 'she stabbed me' – blaming Ms Silva, not MC.¹⁵ The Court of Appeal found Walker's evidence cogent and unequivocal. And it found, expressly, that even without Walker's evidence, nothing suggested a reasonable possibility GC acted in self-defence; on the Court's own view, Walker's evidence simply made self-defence 'even more unrealistic'.¹⁶

⁸Judgment [262] fn 61 (CAB 191).

⁹Judgment [1], [198], [262] (CAB 147, 181, 191).

¹⁰Judgment [69], [277] (CAB 162, 192).

¹¹Judgment [274], [278] (CAB 192–193).

¹²Judgment [280] (CAB 193).

¹³Judgment [86] (CAB 165).

¹⁴Judgment [87] (CAB 165).

¹⁵Judgment [297], [307] (CAB 195–196).

¹⁶Judgment [313] (CAB 196).

PART V: ARGUMENT

A. Section 322K(2)(a) embraces the Zecevic 'original aggressor' reasoning – the Court of Appeal was correct to treat it as relevant

22. The appellant's first argument assumes 'original aggressor' reasoning can only survive if a freestanding common law rule survived the 2014 reforms. That assumption is wrong. Section 322K(2)(a), properly read, already carries that reasoning forward. The question is not whether a common law rule survived. It is what Parliament meant by the words it actually used. It ought be noted that, while the appellant seeks to introduce the language of a “common law *rule*” and the “original aggressor *rule*”, neither the Court of Appeal below nor the Court in *Zecevic v DPP (Vic)*¹⁷ couched the relevant question in terms of a “rule”. Rather, as discussed below, the evidence of a party as being the original aggressor in a conflict is an evidentiary matter,¹⁸ relevant to an whether there is evidence that a person believes the conduct is necessary in self-defence.
23. In *Zecevic*, Wilson, Dawson and Toohey JJ held that where an accused was the original aggressor, 'it will be for the jury to consider whether the original aggression had ceased so as to have enabled the accused to form a belief, upon reasonable grounds, that his actions were necessary in self-defence'.¹⁹ Their Honours treated original aggressor status as an 'evidentiary matter' going to that ultimate question – not a separate legal category.²⁰ Section 322K(2)(a) asks, in almost the same words, whether 'the person believes that the conduct is necessary in self-defence'. The Explanatory Memorandum to the 2014 Bill confirms s 322K(2)(a) was based directly on Wilson, Dawson and Toohey JJ's judgment in *Zecevic*, and was meant to 'capture the broad way in which common law self-defence works'.²¹ The Second Reading Speech says the same thing: 'the first element of the test reflects the common law test for self-defence'.²²
24. That reading is reinforced by ordinary rules of construction. Where Parliament uses a technical legal expression – as it did here, expressly embracing the language from *Zecevic* – the expression is presumed, absent contrary intention, to carry its established

¹⁷ (1987) 162 CLR 645 (*Zecevic*)

¹⁸ *Zecevic*, 663.

¹⁹ *Zecevic*, 663.

²⁰ *Zecevic*, 663, 665.

²¹ Explanatory Memorandum, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic), 6.

²² Victoria, Legislative Council, Parliamentary Debates (Hansard), 25 June 2014, 2129.

common law meaning.²³ The Court of Appeal used that very principle to construe s 322K.²⁴ Nor does s 322N, which abolishes the common law defence, point the other way. Abolishing the common law as a source of law does not strip meaning from the common law concepts embedded in the statutory language that replaces it – a point this Court has recently confirmed when dealing with a relevantly similar provision.²⁵ Nor is there anything in the text or the extrinsic material suggesting 'original aggressor' reasoning matters only under s 322L. Section 322L answers a different question – the specific gap, identified by the Victorian Law Reform Commission, around defending against lawful conduct. It does not displace the *Zecevic* guidance on considering how the s 322K(2)(a) belief is formed.²⁶

25. The Court of Appeal was correct to treat GC's status as original aggressor as relevant to whether there was a reasonable possibility he held the s 322K(2)(a) belief.

B. The Court of Appeal correctly applied Zecevic's 'extent to which' analysis – it did not adopt a rigid, all-or-nothing exclusivity rule

26. The appellant's second argument treats the Court of Appeal's reasoning as requiring a pure, single state of mind – as if any trace of murderous purpose was automatically fatal to self-defence. That is not what *Zecevic* requires, and it is not what the Court of Appeal did.
27. *Zecevic* asks a question of degree, not a binary one. Wilson, Dawson and Toohey JJ looked at '*the extent to which* the accused declined further conflict and quit the use of force or retreated from it' in deciding whether the original aggression had 'ceased' enough to allow the exculpatory belief to form.²⁷ That is a spectrum, running from total cessation to ongoing, unabated aggression, somewhere along which the aggression may cease to rule out the relevant belief. It was never a *rule* that any continuing criminal purpose is automatically fatal, still less that the accused's state of mind must be pure or singular.

²³ *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 531.

²⁴ Judgment [202] fn 41 (CAB 181).

²⁵ *The King v Rohan* (2024) 280 CLR 288, 315–316 [66]–[67], discussing s 324C of the *Crimes Act 1958* (Vic).

²⁶ Victorian Law Reform Commission, *Defences to Homicide: Final Report* (October 2004), 3.78–3.82.

²⁷ *Zecevic*, 663 (emphasis added).

28. The issue was considered in *Anandan v The Queen*,²⁸ where Nettle JA held that a direction telling the jury to find against self-defence simply because the accused's 'aggressive behaviour had not ended at the relevant time' was erroneous, because it ignored the '*extent to which*' that aggression had ceased.²⁹ It is that same error which the appellant now erroneously attributes to the Court of Appeal. However, properly understood, the Court of Appeal did not make it. The Court expressly considered 'the extent to which the original aggression has ceased' as bearing on GC's subjective belief;³⁰ exactly the fact-and-degree question *Zecevic* requires and *Anandan* adopts. The appellant's claim that the Court adopted a 'mutually exclusive approach' does not reflect what question the Court considered.
29. *Massey v The Queen*³¹ makes the same point. The ACT Court of Appeal rejected the submission that an original aggressor can rely on self-defence even though the original aggression had not ended, holding the jury had been properly directed to ask whether the appellant's aggression had ceased 'so as to enable her to form the belief, based on reasonable grounds, that her actions were necessary in self-defence'.³² *Massey* drew, in turn, on *R v Nguyen*³³ for the proposition the Court of Appeal adopted below: self-defence 'cannot be used as a pretext to carry out a criminal purpose'.³⁴ That is the real content of the Court of Appeal's reasoning in the present case – not that self-defence cannot accommodate mixed motives, but that self-defence cannot be used to disguise a criminal design where nothing in the evidence shows that design was actually interrupted, even briefly, by anything the victim did.
30. Properly understood, neither of the appellant's first two arguments identifies any departure from settled principle. They ask this Court to read s 322K(2)(a) in a way that fits neither its text, its drafting history, nor the common law reasoning Parliament meant it to carry forward.

²⁸ [2011] VSCA 413 (*Anandan*).

²⁹ *Anandan*, [15]–[27].

³⁰ Judgment [205] (CAB 182).

³¹ [2013] ACTCA 5 (*Massey*).

³² *Massey* [102]–[108]; special leave refused: *Massey v The Queen* [2013] HCATrans 245.

³³ (1995) 36 NSWLR 397 (*Nguyen*).

³⁴ *Nguyen*, 407; *Edmunds* [212] (CAB 183).

C. The Court of Appeal's conclusion on the s 322I threshold was correct

31. The real question – which the appellant's submissions reach only at AS [58]–[61] – is whether there was evidence capable of showing GC's shooting of MC was a *response* to what MC did. The Court of Appeal answered that question, unanimously, after some 80 paragraphs of careful analysis.³⁵ It concluded no. That conclusion was correct; it is a conclusion which follows unambiguously from the particular facts of the case, set out in Part IV above.

(i) A wound does not, by itself, prove a causal link

32. The appellant's central factual point (AS [4]) is that, because GC was, objectively, fatally wounded, that fact is 'itself evidence from which an inference could be drawn that the person might have believed it necessary to defend themselves'. That conflates two different questions: whether GC was objectively in danger, and whether his conduct – shooting MC – actually resulted from, or was in response to, that danger. The relevant statutory question is only concerned with the second circumstance. As the Court of Appeal put it, quoting *Zecevic*, 'a person who kills with the intention of killing or of doing serious bodily harm can hardly believe on reasonable grounds that it is necessary to do so in order to defend himself unless he perceives a threat which calls for that response'.³⁶ GC's wound shows, at most, that a threat existed. It does not show the threat caused the shooting. Something must bridge that evidentiary gap, and nothing does.
33. In fact, the Court of Appeal went further than was strictly necessary and answered this point directly. Its conclusion did not depend on whether GC actually realised, when he fired, that MC was the one who had stabbed him. The Court held that 'even if Cassidy realised he was being stabbed by Caposiena – he did not kill Caposiena in response to that conduct in self-defence but did so in pursuit of his original plan to murder him'.³⁷ The appellant is, in substance, asking this Court to draw the very inference the Court of Appeal already considered – and rejected – on a view of the facts most favourable to her. Nothing in the appellant's submissions deals with that finding.

³⁵Judgment [256]–[313] (CAB 190–196).

³⁶Judgment [209] (CAB 182–183).

³⁷Judgment [312] (CAB 196).

(ii) The facts in Part IV exclude any connection between the acts of GC with those of MC

34. Paragraphs 11 to 21 above are not provided for context or background colour. Collectively, they exclude any rational inference that GC's shooting was a response to MC's stabbing. GC's intent to kill was, on the unchallenged evidence, 'cemented by the time Cassidy forcefully entered the house'; there was, as the Court of Appeal put it, 'no scope for Cassidy to intend a greater level of harm in response to anything which Caposiena did'.³⁸ He could not have intended more than he had already resolved to do, and did not need MC to prompt him to. The struggle itself – seconds long, unbroken, the two men 'joined together' throughout – left, on the Court's assessment, no room for GC's conduct to 'transform from one of murderous attack in pursuit of his original design to one of self-defence'.³⁹ GC's own account, given moments later to Garry Walker, blamed Ms Silva for his wound, not MC – the only direct evidence of what was actually in GC's mind, and evidence that contradicts, rather than merely fails to support, the inference the appellant asks this Court to draw. And the pattern of GC's wounds – to his back and buttock – fits a chaotic, shifting struggle; not a moment where GC faced a visible threat he could assess and respond to.
35. None of this is addressed in the appellant's submissions. The claim that mortal injury is 'itself' enough evidence of a reasonable possibility cannot be argued by assertion in the abstract. It must be tested against the whole of the record. The evidence does not just fail to support the appellant's argument. It points the other way.

(iii) The Court of Appeal did not trespass on the jury's role

36. The appellant's claim that the Court of Appeal's conclusion is 'an unacceptable intrusion into the constitutional role of the jury' (AS [61]) is premised on a misconstrued inversion of the statutory considerations. Section 322I(1) requires a threshold, gatekeeping decision by the trial judge – and, on appeal, by the appellate court reviewing that decision – precisely so a jury is not asked to speculate about hypotheses the evidence does not support.⁴⁰ The first is a legal question: is there evidence capable of supporting the possibility or is there not? It is not a factual question for the jury to

³⁸Judgment [270] (CAB 192).

³⁹Judgment [275] (CAB 192).

⁴⁰Judgment [170]–[172], [189] (CAB 177–178, 180).

answer first. The Court of Appeal's careful, unanimous, extended analysis is the proper process for determination of this legal question; not a court usurping the jury's function.

37. The Court of Appeal's reasons demonstrate that the Court was cognisant of the separation of the roles between the Court and the jury. For example, where the sufficiency of the evidence turned on a genuinely contestable view of Garry Walker's reliability, the Court said plainly that if its conclusion had depended on accepting his evidence, that would have been a matter for the jury.⁴¹ But the Court's ultimate conclusion did not depend on Walker's evidence at all. It rested on the objective, uncontested facts about timing, continuity and preparation set out in Part IV, considered separately from Walker's account.⁴² That is a proper application of s 322I. It is not an intrusion on the jury's territory.

(iv) The Court of Appeal's conclusion, and why it is right in principle

38. The Court of Appeal's own summary – that 'the facts did not suggest a reasonable possibility that Cassidy subjectively believed that it was necessary to shoot Caposiena in order to protect himself from death or really serious injury'⁴³ – is well supported for the reasons above. It also fits the settled understanding of what self-defence is for. As Ormiston J put it in *R v Lawson*,⁴⁴ the law has never allowed someone to 'create a situation of emergency and provoke an attack upon himself, and yet claim the right to defend himself against that attack by shooting or killing his assailant'.⁴⁵ If the appellant's submissions were accepted, self-defence would extend to a person who sets out to commit premeditated murder, carries it out within seconds, and meets brief, ultimately fatal resistance from the victim in the victim's last moments. There is no rational or principled basis for excusing murder in those circumstances.

D. Conclusion

40. This is a case where three judges of an intermediate appellate court unanimously reached a careful evaluative conclusion on the sufficiency of the evidence, applying settled principles of law. The unusual facts – the fatal wounding of the person who was already intent on committing murder – do not, by themselves, raise a question this Court

⁴¹Judgment [309]–[310] (CAB 196).

⁴²Judgment [311]–[312] (CAB 196).

⁴³Judgment [317] (CAB 197).

⁴⁴ [1986] VR 515 (*Lawson*)

⁴⁵*Lawson*, 580.

needs to resolve. They certainly do not justify disturbing a conviction where the evidence behind the Court of Appeal's conclusion is, on any analysis, compelling.

PART VI: ARGUMENT ON THE NOTICE OF CONTENTION

41. By notice of contention, the respondent contends that the Court of Appeal erred in finding, at [248]–[251] of its reasons, that the evidence disclosed a reasonable possibility that MC's conduct was not 'lawful conduct' for the purposes of s 322L(a) of the *Crimes Act 1958* (Vic).
42. This ground, if made good, disposes of the appeal on its own. If there is no reasonable possibility MC's conduct was unlawful, s 322L excludes self-defence GC as a matter of law. The s 322I onus could never have been discharged – whatever the fate of the appellant's arguments about the original aggressor doctrine, exclusivity of belief, or the sufficiency of the evidence on GC's state of mind under s 322K(2)(a).
43. Two questions arise: did the Court of Appeal identify evidence – as opposed to the mere absence of evidence excluding an alternative hypothesis – capable of suggesting MC's conduct was unlawful? And do the Court's own findings about the character of GC's intrusion actually compel the opposite conclusion? The answer to the first is no. The answer to the second is yes.
44. The respondent adopts Part IV of its submissions in answer to the appeal, and relies in addition on the following, each going directly to the question of the lawfulness of MC's conduct.

A. MC armed himself before GC did anything, and kept the knife concealed

45. Before GC arrived, Silva saw him approaching the house with a plastic bag and told MC. MC went to the kitchen and armed himself with a kitchen knife, then went to answer the door.⁴⁶ He kept the knife concealed behind the door throughout the conversation that followed. It remained concealed when he opened the door to shake GC's hand.⁴⁷

⁴⁶Cf Judgment [12] (trial evidence) (CAB 148); Appellant's Submissions ('AS') [12].

⁴⁷Judgment [262] fn 61 (CAB 191).

B. GC's entry was forcible and immediately violent; MC showed no aggression beforehand

46. MC never raised his voice during the exchange through the locked security door. Twice he told GC, 'I'm really sorry, there's nothing I can do for you'.⁴⁸ The instant MC unlocked the door and put out his hand, GC seized it and forced him inside - a physical struggle began immediately.⁴⁹ The Court of Appeal found, as common ground, that GC's entry was trespass and aggravated burglary.⁵⁰
47. The Court of Appeal found that GC's manner of entry and immediate violence 'must have unquestionably indicated to Caposiena that Cassidy intended to do him real harm'; that MC 'was entitled to defend himself to repel this intrusion and attack'; that he 'had to react instantly to what was obviously imminent danger'; and that 'calm reflection cannot always be expected in such a situation'.⁵¹
48. Despite those findings, the Court went on to hold that a jury could view MC's use of the knife as excessive to the threat as he perceived it - on the hypothesis that he may not yet have seen the firearm.⁵²

C. The statutory threshold under s 322L(a)

49. Whether there is a reasonable possibility a victim's conduct was unlawful, for the purposes of s 322L(a), is governed by the same s 322I threshold that applies to every other element of self-defence. The Court of Appeal itself put the question in those terms, adopting Beale J's formulation in *DPP v McDowall (Ruling No. 1)*: 'Could a jury find or consider that there was a reasonable possibility that the deceased's conduct was unlawful?'⁵³ While that threshold is modest, it is not nothing. It requires evidence capable of supporting the possibility – not the mere absence of evidence excluding some alternative, and not speculation.

⁴⁸Judgment [262] fn 61 (CAB 191).

⁴⁹Judgment [1], [198], [262] (CAB 147, 181, 191).

⁵⁰Judgment [198] (CAB 181).

⁵¹Judgment [243] (CAB 188).

⁵²Judgment [244] (CAB 189).

⁵³Judgment [179] fn 40 (CAB 178–179), citing *DPP v McDowall* [2019] VSC 341, [9].

D. The Court of Appeal did not identify evidence for its finding - it rested on a gap in the evidence

50. The Court of Appeal's finding that there was a reasonable possibility that MC's conduct was unlawful rested on two steps: first, that there is a reasonable possibility MC started stabbing GC before he saw GC was armed with a firearm; second, that if so, a jury could see MC's use of the knife as excessive to a threat he did not yet know was lethal.⁵⁴
51. The first step has no positive evidence behind it. The Court of Appeal said so itself: 'There is no direct evidence which supports the hypothesis that Caposiena started stabbing Cassidy in the first moments upon Cassidy's forceful entry. On the other hand, the evidence... does not exclude this hypothesis.'⁵⁵ That is a candid – and accurate – description of a gap in the evidence, not evidence. The absence of evidence excluding a hypothesis is not evidence supporting it. Treating it as if it were inverts the s 322I test, which asks whether the evidence suggests a reasonable possibility, not whether it rules out every competing theory. The judgment makes the same point elsewhere: an inference that is 'at best... no higher than speculation or surmise'⁵⁶ cannot satisfy s 322I. The same is true here, for the same reason.
52. The Court of Appeal's own hesitancy confirms how thin this reasoning is. It called the possibility 'weak',⁵⁷ and reached its conclusion at [248]–[249] 'not without some hesitation'.⁵⁸ That hesitation was well-founded. On proper analysis it should have fallen the other way – the hypothesis never rose above speculation.
53. Tellingly, the Court's own explanation for why MC reached for the knife 'at the first sign of Cassidy's intrusion' was that he was 'in an increased state of fear'.⁵⁹ A fear-driven response to a sudden, forcible, violent home invasion is the paradigm of a lawful defensive reaction. It does not become unlawful just because the intruder's full arsenal was not yet visible. Nor does the law require a careful, considered and leisurely assessment of the full and exact nature of the threat a person is being confronted with and the precise calculation of the degree of force required to defend against it.

⁵⁴Judgment [236], [242], [244] (CAB 187–189).

⁵⁵Judgment [235] (CAB 187).

⁵⁶Judgment [294], citing *Robertson v R* [2024] NSWCCA 99, [27] (CAB 194).

⁵⁷Judgment [242] (CAB 188).

⁵⁸Judgment [248] (CAB 189).

⁵⁹Judgment [235] (CAB 187).

E. The Court's own findings about GC's intrusion point to lawfulness, not just a weak possibility of the opposite

54. The findings at [243] – which the respondent adopts – sit uneasily with the conclusion at [244], and were never reconciled with it. Someone who has just had his home forced open by a violent intruder is not to be judged, for the purposes of s 322K(2)(b) (as picked up by s 322L(a)), against a standard of measured proportionality calibrated to what he could not yet see. The circumstances MC actually perceived included a man who had, by trespass and aggravated burglary, forced his way in and immediately assaulted him.⁶⁰ That MC could not, in the instant available to him, first confirm the full extent of his attacker's weapons before reaching for the knife he had sensibly armed himself with in advance does not make his response unreasonable – let alone unlawful. The Court's own statement of principle at [243] correctly states the law governing MC's position. The conclusion at [244] does not follow from it, and the reasoning at [235]–[242] gives no solid evidentiary footing capable of displacing it.

F. MC arming himself in advance does not found a reasonable possibility of unlawfulness

55. If the finding below draws any support from the fact MC armed himself with a knife before answering the door, that fact cannot carry the weight. A person in his own home, responding to the unannounced approach of a visitor seen carrying a bag – in the context of known hostility between that visitor's household and his own – is entitled to arm himself as a precaution. That is not unlawful conduct directed at the visitor. It only becomes relevant if it is actually deployed unlawfully. On the evidence, MC kept the knife concealed throughout the calm exchange through the locked door, and it was still concealed when he opened the door to shake GC's hand at GC's own request.⁶¹ There is no evidence he ever brandished it, showed it, or threatened GC with it before GC forced his way in and assaulted him. His precautionary arming supports no finding of unlawfulness. If anything, it is further evidence – unremarked upon by the Court below – that MC was responding to a threat he genuinely feared, not acting as an aggressor.

G. This is the same standard applied consistently, not two different standards

56. The respondent is conscious that it argues, in its submissions in answer to the appeal, that the evidence rules out a reasonable possibility that GC's shooting of MC was a

⁶⁰Judgment [198], [243] (CAB 181, 188–189).

⁶¹Judgment [262] fn 61 (CAB 1981).

response to MC's conduct, while arguing here that the evidence rules out a reasonable possibility MC's own conduct was unlawful. There is no inconsistency in that. Both arguments apply the same test – is there evidence, as against speculation or a gap in the evidence, capable of supporting the possibility – to the one body of evidence. On the s 322K(2)(a) question, that evidence rules out any rational connection between MC's conduct and GC's decision to shoot, for the reasons given in the respondent's submissions in answer to the appeal. On the s 322L(a) question raised here, the evidence is, if anything, even more one-sided – but pointing the other way. It affirmatively and overwhelmingly shows MC's conduct was lawful: resisting, in his own home, a sudden and forcible armed intrusion by a man who had come to kill him. Both conclusions come from the one standard, applied even-handedly.

H. Why this matters

57. If this ground succeeds, it is a complete answer to the appeal on its own. Section 322L(a) would exclude self-defence for GC as a matter of law, without needing to resolve the appellant's arguments about the original aggressor consideration or the exclusivity of belief under s 322K(2)(a), and without needing to reach the question of whether GC's shooting of MC was necessary responsive self-defence to MC's conduct addressed in the respondent's submissions in answer to the appeal. That said, for the reasons given there, the respondent submits both questions should also be resolved in its favour. The two questions reinforce each other; neither is an alternative to the other.

PART VII: ESTIMATE FOR ORAL ARGUMENT

42. The respondent estimates 2 hours for oral argument.

Dated: 23 July 2026



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ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable dates
1	<i>Crimes Act 1958 (Vic)</i>	<i>Authorised Version No. 260 (1 December 2015 to 2 May 2016)</i>	Sections 322I, 322K, 322L and 322N	<i>Act in force at the relevant time</i>	<i>All material events</i>