

## PART VI – DOCTRINES OF SELF-DEFENCE

### I Self-Defence and Homicide

#### A Definition

For self-defence to be left to the jury, the accused will need to construct a version of the facts that supports an inference that he honestly believed on reasonable grounds that it was necessary to do what he did to defend himself from the victim (*Zecevic*). The methodology by which this narrative is persuasively constructed is one of attributing blame: at all times it must be argued that the victim was to blame for their own death.

Note that, as a procedural matter, an accused can plead both self-defence and provocation in the alternative (*Chhay*).

#### B Honest Belief in Necessity

Did the accused honestly believe that it was necessary to do what he did in order to defend himself? (*Zecevic*)

- P will attempt to deny A's belief in necessity by narrating the facts in such a way as to make A's belief appear fabricated
  - P may also attempt to show that A held a prior intent to kill
- A may seek to establish his belief as honest by enlarging his perception of the threat
  - Physical size (V bigger than A; A unable to defend himself; A believed a weapon was necessary; woman/man)
    - *Zecevic* thought V was proficient in Karate
    - *Colon*: intoxication relevant to A's perception of the threat posed by Vs attempting to steal plants
  - V's capacity to harm A
    - Violent disposition
    - Possession of weapons
    - *Zecevic* thought V was going to get a shotgun
    - *Zecevic's* brothers claimed A had a knife
  - A's intoxication
    - Drunkenness may make it more believable that A honestly believed that the force used was necessary
    - [However, belief must still be reasonable]
  - Factors influencing A's perception of the threat posed by V
    - History of physical or mental abuse (battered wives)
    - Mental Disorder
    - *Kurtic*: A had delusions causing him to believe his life was in danger
- Is A mistaken?

- Does not matter if A mistakes V's conduct for a threat, so long as the mistake is honest and reasonable (*Zecevic*)
- If A can adduce evidence that the belief was held, P must disprove BRD the presence of the exculpatory belief

### C *Belief on Reasonable Grounds*

Was the accused's belief based on reasonable grounds?

- Was it objectively reasonable to apprehend death or serious bodily harm? (*Zecevic* per Deane J)
- Could A have retreated?
  - No longer any general duty to retreat (*Zecevic*) but may not be reasonable to kill if A could have easily escaped
- Was V's attack unlawful?
  - Need not be but may support reasonableness of A's belief (*Zecevic* per Wilson, Dawson and Toohey JJ)
- Was V's attack imminent?
  - Imminence not required but makes it more likely that belief in force was reasonable (*Zecevic*)
  - *Taikato*: carrying an illegal precautionary measure (spray) not defensible by SD because there is no imminent attack (Dawson J)
  - *Osland*: evidence of abuse may make a belief in SD reasonable even where no imminent attack (Kirby J)
  - *Secretary*: A killed abusive husband while sleeping, but open to find that A was defending herself from the continuing threat of an assault, so long as the assault was continuing
- Hallucination or mistake
  - It is the belief of A which must be reasonable (*Conlon* per Hunt CJ), and *not* that of a reasonable person
  - However, there must be a reasonable possibility that at least some action in fact took place which could have been mistaken as a threat or a danger to A (*Kurtic*)
- Was help available?
  - *Colon*: alone and intoxicated being confronted by thieves
  - *Secretary*: remoteness of location
- Was V insane?
  - A may use deadly force to prevent life-threatening attacks by an insane V (*Zecevic*)
- Was there a threat of sexual violence?
  - Threat of sexual violation (even where there no fear of death or GBH) may sustain a *reasonable* belief in the necessity of inflicting GBH/death (*Zecevic* per Gaudron J)
  - SD against rape may, in appropriate circumstances, justify death (*Lane* per Lush J)

- Did A take excessive measures to defend herself?
  - If force is unnecessary or unreasonable it will be murder (*Zecevic*)

#### D *Subsidiary Issues*

1 *Did the accused defend a third party believing the victim posed a threat to them?*

- A will be excused if, 'at the time of the killing, [they] believed on reasonable grounds that a third party – relative or stranger – was in imminent danger of death or serious bodily injury' (*Redman VIC*)
  - Cf *Duff*: need to be related to third party to act in defence

2 *Did the accused attempt to prevent the commission of an indictable offence or arrest a known offender?*

- *Crimes Act s 462A*:
  - A may use force proportionate to the objective of preventing the commission, continuance, or completion of an indictable offence
  - A may use force proportionate to the objective of lawfully arresting an offender or suspected offender of any crime
- At common law, A is justified if he knew V was committing or about to commit an offence (*Dadson*; however, an *unknown* justification is irrelevant)

3 *Did A seek to defend their property from V?*

- A can plead SD in relation to property (*McKay; Turner*)
- Eg, the *Home Invasion (Occupants Protection) Act 1998* (NSW) makes it legitimate to kill or injure in a defence of a residence
- The force must still be reasonable; what is reasonable will be less than what is reasonable to defend a person

#### E *Effect on Liability*

A successful plea of self-defence will render the accused entitled to an acquittal in respect of a charge of murder or any other fatal offence against the person.

Self-defence is also a full defence in relation to common assault, causing injury or serious injury, and many of the other supporting offences in the *Crimes Act 1958* (Vic).