[HIGH COURT OF AUSTRALIA.]

THE QUEEN . . . . . APPELLANT;

AND

HOWE . . . . . RESPONDENT.

H. C. OF A. 1958.

SYDNEY, *July* 29-31; *Aug.* 1, 15.

Dixon C.J., McTiernan, Fullagar, Taylor and Menzies JJ.

Criminal Law—Murder—Conviction—Quashed on appeal to Supreme Court—New trial ordered—Appeal to High Court by Crown—Special leave—Questions of law affecting law of homicide—Importance—Self-defence—Excessive use of violence by defendant—Effect—Murder or manslaughter—Miscarriage of justice—Absence—Direction to jury—Special leave rescinded.

Once a ground is disclosed by the evidence upon which a plea of self-defence may arise, it is essential to a conviction of murder that the jury shall be satisfied beyond reasonable doubt that one or other or all of the ultimate facts which establish that plea are not present.

Chan Kau v. *The Queen* (1955) A.C. 206, at pp. 211, 212, referred to.

Where a plea of self-defence to a charge of murder fails only because the death of the deceased was occasioned by the use of force going beyond what was necessary in the circumstances for the protection of the accused or what might reasonably be regarded by him as necessary in the circumstances, it is, in the absence of clear and definite decision, reasonable in principle to regard such a homicide as reduced to manslaughter.

So *held* by *Dixon* C.J., *McTiernan*, *Fullagar*, and *Menzies* JJ.

Per Taylor J.: The test to be applied by a jury in cases where self-defence as justification is rejected rests upon a broader basis than the honest, though unreasonable, belief of the accused. It is sufficient if it appears that what the accused did was done primarily for the purpose of defending himself against an aggressor and the jury should be instructed that unless satisfied beyond reasonable doubt that this was not so a verdict of manslaughter should be returned.

To retreat before employing force is no longer to be treated as an independent and imperative condition if a plea of self-defence is to be made out. Whether a retreat could or should have been made is merely an element for the jury to consider as entering into the reasonableness of the conduct of the accused.

So *held* by the whole Court.

In the absence of very special circumstances it is not the practice of the High Court to entertain an application for special leave from an order setting

aside a capital conviction and granting a new trial if there be no other ground for the application save that the State Court of Criminal Appeal ought to have taken a different view of the evidence or ought not in the particular case to have regarded some specific direction to the jury as necessary or ought, notwithstanding that some error of law appeared, to have held that no substantial miscarriage of justice had occurred.

Decision of the Court of Criminal Appeal of South Australia: *Reg.* v. *Howe* (1958) S.A.S.R. 95, affirmed.

APPEAL from the Court of Criminal Appeal of South Australia.

On 24th to 27th March 1958 Malcolm Horace Howe was arraigned before a judge and jury in the Supreme Court of South Australia in its criminal jurisdiction, at Port Pirie, in that State upon a charge of the murder of one Kenneth Frederick Millard near Port Pirie aforesaid on 13th November 1957. He pleaded not guilty; and in answer to the charge raised an issue of self-defence, alleging that the death of the deceased had occurred whilst he, the accused, was repelling an attempted sodomitical attack being made on him by the deceased. The jury found him guilty of the crime charged, adding a recommendation to mercy to its verdict, and he was sentenced to death.

Thereafter Howe applied to the Full Court of the Supreme Court of South Australia sitting as a court of criminal appeal (*Mayo* and *Reed* JJ., *Piper* A.J.) for leave to appeal against the conviction and sentence. That court granted the application and, treating the hearing of the application as the hearing of the appeal, allowed the appeal, quashed the conviction and ordered a new trial: *Reg.* v. *Howe* (1).

From this decision the Crown by special leave appealed to the High Court.

Further relevant facts appear in the judgments of the Court hereunder.

R. R. St. C. Chamberlain Q.C. and *W. A. N. Wells*, for the appellant.

R. R. St.C. Chamberlain Q.C. Special leave having been granted the whole case is opened up for decision by this Court and the appellant is at liberty to argue that there was no evidence of an issue of self-defence to go to the jury. The duty of the trial judge was to sum up on the basis that the respondent's story was at least a reasonable possibility, and this he did. Even if true, it provided no material for any defence at all. [He referred to *Stephen's Digest*

(1) (1958) S.A.S.R. 95.

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of the Criminal Law, 9th ed. (1950), art. 305, pp. 251, 252; *Mancini* v. *Director of Public Prosecutions* (1); *Holmes* v. *Director of Public Prosecutions* (2); and *R.* v. *Semini* (3)]. An analysis of the elements in the proposition of the Full Court as to an excessive use of force in circumstances where a plea of self-defence would otherwise be available shows it to be foreign to the concepts underlying this branch of the law.

[McTIERNAN J. referred to *Halsbury's Laws of England*, 3rd ed., vol. 10, par. 1382, p. 721; and *Reg.* v. *Rose* (4).]

The proposition finds no place in the principles governing the elements in murder and the circumstances in which a plea of self-defence may be raised. It was within the province of the jury to find the respondent guilty of manslaughter in the circumstances stated by the Full Court but equally it was within its province to find him guilty of murder in those circumstances. [He referred to *Mraz* v. *The Queen* (5).] The Full Court erred in suggesting that there was here a species of provocation. Provocation does not, since *Holmes* v. *Director of Public Prosecutions* (2), negative an intent to kill. [He referred to *Attorney-General for Ceylon* v. *Kumarasinghege Don John Perera* (6).] It can be murder if, a plea of self-defence having failed, the jury is satisfied that the killing was one with malice aforethought. The Full Court's proposition denies that as a matter of law. *Mancini* v. *Director of Public Prosecutions* (1) is inconsistent with the Full Court's view that there was in this defence something akin to provocation and also with its view of the existence of the principles relied upon by it. [He referred to *Reg.* v. *McKay* (7).] The only manslaughter theory available on the facts of this case was the one based on provocation and that was adequately dealt with by the trial judge. [He referred to *Reg.* v. *Terry* (8) and *Archbold's Criminal Pleading, Evidence & Practice*, 33rd ed. (1954), par. 1649, pp. 941, 942.] Those principles are inconsistent with the Full Court's proposition. If the Full Court's proposition be right, then here there was obviously a case for a new trial. It is an abstract statement of the law but even so it would lead to a re-trial only if there were facts to warrant the application of such a principle of law to the facts of this case. The proposition as a matter of law is wrong and misleading, and should not be allowed to remain as a proposition of law which would be taken as binding on other courts, at all events in South Australia.

(1) (1942) A.C. 1.
(2) (1946) A.C. 588.
(3) (1949) 1 K.B. 405.
(4) (1884) 15 Cox C.C. 540, at p. 541.
(5) (1955) 93 C.L.R. 493.
(6) (1953) A.C. 200, at p. 206.
(7) (1957) V.R. 560, at p. 562.
(8) (1955) V.L.R. 114, at p. 117.

There was no real material in this case for the disturbance of the verdict of the jury.

W. A. N. Wells. None of the authorities upon which the proposition of the Full Court was based contains a discussion of the relevance of the qualification as to the existence of an honest belief that the force used was considered necessary. In none of them is there any suggestion that, where there is a clear intention to kill or to inflict grievous bodily harm, because the unlawful violence developed from acts commenced in self-defence that, therefore, a finding of murder is not open. [He referred to *Reg.* v. *McKay* (1); *R.* v. *Scully* (2); and *Cook's Case* (3).] The Full Court's proposition, which is based, apparently, on the sixth proposition of *Lowe* J. in *Reg.* v. *McKay* (4), is only valid where there is an absence of either an intent to kill or an intent to do grievous bodily harm as now understood. [On the defence of "home and family" and "self-defence" he referred to *R.* v. *Barilla* (5); *R.* v. *Hussey* (6); *The Commonwealth* v. *Beverly* (7); *Mead's and Belt's Case* (8); *Reg.* v. *Smith* (9); *Reg.* v. *Odgers* (10); and *R.* v. *Symondson* (11).]

[DIXON C.J. referred to *R.* v. *Patience* (12) and *R.* v. *Whalley* (13).]

A slight battery followed by death would not be murder. [He referred to *Cook's Case* (3); *R.* v. *Biggin* (14); *R.* v. *Griffin* (15); *Dakin's Case* (16); *Reg.* v. *Weston* (17); and *Cross and Jones, An Introduction to Criminal Law*, 3rd ed. (1953), art. 124, p. 247.] All the cases show that if a person has exceeded by accident or by degree the amount of force which would be justified by the circumstances in defending himself, it is in the highest degree improbable that he would have reached the stage of forming an intention to kill. [He referred to *Reg.* v. *McCarthy* (18).] The intention to kill is the decisive element; if there is no intention to kill, it is manslaughter; and if there is an intention to kill, it is murder. Simply because an honest belief of the type postulated was arrived at following on violence which began as self-defence, does not necessarily and for

(1) (1957) V.R., at p. 564.
(2) (1824) 1 Car. & P. 319 [171 E.R. 1213].
(3) (1640) Cro. Car. 537 [79 E.R. 1063].
(4) (1957) V.R. 560.
(5) (1944) 4 D.L.R. 344.
(6) (1924) 18 Cr. App. R. 160 [89 J.P. 28].
(7) (1935) 237 Ky. 35.
(8) (1823) 1 Lewin 184 [168 E.R. 1006].
(9) (1837) 8 Car. & P. 160 [173 E.R. 441].
(10) (1843) 2 M. & Rob. 479 [174 E.R. 355].
(11) (1896) 60 J.P. 645.
(12) (1837) 7 Car. & P. 775, at p. 776 [173 E.R. 338].
(13) (1835) 7 Car. & P. 245, at p. 249 [173 E.R. 108, at p. 110].
(14) (1920) 1 K.B. 213.
(15) (1871) 10 S.C.R. (N.S.W.) 91, at pp. 99, 100, 107.
(16) (1828) 1 Lewin 166 [168 E.R. 999].
(17) (1879) 14 Cox C.C. 346, at p. 351.
(18) (1954) 2 Q.B. 105.

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all purposes and universally reduce what is otherwise murder to manslaughter. [He referred to *R.* v. *Nundah* (1); and *Reg.* v. *Terry* (2).] There is no suggestion in any of the authorities that provided one makes out an intention to kill which results in an unlawful act, viz. a killing, one has to go further and exclude any honest belief that what one has done is justified by the circumstances.

[DIXON C.J. referred to *R.* v. *Patience* (3); *R.* v. *Whalley* (4); *R.* v. *Weston* (5) and *R.* v. *Burdett* (6).]

The defence of provocation is not a denial of malice aforethought, it is merely a concession to human frailty. On the definitions and general consideration of malice see *Stephen's Digest of the Criminal Law*, 9th ed. (1950), art. 264, pp. 211-214; *Archbold's Criminal Pleading, Evidence & Practice*, 33rd ed. (1954), par. 1628, pp. 928-930, and *Russell* on *Crime*, 10th ed. (1950), vol. I, pp. 533, 534.

Dr. *J. J. Bray* Q.C. (with him *L. J. King*), for the respondent. The Crown errs in now suggesting that the facts did not warrant any direction on self-defence or manslaughter in relation to self-defence. That submission is not open because it was not put to the court below that self-defence should not have been left to the jury. That point is taken for the first time in this Court. Special leave would not have been granted on that ground and the point should not now be taken. There is evidence fit to be considered on the two issues of self-defence and manslaughter; it shows that the accused had no intention to kill. There is also evidence to be considered on whether he acted in self-defence but went beyond the necessities of the occasion. The authorities show that there is a form of manslaughter arising out of excessive self-defence. The jury were not told that in these circumstances it may be manslaughter or it may be murder. The trial judge erred in telling the jury that even if it thought that it was necessary to fire the shot, the accused was still not entitled to be acquitted if he did not retreat as far as possible. The vice in the direction in this case was the same as the vice in the direction in *Brown* v. *United States* (7). [He referred to *Brown's Case* (8) and to *Archbold's Criminal Pleading, Evidence & Practice*, 33rd ed. (1954) par. 1638, pp. 934, 935, par. 1652, pp. 943, 944.] Modern text-writers do not suggest that the distinction between homicide committed in self-defence and justi-

(1) (1916) 16 S.R. (N.S.W.) 482; 33 W.N. 196.
(2) (1955) V.L.R., at p. 117.
(3) (1837) 7 Car. & P. 775 [173 E.R. 338].
(4) (1835) 7 Car. & P. 245 [173 E.R. 108].
(5) (1879) 14 Cox C.C. 346.
(6) (1820) 4 B. & Ald. 95; 314 [106 E.R. 873; 952].
(7) (1920) 256 U.S. 335 [65 Law. Ed. 961].
(8) (1920) 256 U.S., at p. 343 [65 Law Ed., at p. 963].

fiable homicide has been abolished : *Kenny's Outlines of the Criminal Law*, (1952), p. 114 ; *Russell* on *Crime*, 10th ed. (1950), vol. I, p. 494 ; *Harris Criminal Law*, 19th ed. (1954), p. 255. The jury should have been directed that if the deceased was trying to commit the act of sodomy on the accused by force he, the accused, was not bound to retreat as in other cases of self-defence, but was entitled to stand his ground and kill if it were necessary to do so. The rule relied upon in the case of justifiable homicide applies to any violent felonious attack. [He referred to *Halsbury's Laws of England*, 3rd ed., vol. 10, pp. 721, 722, pars. 1382, 1384.] The accused had been attacked and had reasonable grounds for apprehending further attacks.

[TAYLOR J. referred to *Russell* on *Crime*, 9th ed. (1936), vol. I, p. 514.]

The direction here covered only manslaughter on the ground of provocation ; it failed to deal with the manslaughter element in relation to self-defence. The analogy to *R.* v. *Barilla* (1) is very marked. [As to retreat he referred to *Reg.* v. *Bull* (2) ; *Beard* v. *United States* (3) ; *Brown* v. *United States* (4) ; and *Reg.* v. *McKay* (5).] The sixth proposition of *Lowe* J. in *Reg.* v. *McKay* (5) sets out the three typical cases of justifiable homicide. If an accused's intention is not to kill but to defend himself, he is guilty of neither murder nor manslaughter. An intention to kill and an intention to protect oneself are in two different categories of thought : the word " intention " is not used in the same sense. [He referred to *Stephen's General View of the Criminal View of England*, 1st ed. (1863), pars. 3, 4 (*a*) to (*e*) ; *R.* v. *Scully* (6) ; *Cook's Case* (7) ; *Coke's Institutes*, Pt. 3, (1817), vol. 3, p. 50.] On the question of illegal violence : see *R.* v. *Thompson* (8). The intention to kill or inflict grievous bodily harm was clearly present in *The Commonwealth* v. *Beverly* (9). According to *Blackstone* the unlawful, intentional killing of another without malice is manslaughter. [He referred to *R.* v. *Barilla* (1) ; *R.* v. *Griffin* (10) ; *R.* v. *Symondson* (11) ; *R.* v. *Biggin* (12) ; *Mancini* v. *Director of Public Prosecutions* (13) ;

(1) (1944) 4 D.L.R. 344.
(2) (1839) 9 Car. & P. 22, at p. 24 [173 E.R. 723, at p. 724].
(3) (1894) 158 U.S. 550, at pp. 554, 557, 564 [39 Law Ed. 1086, at pp. 1088-1090, 1092].
(4) (1920) 256 U.S. 335 [65 Law Ed. 961].
(5) (1957) V.R. 560.
(6) (1824) 1 Car. & P. 319 [171 E.R. 1213].
(7) (1640) Cro. Car. 537 [79 E.R. 1063].
(8) (1825) 1 Mood. 80 [168 E.R. 1193].
(9) (1935) 237 Ky. 35.
(10) (1871) 10 S.C.R. (N.S.W.), at pp. 99, 100, 104, 105, 107.
(11) (1896) 60 J.P. 645.
(12) (1920) 1 K.B., at pp. 218, 219.
(13) (1942) A.C., at p. 6.

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Reg. v. *Weston* (1); *R.* v. *Thomas* (2); *Reg.* v. *Welsh* (3), *Russell* on *Crime*, 10th ed. (1950), vol. I, pp. 563, 565, 572; and *East's Pleas of the Crown* (1803), vol. I, p. 224.] The suddenly formed intention to kill or cause grievous bodily harm in circumstances like those in the present case is only malice aforethought by implication of law, and the circumstances of the illegal attack rebut that implication, so that it is not malice aforethought at all to form that intention under these circumstances. Before the middle of the last century malice aforethought did not necessarily mean intention to kill: see *Russell* on *Crime*, 10th ed. (1950), vol. 1, p. 568. [He referred to *Mead and Belt's Case* (4); *Forster's Case* (5).] The respondent relies upon the passage in *Cross and Jones, An Introduction to Criminal Law*, 3rd ed. (1953) art. 124, p. 247: see also *Dicey's Law of the Constitution*, 8th ed. (1915), Appendix 4, pp. 492-494. The law is accurately, and for the present purposes, completely stated by *Lowe* J. in his sixth proposition; alternatively, if there is a self-defence occasion, and particularly a violent and felonious attack, and the accused acts beyond the necessity of the occasion, the offence is manslaughter, not murder, unless he was not acting in good faith for his own defence. [He referred to *Halsbury's Laws of England*, 3rd ed., vol. 10, par. 1382, p. 721.] The test of reasonableness is a subjective one, not an objective one. [He referred to *R.* v. *Duffy* (6); *Re Manning* (7); *R.* v. *Fisher* (8); *Russell* on *Crime*, 10th ed. (1950), vol. I. pp. 564, 565, 572; *Archbold's Criminal Pleading, Evidence & Practice*, 33rd ed. (1954), par. 1647, p. 940; articles by Dr. *Glanville Williams* and Dr. *J. Ll. J. Edwards*, (1954) *Criminal Law Review*, pp. 740-742, 898; *Holmes* v. *Director of Public Prosecutions* (9), and *R.* v. *Cole* (10).] In all cases of justifiable homicide there must be a reasonable and honest belief by the accused in the necessity of the killing otherwise it would be what *Lowe* J. described as "malice under colour of necessity". An unreasonable verdict may be set aside by the Full Court on appeal: *Criminal Law Consolidation Act* 1935-1956 (S.A.), s. 353 (i). The test is: would a jury, if properly directed, have inevitably come to the same conclusion: see *R.* v. *Sheehan* (11); *Stirland* v. *Director of Public Prosecutions* (12); and *Reg.* v. *Dunbar* (13). The established

(1) (1879) 14 Cox C.C., at p. 352.
(2) (1837) 7 Car. & P. 817 [173 E.R. 356].
(3) (1869) 11 Cox C.C. 336.
(4) (1823) 1 Lewin 184 [168 E.R. 1006].
(5) (1825) 1 Lewin 187 [168 E.R. 1007].
(6) (1949) 1 All E.R. 932.
(7) (1671) Raym. T. 212 [83 E.R. 112].
(8) (1837) 8 Car. & P. 182 [173 E.R. 452].
(9) (1946) A.C., at p. 598.
(10) (1941) 28 Cr. App. R. 43, at p. 51.
(11) (1926) S.A.S.R. 243, at p. 247.
(12) (1944) A.C. 315.
(13) (1958) 1 Q.B. 1, at p. 11.

facts favour the respondent. There is evidence from which it can be inferred that the accused believed that he was going to be the subject of a sodomitical attack, and it establishes that he had no intention to kill. [He referred to *R.* v. *Barilla* (1); *R.* v. *Kahu* (2); *R.* v. *Thiele* (3); *R.* v. *Rogers* (4); and *Bullard* v. *The Queen* (5).] The public conscience in this case would be sufficiently satisfied by a conviction for manslaughter. A submission like this is open even on an application for special leave to appeal: *R.* v. *Mullen* (6). For the foregoing reasons the appeal should be dismissed. This Court, if it is of opinion that the propositions of law contended for are correct, should not interfere with the exercise by the Full Court of its discretion with regard to the application of the proviso, and should not hold that there was no case to go to the jury on any point. That submission was not made to the court below. If the Court is against the accused on the facts the order for special leave should be rescinded rather than deprive the accused of the right which he has acquired under the order of the Full Court. If this Court is of opinion that any jury must have convicted the accused of manslaughter at least, then this Court should substitute a conviction for manslaughter for the order for a new trial and the matter should be referred back for sentence to the Court of Criminal Appeal in South Australia.

R. R. St.C. Chamberlain Q.C., in reply.

Cur. adv. vult.

Aug. 15.

THE following written judgments were delivered:—

DIXON C.J. This appeal comes by special leave from the Supreme Court of South Australia sitting as a court of criminal appeal. The appellant is the Crown. The order of which the Crown complains quashed a conviction of murder and ordered that a new trial be had upon the information charging the respondent with that crime: *Reg.* v. *Howe* (7). The Crown applied to this Court for special leave to appeal on the ground that the decision of the Supreme Court involves a question or questions of law affecting the law of homicide which are of wide importance. The decision in fact was the consequence of two propositions relating to self-defence as a plea which were laid down by the Supreme Court.

The first concerned the question whether it is an essential condition of the plea as a matter of law that the defendant in face of a

(1) (1944) 4 D.L.R., at p. 348.
(2) (1947) N.Z.L.R. 368, at p. 377.
(3) (1928) S.A.S.R. 361, at p. 366.
(4) (1950) S.A.S.R. 102, at p. 113.
(5) (1957) A.C. 635.
(6) (1938) 59 C.L.R. 124.
(7) (1958) S.A.S.R. 95.

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violent and felonious assault, or the threat of such an assault, should have retreated as far as it was reasonably open for him safely to do before meeting the attack with force. The court denied that this was a rule of law and put a failure to retreat in the category only of an element in the considerations upon which the reasonableness of the defendant's conduct must be judged. The Crown, at all events on the hearing of this appeal, objected not so much to the view of the law thus adopted by the Supreme Court as to the manner in which it had been applied in considering the effect of the charge to the jury of the judge presiding at the trial. The second and more important proposition related to the effect of an excessive use of violence on the part of a defendant who but for that would be able to make out a plea of self-defence as an answer to a charge of murder. If death ensues because he has resorted to an unnecessary measure of force in resisting an attack or threatened attack, a degree of force out of reasonable proportion to the danger, does that leave the defendant guilty of murder or is his crime manslaughter? The Supreme Court answered the question thus; "We have come to the conclusion that it is the law that a person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary in the circumstances, is guilty of manslaughter and not of murder" (1). This proposition the Crown contests. It is right to add that on the hearing of the appeal, as distinguished from the application for special leave, the argument for the Crown seemed to dwell rather on the precise scope of the proposition and its applicability to the facts of this case than on the question whether in essence it represents the present state of the law of homicide.

The applicability of the principle formulated depends upon the case made by the respondent at the trial in his defence. The complexion he sought to put upon the circumstances in which the homicide took place of which he was accused had no relation to the case made for the Crown and it is not surprising that, special leave having been obtained, the tendency should assert itself on the side of the prosecution to seek to vindicate the conviction by reference to the support which the evidence may be regarded as providing for the case for the defence rather than by a frontal attack upon the more abstract question whether a general rule sound in principle has been accurately formulated by the Supreme Court. But two

(1) (1958) S.A.S.R., at pp. 121. 122.

observations must be made upon this attidude. In the first place it must be borne in mind that in discharging its functions as a court of criminal appeal the Supreme Court closely considered the state of the evidence in relation to the plea of self-defence and the possible consequences of the direction given by the learned judge; and this is true also in respect of the contention that no substantial miscarriage of justice had occurred. In the second place it would not be in accordance with the practice of this Court to entertain an application for special leave from an order setting aside a capital conviction and granting a new trial if there were no other grounds for the application except that the State Court of Criminal Appeal ought to have taken a different view of the evidence or ought not in the particular case to have regarded some specific direction to the jury as necessary or ought notwithstanding that some error of law appeared to have held that no substantial miscarriage of justice had occurred.

The case made for the Crown at the trial was one which, for all that appears, the jury may have adopted in full. But the Supreme Court took the view that it was possible that the jury might have found a different verdict had they received a different direction in point of law. It is not for this Court to intervene at the instance of the Crown for the purpose of reconsidering such a question as the possibility of a different verdict being reached under a direction which conformed more exactly with law; and the fact that the Crown has obtained special leave because it is an important question whether the state of the law is as the Supreme Court supposed should not lead us to allow the Crown to proceed to the further question whether, assuming the Supreme Court to be right in its view of the state of the law, that court was justified in regarding any insufficiency or inaccuracy in the direction given as possibly accounting for the verdict. Our consideration of the appeal should therefore be confined to the general questions of law upon which the grant of special leave was based.

It is however necessary for the understanding of these questions to give a brief outline of the case for the Crown and of the case which the defendant sought to make. According to the case for the Crown the defendant murdered a man named Millard on 13th November 1957, near Port Pirie for the purpose of robbing him of money. Millard was a man of about thirty-six years of age whose occupation was a barman. On 14th November 1957 at about nine o'clock in the morning his dead body was found by the roadside against the fence. He had been shot dead by a bullet which entered the thorax from the back through a gunshot wound under the right shoulder-blade.

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Some ninety yards nearer to Port Pirie an empty wallet was found on the roadside. It appeared that Millard had drawn a substantial sum of cash on the previous day. He had served in the bar until he finished his day's work at about twenty minutes to seven when he left the hotel. There is no doubt that the deceased drove out that evening with the defendant and that it was the defendant who shot him and dragged his body to the roadside. Nor is there any dispute that the defendant took his money, a sum of £81, and threw his wallet away. So much appears from a statement or statements obtained by the police from the defendant. Accordingly the case for the Crown was that it was simply murder to rob.

The defendant's story endeavoured to place quite another aspect on the case. This aspect best appears from the evidence which he gave at his trial, although there are other statements made by or attributed to him. He was a young man of twenty-three years of age, living at Port Pirie with his parents. He knew Millard. Briefly stated the defendant's evidence was to the following effect. He arranged to go with Millard to a drive-in picture theatre on the night upon which Millard met his death. He joined Millard on the latter's finishing his work. Each had a car and they drove to Millard's room where they drank for a time. They then left Millard's room. The latter obtained a bottle of wine from his own car and took his seat in the defendant's car. They drove off past the drive-in theatre. At the bottom of the car was a .22 repeating Remington rifle. It belonged to the defendant's father and had been left there by the defendant loaded after he had been rabbiting on the evening before. They drove out in order to drink the wine and they proceeded to do this listening to the wireless of the car when suddenly Millard leaned over tore open the fly of the defendant's trousers and touched his private parts. The defendant told him to get out of the car saying that he the defendant was not the chap to do that sort of thing. Millard got out and so did the defendant. Millard walked to the front of the car and for about eight or nine paces beyond. The defendant walked over towards him; why he did not know, so he deposed. However Millard ran at him and grabbed him by the shoulders from behind. The defendant started to run, he believed; Millard tore his shirt but he got free from him. The defendant's evidence proceeds "Then I ran for the car, got the rifle out from the front seat and in my anger I put it up and shot him. When I did that he was about eight or nine paces to the front of the car from me. I don't know what he was doing. When I fired, I was too angry and all mixed up I didn't know which way he was facing. I only fired one shot." The

defendant said that when Millard caught hold of him round the shoulder and tore his shirt, he knew what perverts do " and things like that"; in his own mind he thought Millard was about to attack him sexually and he did not think he could keep him off with his hands. His evidence describes his position by the car and goes on " When I fired the shot, I intended to stop him from further attacks. That's what I say now. I didn't think at all about whether I was likely to kill him. The thought never came into my mind. I was afraid of him. I was angry with him. I didn't think about what I was going to do. It all just came as soon as he grabbed me."

The defendant then recounted how he tried to lift the body into the car and then failing that dragged it to the roadside. He saw the wallet in the deceased's pocket and took it. He knew that Millard was carrying money but had not seen the wallet earlier. The defendant drove off, took the money from the wallet as he did so, and threw the wallet away. His subsequent movements that night bear only on the function of the jury not of the court. But naturally they were the subject of comment: for he went first to the picture theatre and then after replacing his father's rifle went off to a social of a football club.

On the foregoing evidence the defendant's counsel put before the jury a plea of provocation whereby the degree of guilt of the defendant would be reduced from murder to manslaughter. It must be taken that this plea was rejected by the jury. But in this Court for present purposes the plea and its rejection may be disregarded. However the defendant's counsel also put forward a plea of self-defence. In dealing with that plea and the direction to the jury for which it called, it must not be forgotten that once it is raised upon evidence the jury, before they can convict of murder, must be persuaded beyond reasonable doubt that the factual constituents by which such a plea is made out or some one of them did not exist. The state of the law appears to be that once a ground is disclosed by the evidence upon which a plea of self-defence may arise, it is essential to a conviction of murder that the jury shall be satisfied beyond reasonable doubt that one or other or all of the ultimate facts which establish that plea were not present. That appears to be the effect of the modern law: see *Chan Kau* v. *The Queen* (1). In the next place the interpretation of the defendant's evidence was a matter for the jury and it was open to them to interpret it as sufficient proof of a fear of a sodomitical attack. At all events they might not be satisfied beyond reasonable doubt of the contrary. An attack of that nature would be felonious as well as violent: s. 69

(1) (1955) A.C. 206, at pp. 211, 212.

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of the *Criminal Law Consolidation Act* 1935-1952 (S.A.). But an attempt or an assault with intent to commit the felony or an indecent assault on the defendant would amount only to a misdemeanour: s. 70. In either case the defendant's alleged apprehension was of an unlawful attack of a violent nature.

In the Supreme Court the direction to the jury on this defence given by the learned judge at the trial was closely considered and its effect was summarized in their Honours' reasons. The view the Supreme Court took was that the jury had been plainly told "that where a person charged with the murder of an assailant relies on self-defence, he cannot succeed, and has no defence at all, if the jury are satisfied that the killing took place either (1) when the accused has not retreated as far as possible having regard to the attack; or (2) if he has used more force than is necessary for mere defence, the result in both cases being that the person who kills is guilty of murder".

The foregoing account of the learned judge's direction to the jury forms the basis of their Honours' judgment and for the purposes of the appeal we should accept it as the starting point. It will be seen that the second proposition which this summary of the direction formulates raises the question whether, where upon an indictment for murder the accused relies on self-defence as a plea and all the elements of that defence are made out except that which relates to the proportion of the force used to the degree of danger threatened or reasonably apprehended, the verdict against the accused should be, or at all events may be, manslaughter and not murder. The assumption made for the purpose of this question is that a man actually defending himself from the real or apprehended violence of the deceased has used more force than was justified by the occasion and that death has ensued from this use of excessive force. In all other respects, so it is assumed, the elements of a plea of self-defence existed. That is to say it is assumed that an attack of a violent and felonious nature, or at least of an unlawful nature, was made or threatened so that the person under attack or threat of attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage. This would mean that an occasion had arisen entitling the person charged with murder to resort to force to repel force or apprehended force. Had he used no more force than was proportionate to the danger in which he stood, or reasonably supposed he stood, although he thereby caused the death of his assailant he would not have been guilty either of murder or manslaughter. But assuming that he was not entitled to a complete defence to a charge of murder, for the reason only that the

force or violence which he used against his assailant or apprehended assailant went beyond what was needed for his protection or what the circumstances could cause him reasonably to believe to be necessary for his protection, of what crime does he stand guilty? Is the consequence of the failure of his plea of self-defence on that ground that he is guilty of murder or does it operate to reduce the homicide to manslaughter?

There is no clear and definite judicial decision providing an answer to this question but it seems reasonable in principle to regard such a homicide as reduced to manslaughter, and that view has the support of not a few judicial statements to be found in the reports.

In *R.* v. *Biggin* (1) *Darling* J. directed the jury to this effect: (2). In *R.* v. *Whalley* (3) *Williams* J. took that view. There the prisoner had not killed his assailant, but had inflicted grievous bodily harm using great violence for the purpose of resisting arrest under an invalid process. *Williams* J. decided that the case must be treated as if the prosecutor were a stranger and had no warrant at all. Sir *William Maule* as counsel submitted that the force used by the prisoner was not justified and said that if the assault by the prisoner was not justifiable and death had ensued it would be murder. To this *Williams* J. answered "Taking it as we must now do, that the prosecutor . . . had no right at all to apprehend the prisoner, I think, that, on the facts you have opened, if death had ensued, it would have been manslaughter only" (4). He directed an acquittal on the various counts of wounding.

Two years later in the course of summing-up to the jury in a case of wounding with intent to murder *Parke* B. said: "If a person receives illegal violence and he resists that violence with anything he happens to have in his hand, and death ensue, that would be manslaughter": *R.* v. *Patience* (5). Although this statement happens to be expressed in rather concrete or objective terms, omitting as it does any explicit reference to the proportion of the violence to the danger, clearly enough it proceeds from the same doctrine. In *R.* v. *Scully* (6), and in *Reg.* v. *Bull* (7), the indictments were for manslaughter but that meant that the prosecution accepted and proceeded upon the same principle, which it is clear enough accorded with the view of the presiding judges. Again, *Cockburn* L.C.J. appears to have adopted the same view in a case where a charge of

(1) (1920) 1 K.B. 213; 36 T.L.R. 17.
(2) (1920) K.B., at p. 219; 36 T.L.R., at p. 18.
(3) (1835) 7 Car. & P. 245 [173 E.R. 198].
(4) (1835) 7 Car. & P., at p. 250 [173 E.R., at p. 110].
(5) (1837) 7 Car. & P., at p. 776 [173 E.R. 338].
(6) (1824) 1 Car. & P. 319 [171 E.R. 1213].
(7) (1839) 9 Car. & P. 22 [173 E.R. 723].

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murder was supported by evidence that the prisoner had shot the deceased in circumstances that made it possible that he had fired under the apprehension of attack. The Lord Chief Justice reduced his direction to writing and on this point the note read as follows: " but if the prisoner resorted to the gun in self-defence, against serious violence or in the reasonable dread of it, it would be justifiable, and that even if there was not such violence, or ground for the reasonable apprehension of it, yet that if the conduct of the deceased naturally led him to apprehend it and deprived him of his self-control, or if an assault, though short of serious injury, was committed on the prisoner, then it would be manslaughter." There appears here to be a contrast intended between what is " justifiable " resulting in a complete acquittal and the use of excessive force to repel an assault " short of serious injury " and therefore going no further than reducing the homicide to manslaughter : *Reg.* v. *Weston* (1). A like view has been adopted in British Columbia, *R.* v. *Barilla* (2). It may be added that in discussing *Mancini's Case* (3) Professor *Landon* has remarked that " in a case like *Mancini's*, where self-defence is the plea, it may well be open to the jury to find that the accused, though actuated by fear, either took unnecessarily violent measures to repel the attack, or failed to retreat before his assailant, and is therefore guilty of manslaughter." Finally in *Reg.* v. *McKay* (4), *Lowe* J. in the series of propositions he laid down included the following : " If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter—not murder " (5).

From the foregoing authorities it appears that in substance the Supreme Court took a correct view of the consequences of the failure of a plea of self-defence to a charge of murder when it fails only because the deceased's death was occasioned by an excessive use of force, that is to say by force going beyond what was necessary in the circumstances or might reasonably be regarded in the circumstances as necessary.

The view of the Supreme Court appears also to be correct as to the position which the modern law governing a plea of self-defence gives to the propriety of a person retreating in face of an assault or apprehended assault before resorting to violence to defend himself. The view which the Supreme Court has accepted is that

(1) (1879) 14 Cox C.C., at p. 351.
(2) (1944) 4 D.L.R. 344.
(3) (1942) A.C. 1.
(4) (1957) V.R. 560.
(5) (1957) V.R., at p. 563.

to retreat before employing force is no longer to be treated as an independent and imperative condition if a plea of self-defence is to be made out. No doubt in certain circumstances it was so regarded. In art. 305 of Sir *James Stephen's Digest of the Criminal Law*, 9th ed. (1950), pp. 252, 253 it is stated that, subject to some wide exceptions, if a person is unlawfully assaulted by another without any fault of his own but with a deadly weapon it is his duty to abstain from the infliction of death or grievous bodily harm on the person assaulting until he has retreated as far as he can with safety to himself. The exceptions cover an assault upon a man in his own house or when he is executing a duty imposed by law or when his assailant is resisting the exercise of force which the person assaulted has by law a right to employ against the person of another. The supposed inflexibility of the rule comes from the days when armed conflict was common. *Stephen's* statement includes the passage, "if two persons quarrel and fight neither is regarded as defending himself against the other until he has in good faith fled from the fight as far as he can": 9th ed. (1950), p. 253. Certain qualifications are mentioned and subject to them it is possible that in a practical point of view the last statement may still obtain. But there can be no doubt at this day that whether a retreat could and should have been made is an element for the jury to consider as entering into the reasonableness of the defendant's conduct. *Holmes* J. pronounced upon the question in a way which one may well be content to adopt: "Rationally, the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth, it has tended in the direction of rules consistent with human nature. Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and that if he kills him, he has not exceeded the bounds of lawful self-defence. That has been the decision of this court. *Beard* v. *United States* (1). Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety, or to disable his assailant rather than to kill him": *Brown* v. *United States of America* (2).

(1) (1895) 158 U.S. 550, at p. 559 [39 Law Ed. 1086, at p. 1090].

(2) (1920) 256 U.S., at p. 343 [65 Law Ed. 961, at p. 963].

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Some part of the history of the law will be found dealt with by the late Professor *Beale* in a paper called *Retreat from Murderous Assault*, (1903) 16 *Harvard Law Review* 567. But upon the history of the matter it is enough again to quote from *Holmes* J. in the same case. " It is useless ", he said, " to go into the developments of the law from the time when a man who had killed another, no matter how innocently, had to get his pardon whether of grace or of course. Concrete cases or illustrations stated in the early law in conditions very different from the present, like the reference to retreat in 3 Co. Inst. 55, and elsewhere, have had a tendency to ossify into specific rules without much regard for reason " (1).

It will be seen from the foregoing conclusions that there were two matters upon which the direction given to the jury at the trial of the case before us were not in accordance with the view of the law which it appears proper to accept. In saying this the summary of the judge's direction on the two material topics is of course adopted. For the reasons already given the effect of the charge is a matter in which in the present case, we should accept the views of the Supreme Court.

It follows from what has been said that the Crown should fail in its attempt to obtain a more favourable interpretation of the law governing the present case on the two points of general application. We were invited nevertheless to go beyond these questions and review the conclusions which the Supreme Court formed about the real effect upon the validity of the conviction of the defects in the judge's charge which have been discussed. These are not matters which would ordinarily be open to the Crown. For when a new trial in a criminal case has been ordered special leave would not be granted to the Crown for such a purpose unless the circumstances were very special. The proper course for this Court to take therefore appears to be not to allow the Crown under the special leave which it has obtained to go beyond the two points for the consideration of which special leave to appeal was given. Accordingly having decided those points, the proper course for the Court to pursue now is to rescind special leave to appeal.

McTIERNAN J. I agree in the judgment of the Chief Justice, both in the reasoning and the conclusions.

FULLAGAR J. I agree with the judgment of the Chief Justice in this case, and I have nothing to add.

(1) (1920) 256 U.S., at p. 343 [65 Law Ed., at p. 963].

TAYLOR J. In March 1958 the respondent was tried at Port Pirie in South Australia for the murder of one Kenneth Frederick Millard. The charge, which was the common law charge of murder, was laid pursuant to s. 11 of the *Criminal Law Consolidation Act* 1935-1956 and on 27th March he was found guilty and sentenced to death. Upon a subsequent appeal to the Full Court the conviction and sentence were set aside and a new trial was ordered (1). This appeal by the Crown is now brought by special leave from the order of the Full Court.

The point of special interest which was thought to justify the granting of special leave is concerned with the appropriate directions to be given to a jury upon a trial for murder where, upon the evidence in the case, the conclusion is open that a situation had arisen in which the accused was entitled to defend himself against a felonious attack but that the death charged resulted from the use of more force than could reasonably have been thought by the accused to be necessary in the circumstances. After an extensive survey of the problem *Mayo* J., speaking for the Full Court, formulated the following proposition: " We have come to the conclusion that it is the law that a person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary in the circumstances, is guilty of manslaughter and not of murder " (2). The basis upon which this proposition is founded may be discovered in their Honours' statement that they regarded the situation which they described " as a case of unlawful killing, without malice aforethought, for although the killer may clearly intend to inflict grievous bodily harm on his assailant, and if necessary, to kill, his state of mind is not fully that required to constitute murder ". In essence their Honours seem to have regarded the existence of such an honest belief as necessarily inconsistent with the contemporaneous existence of a state of mind required to support a verdict of guilty of murder.

In spite of the submission of the Crown that the issue of self-defence did not really arise upon the evidence in the case it is unnecessary to recapitulate the facts. It is sufficient to say that there was some evidence of an attack upon the respondent and it may be possible to perceive some evidence that in shooting the deceased the respondent believed that his action was necessary for his own protection. At all events both the learned trial judge and

(1) (1958) S.A.S.R. 95.

(2) (1958) S.A.S.R., at pp. 121, 122.

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the Full Court considered the evidence, flimsy in the extreme though it was, sufficient to raise the issue of self-defence and accordingly the onus devolved upon the Crown of satisfying the jury beyond reasonable doubt on this issue. The verdict of the jury, however, negatived this defence and, indeed, the issue of provocation, but if the view expressed by the Full Court is correct it was necessary for the jury to be satisfied before returning a verdict of guilty of murder that the respondent did not honestly believe that the act of shooting was necessary for his protection

It may be thought with some justification that a direction founded upon this view of the law would tender a somewhat artificial or unreal issue of fact for the consideration of a jury. Indeed it may be thought only remotely possible that a jury, having satisfied itself beyond reasonable doubt that an accused person had used more force in self-defence than he could reasonably have thought necessary, would, thereafter, be prepared to entertain the view that the degree of force used was no greater than the accused, in fact, honestly believed to be necessary. In this situation it is not surprising that the principle which the Full Court thought to be " implicit in the early cases ", has not, as their Honours observed, attracted the attention of textbook writers and commentators or been the subject of consideration by any appellate court in England. Nor, indeed, was counsel for the prisoner able to cite any English cases or any textbook in which the enunciated proposition had been stated to form part of the English common law relating to homicide.

The statement of principle enunciated by the Full Court was founded primarily upon observation made by *Lowe* J. in the case of *Reg.* v. *McKay* (1). In that case his Honour formulated six propositions relating to homicide. His final proposition was that " if the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter—not murder " (2). It was this proposition upon which counsel for the prisoner relied upon the appeal to the Full Court and before this Court and it was advanced as an authority for the view not only that a verdict of manslaughter is permissible in the circumstances hypothetically stated but that a verdict of murder is not open in any case where, on such an occasion, the killing results from the use of force beyond that reasonably necessary in the circumstances. But it will be observed that the proposition formulated by *Lowe* J. is not in any way limited to cases where it appears that the accused entertained an honest belief that the force

(1) (1957) V.R. 560.

(2) (1957) V.R., at p. 563.

used, though excessive on any reasonable view, was necessary. This distinction is of significance and reflection upon it provides grounds for thinking that the test proposed by the Full Court is erroneous.

It is unnecessary at this stage of the history of criminal law to draw attention to the fact that punishable homicides fall into two categories, murder and manslaughter. But it is desirable to do so in order to point out that at common law *malice aforethought*—whatever that term may now be taken to comprehend—was an essential ingredient of the crime of murder. All other punishable homicides were manslaughter. Even if it were not abundantly clear at a much earlier stage it is undeniable since *Woolmington* v. *Director of Public Prosecutions* (1) that upon a charge of murder, it is for the Crown, whatever the circumstances of the killing, to establish beyond reasonable doubt the existence of the requisite malice on the part of the accused. This of course may be done by proof of a deliberate killing unaccompanied by any mitigating or alleviating circumstances. But mitigating or alleviating factors may be found in provocation or in other circumstances which tend to show that the killing was not wilful or that the accused had acted in defence of his life liberty or property. This must, I think, be taken to be the reason underlying the rule followed in the almost countless cases concerned with homicide by accused persons in the course of resisting an unlawful arrest or an unlawful invasion of proprietary rights or in the course of violently resisting assaults attended with circumstances of great personal indignity. It seems that in cases which fall into the last-mentioned categories the attendant circumstances may, as in clear cases of sufficient provocation, be taken as sufficient to prevent the implication that the killing was malicious in the sense in which that term has come to be understood in relation to the crime of murder : *Woolmington's Case* (2) ; see also *Mancini* v. *Director of Public Prosecutions* (3) ; *Holmes* v. *Director of Public Prosecutions* (4) and *Chan Kau* v. *The Queen* (5). For my own part I can see no real distinction between cases of the character just mentioned and cases where the unlawful killing has taken place upon an occasion of and for the purposes of self-defence and, it seems to me that it was with much the same notion in mind that the Full Court's proposition was formulated. But this proposition selects as the vital factor the belief of the accused that the force used was no more than that necessary in the circumstances. No doubt

(1) (1935) A.C. 462.
(2) (1935) A.C., at p. 482.
(3) (1942) A.C. 1.
(4) (1946) A.C. 588.
(5) (1955) A.C. 206.

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in such a case it would be proper for a jury to return a verdict of manslaughter but the difficulty inherent in the proposition is that it envisages what may be regarded as a somewhat unreal situation. As already mentioned, on this test, the issue of the accused's belief would only arise for determination after a jury had satisfied itself beyond reasonable doubt that the accused had used more force than he could on reasonable grounds have believed to be necessary. Moreover action in self-defence is instinctive and does not wait upon a precise appreciation of the exigencies of the occasion or upon the formation of a belief concerning the precise measures which are necessary. The many cases to which we have been referred satisfy me that the test to be applied by a jury in cases where self-defence as justification is rejected rests upon a broader basis than the accused's honest, though unreasonable, belief. It is in my view, sufficient if it appears that what the accused did was done primarily for the purpose of defending himself against an aggressor and the jury should be instructed that unless satisfied beyond reasonable doubt that this was not so a verdict of manslaughter should be returned.

In form this test may not be quite as wide as that proposed by *Lowe* J. who may, perhaps, be taken to have thought a verdict of manslaughter inevitable " if the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon". There seems little doubt that even upon such an occasion the degree of force used and the attendant circumstances may be such as to leave open the question whether the accused merely acted under " pretence of necessity ". Such a case would fall within the third proposition formulated by *Lowe* J. and I do not think that by his final proposition he is to be understood as postulating that manslaughter is the appropriate verdict *merely* because the killing has taken place on an " occasion " warranting action in self-defence ; rather I take him to be referring to cases where not only the occasion warrants action in self-defence but also where the accused, in fact, acts for the purposes of self-defence.

The foregoing observations assume that this was a case in which the issue of self-defence properly arose for the jury's consideration. But before us the Crown, as already mentioned, contended that this was not so. Yet the learned trial judge and the Full Court thought that it was such a case despite the fact that the evidence was, at the most, of a very unsatisfactory and inconclusive nature. Upon a consideration of the facts, however, I do not think that we should entertain this contention. Special leave was given for the purpose of enabling consideration to be given to the point already discussed and not for the purpose of considering whether a proper appreciation

of the evidence showed that this was a case in which the issue of self-defence and attendant questions arose for consideration. Essentially this was a matter for the Full Court and I see no reason why we should review their decision on this point.

If the case was one in which the issue of self-defence as justification arose there is a further reason why a new trial should take place for, in directing the jury, the learned trial judge formulated a test which had regard only to the actual necessities of the occasion and which ignored the requirement that the jury should consider the question of the respondent's reasonable belief or the question of what he could reasonably have believed to be necessary. Upon the authorities this was an inadequate direction and was sufficient to justify a new trial. I should add that because of considerations which are apparent from the foregoing reasons I prefer to state the test as being whether the respondent used more force than on reasonable grounds he could have believed to be necessary and not whether he used more force than on reasonable grounds he actually believed to be necessary.

A further objection taken to the summing-up was concerned with the question whether the respondent was, upon any view of the facts, entertained by the jury, bound to retreat before taking action in self-defence. On this point I agree with the conclusion of the Full Court and I agree that, having expressed our views upon the point which was thought to merit fuller consideration, it is proper to dispose of the matter by rescinding the order for special leave and allowing the order of the Full Court to stand.

MENZIES J. The respondent Howe was convicted of murder upon trial before *Ross* J. and his conviction by the jury was set aside by the Full Court of South Australia on the ground of misdirection. A new trial was ordered (1).

Special leave to appeal to this Court was granted upon the application of the Crown in order that an important question of criminal law might be determined by this Court. That question, stated abstractly, was whether upon a trial for murder where self-defence is in issue the jury should be directed that it is manslaughter and not murder if an accused person in defending himself from a violent and felonious attack killed his attacker by the use of force which notwithstanding his honest belief that it was necessary for his self-protection was force in excess of that which on reasonable grounds he could have believed was necessary for that purpose.

I have stated the question in this way because it would be a very unusual case in which a jury would come to such findings and

(1) (1958) S.A.S.R. 95.

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because it is, I think, open to question whether the evidence given upon Howe's trial really raised it. The evidence said to raise it, disregarding all else, was in the main the evidence of Howe himself and was to the following effect. That Howe and Millard (the deceased) drove in Howe's car to a secluded spot about five miles away from Port Pirie to have a drink. After they had finished a bottle of sherry Millard pulled open the fly of Howe's trousers and touched his penis. Howe expostulated and told Millard to get out of the car. He did so and so did Howe and then without further dissension or discussion they walked together in front of the car and when they were eight or nine paces in front of the car Millard suddenly grabbed Howe by the shoulder. Howe wrenched himself free and ran back to the car and upon opening the door saw protruding from under the front seat the butt of a loaded pea rifle which he had put there but had forgotten for the time being. Seeing the rifle he seized it and shot Millard who was then standing eight or nine paces in front of the car with his back to Howe. Howe's further evidence was that he believed that the attacks both in and out of the car were sodomitical attacks by Millard, that Millard was somewhat taller and heavier than himself, that he didn't think he could keep him off with his hands, that he fired intending to stop further attacks and when he did so he was angry, afraid and "all mixed up", that he didn't think at all about whether he was likely to kill Millard and that it never occurred to him to get into the car and drive off.

Ross J. did direct the jury that upon this evidence they could find manslaughter instead of murder on the ground of provocation but he gave no other direction about manslaughter. On the issue of self-defence, apart altogether from provocation, he instructed the jury that if the force used was excessive, i.e. greater than was necessary for mere defence, then the evidence afforded no defence at all. It is this direction that gives rise to the question now before this Court because the Full Court decided that it was wrong.

In addition to this question there was a number of other matters argued in the Full Court and in this Court in relation to the summing-up. I do not think it necessary or desirable to refer to more than one of these. They are all matters for the Full Court sitting as a court of criminal appeal rather than for this Court.

The other one to which I want to refer is that *Ross* J. told the jury that to the rule that a man may kill in reasonable self-defence without being guilty of any crime there is a qualification, namely, that it is the duty of a person attacked to retreat as far as possible having regard to the seriousness of the attack. This was stated as

something additional to the requirement that the force used must be only such as was necessary for self-protection. The Full Court considered that a direction in these terms was wrong and with that I agree. I agree too with the Full Court that what has been called the possibility of retreat, i.e. of avoiding danger without shooting as Howe did, is something to be taken into account in considering whether what Howe did was necessary.

At this point I propose to state in my own words the law which I consider applicable to such a case as this, reserving for the moment the principle question here in issue. By way of preface I would observe that what I am about to say is confined to a case of self-defence against serious violence though not necessarily felonious violence. A man who is attacked may use such force as on reasonable grounds he believes is necessary to prevent or resist the attack and if in using such force he kills his assailant he is not guilty of any crime even if the killing was intentional. In deciding in a particular case, whether it was reasonably necessary to have used as much force as was in fact used, regard must be had to all the circumstances including the possibility of retreating without danger or yielding anything that a man is entitled to protect. If the force used was disproportionate to the seriousness of the attack and the danger of the person attacked, then force beyond what was reasonably necessary will have been used and some crime will have been committed. This statement leaves open the exact consequences of using what is conveniently enough described as excessive force to meet such an attack and to that difficult question I now turn.

The question has been considered in Australia recently on three occasions. In *Reg.* v. *McKay* (1) *Lowe* J. at the end of a series of general propositions in relation to self-defence and the prevention of felonies said: "If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon but the person taking action acts beyond the necessity of the occasion and kills the offender the crime is manslaughter—not murder" (2). This was applied by *Smith* J. in *Reg.* v. *Bufalo* (3). In this case the Full Court expressed their view of the law on this point in the following terms: "We have come to the conclusion that it is the law that a person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more force than he honestly believes to be necessary in the

(1) (1957) V.R. 560.
(2) (1957) V.R., at p. 563.
(3) (1958) V.R. 363.

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circumstances, is guilty of manslaughter and not of murder" (1). This proposition was stated after a review of the authorities and I now turn to those authorities.

Many of the earlier cases are concerned with killings in the course of resisting wrongful arrest attempted under colour of lawful process. It was the law that to kill while resisting lawful arrest was murder but it is clear that where the attempted arrest was not authorised by law the officer attempting the arrest lost his "peculiar protection" so that to kill him would in some circumstances be no more than manslaughter. This was so notwithstanding that the killing was intentional unless it was also premeditated. There are two views whether it was murder or manslaughter in a case where in resisting illegal arrest the resistor, by the use of greater force than was necessary to prevent his arrest, killed the officer attempting it. In *Russell* on *Crime*, 10th ed. (1950), vol. 1, p. 488, it is said: "The fact that a warrant is illegal may make an attempt to execute it a provocation: but does not necessarily reduce from murder to manslaughter the offence of killing the officer in resisting its execution. If the execution can be resisted without proceeding to extremity of violence, use of great and unnecessary violence unsuited to the provocation given or proof of premeditated previous threats or express malice would seem to make killing in such a case murder. The principle was stated by *East* to be that the illegality of an attempt to arrest merely puts the officer on the same footing as any other wrongdoer." The implication here seems to be that it it is murder to kill by the use of excessive force in resisting unlawful attack whether made under colour of authority or not. If this is what is meant I do not think the authorities bear it out.

In *Stephen's General View of the Criminal Law of England*, 1st ed. (1863), p. 117, the intent to resist unlawful apprehension is treated as a state of mind constituting "that lighter degree of malice which is necessary to the crime of manslaughter" rather than murder. This is in my opinion illustrated by *R.* v. *Cook* (2); *R.* v. *Whalley* (3); and *Reg.* v. *Patience* (4), to take but three of the relevant authorities. Others are to be found in *Halsbury's Laws of England*, 3rd ed., vol. 10, pp. 707-709. In *Cook's Case* (2) it was said that when a bailiff was shot dead by the prisoner in unlawfully breaking into the prisoner's house to arrest him, it was manslaughter "for he might have resisted him without killing him; and when he saw him and shot voluntarily at him it was manslaughter". The bailiff's action

(1) (1958) S.A.S.R., at pp. 121, 122.
(2) (1640) Cro. Car. 537 [73 E.R. 1063].
(3) (1835) 7 Car. & P. 245 [173 E.R. 108].
(4) (1837) 7 Car. & P. 775 [173 E.R. 338].

was described as " not sufferable for under colour thereof one may enter who hath not any such authority ; and everyone is entitled to defend his own house ". In *R.* v. *Whalley* (1), where the charge was wounding, the prisoner struck the prosecutor on the head with a stone. The prosecutor was attempting to arrest the prisoner on a warrrant issued by commissioners of bankruptcy but it having been held that he had no authority to do so under the warrant *Williams* J., in answer to an argument that as the circumstances did not justify the force used it would have been murder had the prosecutor died, said that in the case opened " if death had ensued it would have been manslaughter only ". In *Patience's Case* (2) upon a charge of wounding with a knife with intent to murder, *Park* B. after deciding that the attempted arrest of the prisoner by the constable who was wounded was illegal and that there was no evidence of premeditated violence, said : "If a person receives illegal violence, and he resist that violence with anything he happens to have in his hand, and death ensue, that would be manslaughter " (3). In *Reg.* v. *Allen* (4) *Blackburn* J., writing for himself and *Mellor* J., said " When a constable, or other person properly authorized, acts in the execution of his duty, the law casts a peculiar protection round him, and, consequently, if he is killed in the execution of his duty, it is, in general murder, even though there be such circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter. But when the warrant under which the officer is acting is not sufficient to justify him in arresting or detaining prisoners, or there is no warrant at all, he is not entitled to this peculiar protection, and consequently the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation " (5).

On the whole the authorities seem to me to establish that to carry resistance to unlawful arrest to the point of killing was manslaughter, notwithstanding that the killing was intentional and was due to the use of excessive force, provided there was no " previous malice ". Although this position was reached before the doctrine of provocation had taken its present form and was probably based in part upon the disfavour with which violence on the part of officers under colour of legal process was viewed, I consider that in law the only effect of a determination that the process was not lawful was to deprive the officer of his " peculiar protection "

(1) (1835) 7 Car. & P. 245 [173 E.R. 108].
(2) (1837) 7 Car. & P. 775 [173 E.R. 338].
(3) (1837) 7 Car. & P., at p. 776 [173 E.R., 338].
(4) (1867) 17 L.T. (N.S.) 222.
(5) (1867) 17 L.T. (N.S.), at p. 225.

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and put him in the same position as any other person who makes a violent and unlawful attack on another. On this basis the authorities which I have considered do support the view that it is manslaughter if an assailant is killed by the person attacked while resisting with excessive force an unlawful and serious attack. This was the view taken by the Supreme Court of New South Wales (Full Court) in *Reg.* v. *Griffin* (1). There the accused designedly but suddenly and without premeditation shot his neighbour with whom he had a running quarrel and who had rushed at him shouting threats. The accused had been convicted of murder but this conviction was set aside, *Stephen* C.J. saying: "Now the law clearly is, that if there was in fact such a design manifested, on the part of the deceased—an intention then and there to commit the act of violence suspected, or said to have been, by either wounding or inflicting other grievous bodily harm on the prisoner—or even, as I apprehend, if there was at the moment reasonable ground for believing that such a design existed—the prisoner was entitled immediately to take effectual measures for his protection; and, being in his own house, was not bound to retreat in order to avoid the danger. The person so believing could not indeed justify the taking of life, or using a deadly weapon in a manner likely to take life, unless he could not otherwise prevent the apprehended injury—or, at least, unless there was reasonable ground for believing that there were no other means and he did in truth act on that belief. I do not say, that in each case alike the homicide (supposing death to ensue) would be justifiable. In one of the cases put, the act of killing might be manslaughter. But in none of them would it be murder" (2).

The last of the older cases to which I want to refer is *Reg.* v. *Weston* (3) which was a case where the prisoner shot and killed the deceased. There in his charge *Cockburn* C.J. told the jury that "if an assault, though short of serious injury was committed on the prisoner then it would be manslaughter" and left to the jury the question "Was it done after an assault made by the deceased on the prisoner, though short of an assault calculated to kill or cause serious bodily injury?" (4) which he stated would amount to manslaughter. The verdict was manslaughter on the ground that the prisoner had levelled the gun against the deceased unnecessarily and had discharged it accidentally, not on the ground that unnecessary force had been used.

It was submitted by the Crown that in all these cases in which manslaughter was found or where it is stated that the proper

(1) (1871) 10 S.C.R. (N.S.W.) 91.
(2) (1871) 10 S.C.R. (N.S.W.), at p. 100.
(3) (1879) 14 Cox. C.C. 346.
(4) (1879) 14 Cox. C.C., at p. 351.

verdict would be manslaughter there was no malice aforethought in the sense of an intention to kill or do grievous bodily harm. I cannot accept this view because I think the language used in more than one case, some of which I have cited, shows that the accused did have an intention to kill or wound his assailant. The distinction drawn between premeditated and sudden violence, e.g. in *Patience's Case* (1), is also opposed to this contention.

Passing now to the modern authorities there are two to which I want to refer, one from Columbia, Canada, and the other from Kentucky, U.S.A. In *R.* v. *Barilla* (2), it was said: "Manslaughter was referred to in relation to provocation, and acquittal was referred to in relation to self-defence. But nowhere in the summing-up did the learned judge direct the jury upon manslaughter in relation to self-defence, that is to say, that excessive self-defence would justify a manslaughter verdict but not acquittal" (3). . . . "The jury were not instructed that if they found that firing the revolver as Barilla did was an unnecessarily violent act of self-defence in the circumstances of the attack then launched, that it was open to them to find a verdict of manslaughter" (4). In *The Commonwealth* v. *Beverly* (5) it was said: "In making application to the facts disclosed on this trial the court concludes that the instructions on murder and on manslaughter, based upon the theory of heat and passion or sudden affray, were properly given. But instructions No. 3 and 4 were too favourable to the defendant. In place of them, the court should have instructed that the jury might find the defendant guilty of voluntary manslaughter upon the idea that he had used more force than was necessary or reasonably necessary to prevent the commission of the felony described and to protect his property (5)".

These passages indicate a view of the law inconsistent with that which would regard excessive force as something which would convert justifiable homicide into murder.

It was argued by the Crown that the decision of the House of Lords in *Mancini* v. *Director of Public Prosecutions* (6) is inconsistent with the propositions of both *Lowe* J. in *McKay's Case* (7) and the Full Court in this case (8). In that case the trial judge directed the jury with regard to self-defence and as to this Viscount *Simon* L.C. said: "It was in fact, if anything, too favourable to the appellant, for *Macnaghten* J. did not invite the jury to consider whether, even if it

(1) (1837) 7 Car. & P. 775 [173 E.R. 108].
(2) (1944) 4 D.L.R. 344.
(3) (1944) 4 D.L.R., at p. 345.
(4) (1944) 4 D.L.R., at p. 347.
(5) (1935) 237 Ky. 35.
(6) (1942) A.C. 1.
(7) (1957) V.R. 560.
(8) (1958) S.A.S.R. 95.

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were true that the appellant was menaced with the pen-knife, that would justify the use of the appellant's terrible weapon so as to constitute a case of necessary self-defence, nor did the learned judge make any observations on the question whether the appellant could not have escaped from the threatened danger by retreating from the club. The learned judge was content that the jury should deal with the question of self-defence on the basis that, if they believed the appellant's story at the trial about Distleman advancing with the open pen-knife in his hand, they should return a verdict of 'not guilty'. The jury's verdict shows that they disbelieved the appellant's story. Self-defence by the use of so deadly a weapon could not be made out if the appellant was never threatened with the pen-knife, and the learned judge, accordingly, proceeded to charge the jury on the alternative view that, although, if the appellant was disbelieved, self-defence must be rejected, yet the circumstances might still justify the jury in returning a verdict of manslaughter rather than of murder" (1). Later on the Lord Chancellor said: "Although the appellant's case at the trial was in substance that he had been compelled to use his weapon in necessary self-defence—a defence which, if it had been accepted by the jury, would have resulted in his complete acquittal—it was undoubtedly the duty of the judge, in summing-up to the jury, to deal adequately with any other view of the facts which might reasonably arise out of the evidence given, and which would reduce the crime from murder to manslaughter" (2). The trial judge did not direct the jury that the use of excessive force in the course of self-defence would warrant or require a verdict of manslaughter and it is now said that the fact that this was not treated as an omission shows that such a direction was not necessary. I cannot accept this contention. The judgment of the Lord Chancellor was based upon the assumption that the jury rejected the prisoner's story that he was attacked with a knife and that this rejection left nothing beyond the possibility of an attack with hand or fist. It was not argued for the prisoner that he killed with his knife in defending himself against such an attack; what was argued and what was rejected was that such an attack could amount to provocation for the killing. It would, I think, be quite unsafe to regard *Mancini's Case* (3) in the way for which the Crown contended. The House of Lords was not dealing in any way with the problem that arises here.

Upon consideration of the foregoing authorities and bearing in mind the improbability that an error of judgment on the part of a

(1) (1942) A.C., at pp. 6, 7.
(2) (1942) A.C., at p. 7.
(3) (1942) A.C. 1.

man resisting a serious attack as to the degree of force that the occasion reasonably required for his self-protection, would of itself make into murder what would otherwise be justifiable homicide, I have reached the conclusion that the law is that it is manslaughter and not murder if the accused would have been entitled to acquittal on the ground of self-defence except for the fact that in honestly defending himself he used greater force than was reasonably necessary for his self-protection and in doing so killed his assailant. It is to be observed that this statement of the law would always leave open the question whether the person who killed was defending himself when he did so. Having reached this conclusion and the conclusion that the trial judge's direction as to retreat was wrong, I think the proper course to follow is to rescind the special leave to appeal that was granted and so allow the order of the Full Court for a new trial to stand.

Order for special leave to appeal rescinded except in so far as it embodies the undertaking of the Crown as to costs.

Solicitor for the applicant, *R. R. St.C. Chamberlain* (Crown Solicitor for South Australia).

Solicitors for the respondent, *King & Clark.*

J. B.