

Judgment Number : S3582.1

PARTIES

R (RESPONDENT)
V
LINDSAY ALLAN FRY (APPELLANT)

TITLE OF COURT : SUPREME COURT OF SOUTH AUSTRALIA
JURISDICTION : COURT OF CRIMINAL APPEAL
CORAM : THE HONOURABLE THE ACTING CHIEF
JUSTICE WHITE
THE HONOURABLE JUSTICE COX
THE HONOURABLE JUSTICE MOHR
ON APPEAL FROM : THE HONOURABLE JUSTICE MULLIGHAN
FILE NO/S : SCCRM-91-697
DELIVERED : ADELAIDE
25-AUG-92
HEARING DATE/S : 15-JUN-92 to 17-JUN-92

JUDGMENT OF THE HONOURABLE THE ACTING CHIEF JUSTICE WHITE

(THE HONOURABLE JUSTICE MOHR concurring)

CATCHWORDS

CRIMINAL LAW AND PROCEDURE --- PARTICULAR OFFENCES ---
OFFENCES AGAINST THE PERSON

Murder - the arrest-murder rule or apprehension-murder rule - whether the said rule is still applicable in South Australia - if so, whether the ancient common law defence of presumed provocation entitling an accused to an automatic verdict of manslaughter where the attempted apprehension or arrest was illegal, survived with the rule - whether excessive violence in the course of the attempted apprehension or arrest is capable of converting a lawful apprehension or arrest into an unlawful one which attracts presumed provocation.

HELD: (i) the common law rule known as arrest-murder or apprehension-murder was introduced into this State on its settlement and remains part of the common law to this day; (ii) presumed provocation in the case of illegal attempted arrest or apprehension was originally introduced into this State but the law relating to provocation had changed and developed from time to time and is now authoritatively defined in *Stingel v The Queen* (1990) 171 CLR 312.

STINGEL V THE QUEEN (1990) 171 CLR 312, discussed.

CRIMINAL LAW AND PROCEDURE --- PARTICULAR OFFENCES ---
OFFENCES AGAINST THE PERSON

Self-defence - whether offender is entitled to rely upon

CATCHWORDS (Continued)

self-defence where force is used in the course of a lawful arrest - whether attempted apprehension or arrest becomes unlawful as a result of the application of too much force. HELD, the former distinction between lawful and unlawful application of force before self-defence could be pleaded has been abolished - Zecevic v DPP [1987] 162 CLR 645 - all the circumstances are taken into account in deciding whether resistance to arrest which involves force is an occasion of self-defence at all.

ZECEVIC V DPP [1987] 162 CLR 645, discussed.

CRIMINAL LAW AND PROCEDURE --- JURISDICTION, PRACTICE AND PROCEDURE --- WARRANTS, ARRESTS, SEARCH AND SEIZURE OF GOODS, EXAMINATION OF THE

Summary Offences Act 1953, s.79a. - whether failure to advise arrested person of his right to have a relative present is fatal to the admissibility of subsequent admissions. HELD, was not criminal law - evidence in rebuttal - rebuttal evidence consisting of proof of prior inconsistent statement by the last of many defence witnesses in a long trial - whether accused prejudiced. HELD, in the particular circumstances of this case there was no appreciable prejudice.

CRIMINAL LAW AND PROCEDURE --- JURISDICTION, PRACTICE AND PROCEDURE --- JUDGE'S SUMMING-UP

Appeal - facts - a 43 year old man of low intelligence robbed a young woman at Salisbury interchange after flourishing a knife at her. Uniformed police officers in a patrol car were notified and arrived at the scene within 10 minutes. After seeing one of the approaching constables, the appellant walked away quickly with the knife in his hand, flourishing it from time to time in the direction of the constable. The constable struck his arm repeatedly with a baton, telling him to drop the knife and stop. The baton blows increased and some blows might have been to the shoulder and head. The second uniformed constable then arrived to assist and stood in front of the appellant. The appellant seized the second constable, turned him around and stabbed him deeply in the chest. The appellant said to the interrogating detective and to the jury in evidence that he intended to stab the second constable and get him out of the way so that he could attend to the first constable and then make good his escape. HELD, that the trial judge should have withdrawn both provocation and self-defence from the jury. No ordinary person of 43 years of age would have lost control in the circumstances and stabbed the second officer. Further, there were no reasonable grounds for belief that any force was necessary, let alone the force in fact used. HELD FURTHER, that the officers were in the course of a lawful attempted apprehension of an armed offender and the felony rule law applied. The relevant provocation test was that referred to in Stingel v The Queen (supra) and not the ancient defence of presumed provocation which originally attached to the rule when the attempted

CATCHWORDS (Continued)

apprehension was illegal. FURTHER, the ancient rule was confined to formal defects in the authority of the arresting constable, bailiff, or other person and did not extend to excessive force used in the course of making a lawfully authorized arrest. HELD FURTHER, that a special court of five judges would not be convened to consider the survival of the apprehension-murder rule in South Australia so recently after it had been affirmed in The Queen v Marshall (1986) 43 SASR 448; (1987) 49 SASR 133 (F.Ct).

THE QUEEN V MARSHALL (1986) 43 SASR 448; (1987) 49 SASR 133 (F.Ct), applied.

REPRESENTATION

APPELLANT LINDSAY ALLAN FRY

Counsel : MR J D LYONS

Solicitors : MATTHEW MITCHELL

RESPONDENT R

Counsel : MS A M VANSTONE

Solicitors : CROWN SOLICITOR

Judgment Category : B

Number of Pages : 42

R. v. FRY

Court of Criminal Appeal

White A.C.J.

Appeal against conviction for murder of a police constable who was stabbed while seeking to apprehend the appellant as he was making his escape soon after he had robbed a woman at knife-point.

1. Narrative of the Events of July 26 1990.

(i) Events up to the moment of the stabbing.

At about 9.20 a.m. the appellant approached a young woman, Miss Delaney, at the Salisbury rail-and-bus interchange while she was waiting for a train to take her from Salisbury to Adelaide. The appellant knew her because she had previously refused him free coffee tickets at her employer's coffee shop in Rundle Mall Adelaide. He obviously resented this. He had seen her at Salisbury interchange on a previous day. He discovered that she took a train to Salisbury and a bus from there to her home. He expected to meet Miss Delaney on the morning of July 26 on her way to work. He brought with him a serrated kitchen knife from his home. On seeing her, the appellant approached her, flourished the knife at her and demanded money. She said she had none. He then took her ticket and left her. She made an immediate complaint to a railway inspector.

(The appellant was a 43 year old man at the time, tall and heavily built. He was and is a man of low intelligence, being in the lowest 10% of intelligence of the normal population.)

The inspector immediately rang the police station which relayed a message to a mobile car in which Constables Barr and Lewcock were travelling. They arrived at the Salisbury interchange within about 10 minutes of the robbery. While Constable Barr was parking the police car, Constable Lewcock alighted quickly to make enquiries about the whereabouts of the offender.

Meanwhile the appellant, who was intent upon escaping from the interchange, had first gone to sit in a bus which he believed was about to leave. It did not. He became impatient about the delay. He was informed that the bus was not leaving for some time. The appellant left that bus and went to a second bus, No.226. The only occupant of that bus was the driver, Mr Chenoweth. The appellant went to and sat in that bus. Mr Chenoweth had been instructed not to leave.

The inspector pointed out the appellant to Constable Lewcock who had just arrived. He went to bus No.226 and climbed inside. There was a brief encounter inside the bus when Constable Lewcock took out his baton and told the appellant to put down the knife.

The appellant refused and hurried out of the bus by the side door. He then walked quickly in a northerly direction. Constable Lewcock followed, baton in hand, and soon caught up with the appellant. Constable Lewcock called upon the appellant to drop his knife and stop, but, apart from turning and flourishing the knife, he persisted in hurrying away. Constable Lewcock repeatedly struck the appellant's right arm and hand to force him to drop the knife.

It would have been dangerous for the constable to try to arrest him while he still had the knife in his hand. The two men had hurried some 36 metres north of bus No.226 before Constable Barr caught up with them. He moved around ahead of the appellant to stop him.

Evidence from several witnesses indicated that Constable Lewcock had struck a moderate number of blows to the appellant's arm before Constable Barr confronted him. Two other witnesses described many more blows to the arm and some to the head.

The appellant became stationary, put his left arm over the smaller Constable Barr's shoulder and held Constable Barr so that both men were facing in the same direction. Constable Barr could do nothing to protect himself. Constable Lewcock struck the appellant several baton blows about the head and shoulders in an effort to secure his partner's release.

The appellant stabbed the knife deeply into Constable Barr's chest. That blow proved to be fatal. He then stabbed two lighter blows to Constable Barr's chest. Constable Barr fell to the ground and lay there bleeding. (He died some hours later from the first stab wound in spite of efforts to resuscitate him.)

I interrupt the narrative to make one point which should be borne steadily in mind. The stabbing occurred in the course of a pursuit before there could be an arrest, a pursuit of a suspected offender whom the uniformed officers reasonably suspected of a very recent serious crime. They

were lawfully entitled, on the information which they had, to pursue, apprehend and arrest the appellant.

The common law rule, which is sometimes called the arrest-murder rule, applies in South Australia. It applies not only to the arrest but also to prior pursuit for the purposes of apprehension and arrest. This common law rule, which also applies in Victoria, entitles a jury to bring in a verdict of murder even though the prosecution does not prove actual malice (the specific intention to kill) or implied malice (the intention to do grievous bodily harm). It is sufficient that the resisting offender intended to do a violent act which in fact causes death, from which malice is presumed (constructive malice).

(ii) The events between the time of the stabbing and the time of arrest.

After Constable Barr fell to the ground, the appellant hurried towards and boarded a train which had just moved into the interchange. Constable Lewcock followed and caught up with the appellant. Before they reached the train and when Constable Lewcock got within striking distance he struck further blows with the baton to reinforce demands that he drop the knife. These blows and demands had no effect upon the appellant who insisted upon retaining the knife in his hand.

On the train, Constable Lewcock drew his gun from its holster. It was only at this stage that the appellant surrendered his knife, not to Constable Lewcock but to a young passenger who persuaded him that was the best thing to do. Constable Lewcock then took charge of the appellant without arresting him. He led him to a position where other

constables were. When the appellant went to move off, Constable Lewcock tried to put handcuffs on him and the appellant resisted. He was subdued by several uniformed officers after a violent struggle. He fell on his stomach and grazed his forehead on the ground. He was handcuffed with his hands behind his back and lay face down on the ground.

Constable Lewcock did not formally arrest him. He called for a police cage-car to convey the appellant to the Elizabeth police station. While the uniformed constables were still recovering their breath, Detective Cardwell crouched on the ground beside the appellant and spoke to him. His face was about 12 inches from the appellant's face. He formally arrested the appellant, told him why he was under arrest and told him that he did not have to answer questions and that he had a right to have a friend or solicitor attend any interrogation. He also told him he was taking him to the Elizabeth police station.

(iii) The dispute whether Detective Cardwell spoke to the appellant at all at the interchange.

The appellant denied that he had any conversation with Detective Cardwell while he was face down on the ground. He denied being told that he was arrested or told of his rights. He said that when he was brought to his feet by someone and was about to get into the cage-car, Detective Cardwell told him he was being taken to the Elizabeth police station. Detective Cardwell said that he and another constable helped the handcuffed appellant into the cage-car.

I interrupt the narrative again to deal briefly with the evidence of three constables who had subdued and then

guarded the appellant as he lay on the ground. These three constables were called by the prosecution during the voir dire hearing. The effect of their evidence was that they could not recall Detective Cardwell speaking to the appellant in the way he claimed. They did not deny that he could have but they had no memory of it. It was a matter of recall. The trial judge gave reasons for his voir dire ruling. He held that it was understandable that they might not recall the formality of an arrest spoken at ground level when they had just been involved in a violent struggle with the appellant in the course of handcuffing him, when they were affected by the sight of the wounded Constable Barr, and when they had no occasion to turn their minds to the issue until they were asked to do so one year later.

The learned trial judge found that Detective Cardwell did formally arrest the appellant and advise him of his rights at that stage. He found Detective Cardwell's evidence was confirmed in many other respects. His Honour ruled that Detective Cardwell's evidence of that brief conversation could be admitted at the trial.

On the appeal, the appellant complained (Ground 4) that the prosecution did not call these same three uniformed police officers as prosecution witnesses before the jury. The prosecutor exercised her discretion to refrain from calling them. The appellant complained that he was thus forced to call them during the defence case and lost the right to cross-examine them. However, the evidence which they gave at the trial was substantially similar to the evidence given at the voir dire, perhaps with a little more

emphasis at the trial on the possibility that they may have forgotten Detective Cardwell's brief conversation. To compensate for this very slight change of emphasis, the appellant's counsel at the trial sought leave to cross-examine these three constables, that is, impeach the witnesses which he had called. The trial judge refused leave. In my opinion, he did so correctly. The appellant's counsel made no application to declare these witnesses hostile and there was no basis for doing so. The Crown Prosecutor was entitled, in her discretion, not to call these witnesses who could only say that they had no recall. The trial judge had believed Detective Cardwell on the voir dire and saw no unfairness in the constables not being called by her. There were ample reasons why the constables might fail to remember such a brief conversation. In my opinion, there is no substance in this ground of appeal and I would reject it.

The other complaint, which arose out of the same incident and might as well be dealt with at this stage, is the complaint in Ground 1(b) that Detective Cardwell did not comply exactly with the provisions of s.79a. of the Summary Offences Act 1953, which provides that, at the time of any arrest, the person arrested must be advised of his rights to silence and to have a relative, friend or solicitor present. He omitted reference to a relative.

In the extraordinary and distressing circumstances at the interchange, it is understandable that Detective Cardwell might make a slip and fail to include one of the categories of persons who could be present at Elizabeth

police station. He clearly conveyed all the other information required to the appellant. It is true that these are important rights and that they should not be whittled away, watered down or waived too readily. The trial judge was aware of this. He ruled at the end of the voir dire that the omission was not deliberate and that the section had been substantially complied with. I agree with him. I would not, in the circumstances, interfere with the exercise of his discretion to admit this short conversation. I would dismiss this ground of appeal.

(iv) The events on arrival at Elizabeth police station.

Detectives Cardwell and McGinlay took the appellant to the C.I.B. office at Elizabeth police station. They did not take him straight to the watch house sergeant. They wished to continue their investigations. They were entitled to do this, as the trial judge appreciated. In long reasons for his rulings on the voir dire, his Honour quoted at length from a passage in the judgment of the learned Chief Justice in R. v. Santos and Carrion (1987) 45 S.A.S.R. 556 at 561-562 concerning the continuing right of investigating police officers to pursue their enquiries and to question the accused before and after he has been taken to the officer in charge of the nearest police station, and even after he has been released on bail. The only restrictions are the time limits in the Summary Offences Act and right to bail under the Bail Act. The High Court affirmed that decision in (1987) 61 A.L.R. 668. See also The Queen v. Conley (1982) 30 S.A.S.R. 226 at 242. Provided the tests of voluntariness and fairness were satisfied, the contents of

the interrogations of the appellant which followed at the Elizabeth police station (and later at the Elizabeth Hospital) were admissible.

Immediately on arrival at the police station at 9.50 a.m., Detective Cardwell thought it was expedient to arrange for a St John Ambulance officer to attend because a little blood was oozing from the two lacerations on the appellant's scalp below and above his receding hairline. He rang the ambulance service and a St John's attendant arrived at 10.03 a.m.

While awaiting the attendant's arrival, Detective Cardwell began to interrogate the appellant. He repeated the caution and advice which had recently been given at the interchange. This time he mentioned his right to all categories of persons in s.79a. Detective Cardwell's view was that the appellant fully understood his rights and was fit to be interrogated notwithstanding his scalp injuries; and his view proved to be correct. The medical opinion, apart from that of Dr Flock to which I will refer later, confirmed that there was no reason why the appellant should be in hospital or why he should not answer questions.

I set out later the contents of that interview at the C.I.B. Suffice it to say here that the responses of the appellant were appropriate to the questions asked and demonstrated that he had a good memory of all events before and after the stabbing, seen from his point of view. They make it clear that the appellant deliberately plunged the knife into Constable Barr's chest to get him out of the way so that he could escape. He also stated that they were

police officers trying to apprehend him for the robbery which he had just committed and admitted. But he took the view that they had no right to deprive him of his liberty whatever he had done, and that he was entitled to use the knife to make good his escape.

It will be seen later that it is settled law that even where the attempted apprehension or arrest is unlawful, the person resisting the same is not entitled to use any more force than he believes to be necessary and is reasonably necessary in the circumstances. The test of reasonableness is objective and not dependent upon the rather infantile subjective views of this appellant. For reasons also given later this attempted apprehension was, at the moment of the stabbing, completely lawful, even though preceded by quite a number of blows to the hand and eventually to the head to try to get him to drop the knife. From an objective point of view, this was a lawful attempted apprehension and no reasonable jury could have doubted that his use of the knife in the circumstances to avoid apprehension for a robbery which he knew he had just committed with the same knife, was unreasonable. The jury would also know that an arrest was not possible unless and until he dropped the knife.

(v) The events at Lyell McEwin Hospital, Elizabeth.

The appellant was accompanied to the hospital by Detective Cardwell, to whom the sergeant had just deputed his custody. They arrived at 10.30 a.m. He was chained to a barouche. A nurse checked him and was of the opinion that there was no urgency about a doctor seeing him. The same nurse checked on him two more times in the next hour or so

and was of the same opinion. Detective Cardwell was of the same opinion, that his medical condition was such that he did not need urgent medical attention and that he was fit to be interviewed. He proceeded with the interrogation which had been taking place at the Elizabeth C.I.B. office.

At the voir dire, at the trial and on the appeal, the appellant objected strongly to this further interrogation on several further grounds. First, he said that the appellant was now in the custody of the officer-in-charge of the watch-house sergeant at the Elizabeth police station who had authorized medical treatment but not given permission to continue with any interrogation. Second, he said that the appellant was bleeding from a laceration on the head and there was reason to believe that he might have suffered a head injury and might not understand what was being asked of him. Third, he said that the appellant was awaiting medical treatment and the detective had no right to speak to him until he had been cleared by a medical officer. Fourth, he was chained to a barouche. However, Detective Cardwell repeated the charges, the warning and his rights at the hospital. It was said that, in the light of all the circumstances, it was unfair to interrogate the appellant within the meaning of R. v. Lee (1950) 82 C.L.R. 133, especially as he was a man of low intelligence.

The seeming impatience of Detective Cardwell was excused by the learned trial judge who rejected all complaints of unfairness and impropriety. The medical staff were not available to attend to the appellant because they were busily engaged in trying to resuscitate his victim,

Constable Barr. The latter died about an hour later at 11.45 a.m. The detective interrupted his interrogation at about the time of death so that he could ascertain what had happened. He then came back and informed the appellant that Constable Barr was now dead and that the charge was now murder. The appellant said that he did not care but regretted that he could not now sue Constable Barr. He also made other remarks which showed that he knew full well what he had been doing and that he intended to stab Constable Barr and get away from the constables with the aid of the knife at all costs.

Some hours after this part of the interrogation had ceased, the appellant was seen by Dr Gunawardene who ordered x-rays to be taken. After the x-ray report was available, the doctor said that he could see no reason why the appellant should be detained further in hospital. He gave this evidence at the voir dire and at the trial. In his opinion, the appellant was fit for questioning at that time. The appellant was discharged from hospital at 3.15 p.m.

It is worth mentioning at this stage another incident which happened at the hospital. Detective Cardwell had been making handwritten notes while he was alone with and interviewing the appellant. Detective McGinlay was not present at that time. When Detective McGinlay came to the hospital, Detective Cardwell showed him the notes and described their contents in a general way. Since Constable McGinlay had not been present at the interview at the hospital, he could not initial them to identify them and he did not read them thoroughly. When he was asked a year

later at the voir dire and trial to recount their contents, he could not do so except in the most vague and general way. However, he did remember that when Detective Cardwell handed him the notes, Detective Cardwell had said to him that the notes showed that the appellant had "big plans for the girl". This was a gloss placed by Detective Cardwell on the contents of part of his notes. The justification for Detective McGinlay recounting before the jury this possibly prejudicial comment was that he could remember little about the notes themselves. This comment had "stuck" in his mind. There was a challenge to Detective Cardwell's evidence that there had been an interrogation and notes. No real prejudice could have been caused to the appellant by this additional comment because the evidence of Detective Cardwell, given from the notes, showed that the appellant did entertain feelings of resentment because Miss Delaney had refused him free coffee vouchers, to the extent that he kept an eye on her at Salisbury on a previous day. He followed that up by being at the interchange early in the morning to meet her, whereupon he flourished a knife at her and robbed her. The additional gloss that he had "big plans" for her did not carry the matter much further. The comment tended to increase the likelihood that he had made the notes which he said he had made. A most concerted attack was made from beginning to end on Detective Cardwell's evidence that he had had any conversations or ever made any notes.

Far from interfering with the trial judge's exercise of his discretion to allow in all of this evidence, I would

agree with him. His Honour left all questions of fairness to the jury for their consideration, as well as the question whether anything was said by the appellant to Detective Cardwell.

At this stage, I should also deal with a related complaint that the trial judge overlooked the issue of the voluntariness of the appellant's answers to Detective Cardwell. This point was not taken on the voir dire or at the trial. It was a new point taken by counsel on the appeal.

At the voir dire hearing, counsel then appearing for the appellant repeatedly told his Honour that voluntariness was not in issue. It goes without saying, however, that his Honour knew that voluntariness was an issue. What was really meant by counsel, and understood by his Honour, was that the issue of the appellant's voluntariness in his responses during interrogations was not being contested by the appellant. That being so, his Honour might more readily make a finding that, if anything was said at all, it was said voluntarily. The trial judge could not have proceeded to deal with the question of unfairness unless he had first been satisfied that the answers were voluntary. In saying that voluntariness was not in issue, that the answers were sensible responses to the questions and that the questioning was fair, in all of the circumstances, his Honour was necessarily deciding the question of voluntariness by implication.

Once the evidence of Detective Cardwell was admitted, it went a long way towards proving at least implied malice (an

intention to cause grievous bodily harm) sufficient to support a verdict of murder, quite independently of the apprehension-murder rule. At the same time, the appellant's statements to Detective Cardwell also showed how determined the appellant was to avoid apprehension at all costs and supported what could be inferred from his conduct anyway, namely, that he was determined to do at least serious injury to Constable Barr (which in fact resulted in death) to avoid apprehension. That fact would be sufficient for a verdict of murder under the apprehension-murder rule.

(vi) Events after the return of the appellant to the Elizabeth watch-house.

Detective Cardwell's association with the appellant had ceased by this time. When the appellant returned to the Elizabeth watch-house, the sergeant permitted detectives from the major crime squad to interrogate him. The appellant was not prepared to co-operate with them unless his solicitor was present. No admissions were made to these detectives.

(vii) Later medical evidence that day.

At 5.07 p.m. the appellant was taken to Adelaide watch-house where Dr Flock, the police doctor, saw him for the purposes of taking hair and blood samples. On the voir dire, Dr Flock was questioned by defence counsel as to the possibility that Constable Lewcock's blows to the appellant's head, especially those as described by Mr Chenoweth and Mr O'Brien, could have had some adverse effect upon the consciousness of the appellant of what he was doing at the time of the stabbing. It was suggested to by Dr Flock that he might have suffered concussion.

Dr Flock agreed with this possibility. He was not an expert in the area of concussion but he had wide experience in police matters and he claimed some general knowledge of the causes and effects of concussion. At the voir dire and again at the trial, the prosecution called a specialist in this area, Mr North, who said that the plaintiff could not have suffered concussion without loss of consciousness and, therefore, without loss of memory for the corresponding period. The appellant claimed to have a memory at all times of what was going on. He did not claim loss of memory. The account which he gave to Detective Cardwell showed that he had a continuous memory of what was happening prior to, during and after the stabbing. There was no gap in his claimed memory. There could not, therefore, have been any loss of consciousness since there was no loss of memory. It follows that there was no concussion according to Mr North. It is unlikely the jury would prefer Dr Flock to Mr North in the light of the appellant's own evidence. Mr North was much better qualified and more authoritative in this area. The learned trial judge put both versions of the number of baton blows to the jury and left it to them. It is fair to comment that the two lacerations to the head of the appellant could hardly have been from blows inflicted by Constable Lewcock when he was following the retreating figure of the appellant and striking at his right side and right arm and then presumably at the right rear part of the head. The lacerations seemed to be too far forward for the baton to have caused them at the pre-stabbing stage.

Dr Flock had noticed some possible liver condition which the appellant might have suffered and sent him back to Dr Heah who saw him at 6.42 p.m. However, Dr Heah discharged the appellant saying there was no reason why he should be in hospital. He was of the opinion that he would be fit for the interrogation.

That concludes the narrative of the events of that day.

2. The relevance of Detective Cardwell's evidence.

The evidence of Detective Cardwell was important from many points of view. First, it informed the jury about the appellant's account of what he was doing and thinking before and during the stabbing. It threw light on the questions of deliberateness of the stabbing, the voluntariness of the appellant's answers and his knowledge that the uniformed officers were pursuing him in relation to the recent robbery of the woman. It revealed his intention to use the knife to avoid apprehension and his determination to get away at all costs. Second, his answers informed the jury that he had suffered no loss of memory which put an end to the suggestion that he might have been concussed or unaware of what he was doing. Third, the appellant's admitted aggressiveness put an end to the possibility of success of any defence that there were reasonable grounds for his belief that the use of the knife was necessary in the circumstances. Whatever the officers did, he was determined to use the knife to get away. Fourth, although the appellant had a mistaken view of what was meant by the words "out of control" (he thought that the words meant that the situation was out of control whereas he was in control

because he was bigger than Barr and in control of the fight), there was ample evidence in his answers to put an end to any suggestion that the provocation (if any) would cause an ordinary man of his age to lose control and do what the appellant did. He did not think that the police had any right to arrest him, even though he knew and admitted that he had robbed the young woman at knife-point. He thought he had the right to get away and use the knife to that end, whatever the constables did. He was not prepared to put down his knife so long as they held their batons. What the appellant said to Detective Cardwell was highly probative for the purposes of excluding both provocation and self-defence, more especially the objective aspects of these defences.

2. What the appellant told Detective Cardwell.

(i) At Elizabeth C.I.B. office.

"Q. When the policeman you stabbed first came up to you, why didn't you drop the knife.

A. Because I said I wasn't going to let him get the better of me. He was big but I was bigger than him. I knew I could do him.

Q. Why did you stab him.

A. Because he was going to arrest me." (p.120)

"Q. Why did the policeman (beat you) with the stick.

A. Because I had a knife.

Q. You should have dropped the knife

A. No, no way. I was going to do him."

(ii) At the hospital.

"Q. What happens if the policeman dies.

A. Fuck him for trying me." (p.121)

"Q. Do you understand what I mean by murder.

A. Yeah, I killed him. Fuck the cunt anyway.
I done him. I said I could do him." (p.121)

"Q. Do you realize that what you have done today
is very wrong.

A. Yes. So?

Q. You killed a policeman.

A. I told you he deserved it. I told you that
before." (p.122)

"Q. What did you think might happen if you put
your knife down.

A. Going to try and knock me out.

Q. So what happened then.

A. Then eventually Lewcock hit me from behind
as Barr was about to strike me. I pushed
the knife at him further.

Q. Just at that moment, what did you think was
going to happen to you if you didn't push
the knife at them.

A. Lewcock was going to kill me and also Barr
was probably going to kill me and knock me
out." (p.123)

3. What the appellant told the jury.

"A. What I wanted was to get away. But if
there was going to be any fight, well, I
was certainly going to stand up to them and
I certainly wasn't just going to hand over
my knife and do the frickin' thing they
fucking wanted me to do ... I was going to
make it real difficult for them ... I told
him to drop his baton and he didn't."
(p.126)

"A. It was my right to go and get the ticket
off her and there shouldn't have been any
interference (by the police).

Q. So if somebody doesn't give you a free
coffee ticket you are entitled to rob them
at knife point, is that what you are
saying.

A. Yes, if need be.

Q. Then are you entitled to avoid arrest by the police officers.

A. Yes.

Q. If they try and restrain you you are entitled to stab one of them.

A. Well, if they're going to kill me, yes." (p.127)

"A. It was not an accident. I intended to injure him because I said I would use the knife. But he wouldn't listen. He just kept on hitting me. (The "it" referred to above is the stabbing.)

Q. So you meant to injure him (by stabbing Constable Barr).

A. Yes.

Q. In what way.

A. Well, just so that I could have a go at Lewcock who was hitting me hard from behind.

Q. What you wanted to (do) was to put Barr out of the picture and then turn to Lewcock.

A. Yes. That was my intention at that time. ... I meant to injure (Barr) so that the knife went into him ... anywhere on the upper body." (p.129)

"A. Barr was in the front and I couldn't get to Lewcock. That is why I ended up stabbing Barr first.

Q. Once you had dealt with Barr you intended to deal with Lewcock.

A. Yes, that was my intention.

Q. Were you going to stab him too.

A. Yes."

"A. I told him I intended using the knife if they didn't drop their batons. I yelled at them because they didn't take any notice of what I intended, that I intended to use the knife if they didn't drop their batons."

Q. After you stabbed Mr Lewcock, you were planning to make your escape.

A. Yes." (p.132)

(After the stabbing)

"A. I was weighing up the situation that I was in. It was a very tough situation because one way I wanted to fight Lewcock, as in my own eye I only half won the battle. I got rid of Barr. I was clear of Barr. All I had to do was injure Lewcock. Then I could get away."

4. What the trial judge told the jury about the possible effects of the baton blows.

On the questions of provocation and self-defence, his Honour introduced the possibility of violent blows rendering the attempted apprehension of the appellant unlawful in this way:

"Ladies and gentlemen, does the evidence admit of a reasonable possibility that the accused may have had that intention" (of using force to avoid arrest) "initially but events overtook that state of mind due to the violence of the blows which the accused said Constable Lewcock struck him. Is it a reasonable possibility that the accused did intend to avoid arrest or that he had no such intention at all but that he was then chased and beaten by the police and particularly Constable Lewcock and later Constable Barr, so that any thought of avoiding arrest or any thought of using force for that purpose was no longer in his mind?" (p.141)

The summing up deals with provocation specifically from p.152 onwards.

At p.154 and 155, his Honour said this:

"If you were to accept the version of the events as given to you by Constable Lewcock and the version as given to you by Mr Falkenberg and Mr Neville, of which I reminded you, you may easily conclude that an ordinary man would not have lost his self-control to the required extent. If, however, you were to accept that it is a reasonable possibility that the accused was struck many times on the arms, body and head, by Constable Lewcock and Constable Barr in the circumstances as you find proved beyond reasonable doubt existed, then you must ask yourselves whether it is a reasonable possibility that an ordinary man in those circumstances might have been deprived of his power

of self-control and might have acted as the accused did in stabbing Constable Barr, a police officer."

(On p.153, his Honour had referred to "an ordinary man of his age".) His Honour said shortly afterwards (pp.155-156) in relation to loss of self-control:

"In consideration of that issue you are not to have regard to the personal characteristics of the accused, such as his level of intelligence, or any degree of immaturity."

At p.156, his Honour dealt with the quite separate topic of whether the accused himself was or might have been provoked by what had been happening to him.

"In considering whether the accused was provoked to kill Constable Barr, you must take into account all of the relevant circumstances including the historical context which developed, whether it was provocative conduct, the conditions under which it took place, the characteristics of the accused, his physical condition, the disadvantage under which he was suffering, the general atmosphere and context under which the events occurred and might have been thought were contributing to lose control of himself."

At p.157, his Honour also said:

"You have heard evidence about the characteristics of the accused and it is for you to decide what evidence you accept, whether the general personality type, level of education, experience in life, intelligence level and any other characteristic of the accused might have affected the gravity of any provocation to him and his response to it."

These passages comply substantially and sufficiently with the various aspects of the subjective test in Stingel at p.326. In the latter passage and in other passages, his Honour concisely directed them in terms of all aspects of the subjective test, that is, the appellant's own view of the gravity of the provocation and his response to it. And at p.159 he put the evidence of Mr Chenoweth of more baton blows and the possible subjective effect thereof. His

Honour turned to the kind of possible provocation or provocative acts which might have affected the appellant if he was beaten in the more severe way that the witness Chenoweth described.

I am in no way critical of the learned trial judge for leaving provocation and self-defence to the jury out of an excess of caution. The voir dire had lasted six weeks and the trial a further six weeks. On one version of the facts (the evidence of the prosecution witness Chenoweth and the defence witness O'Brien) more blows were struck with the baton than were described by three other witnesses. If the blows were as many and as violent and as often to the head as these witnesses described, the jury might have thought it possible that the accused might have believed that what was happening was a beating rather than a pursuit to apprehend. However, the accused's own admissions and evidence, quoted above, take the possible sting out of Chenoweth and O'Brien's evidence. Far from losing control in any relevant sense or needing to fend off an attack, the appellant was deliberately resisting lawful attempted apprehension. He was determined to keep the knife at all costs even before the blows with the baton.

5. Should the trial judge have left the issue of provocation to the jury at all.

There are several aspects to the question of provocation:

(i) has the law of provocation remained static in relation to the apprehension-murder rule after it was first received in and became the common law of this State in 1836?;

- (ii) if it did, was the trial judge in error in summing up in terms of Stingel v. The Queen (1990) 171 C.L.R. 312?;
- (iii) if apprehension-murder provocation underwent substantial changes between 1836 and 1990 until it reached the form laid down in Stingel, should the trial judge have ruled as a matter of law that no reasonable jury could find that the ordinary man of the appellant's age of 43 might have lost his self-control in the way that the appellant did in the circumstances?;
- (iv) does it matter that the attempts at apprehension by the uniformed constables were "lawful"?; and
- (v) did the blows struck by Constable Lewcock render "unlawful" their attempts to apprehend the appellant?

- (i) Has the apprehension-murder rule remained static in South Australia since 1836;
- (ii) and if it has, has the ancient rule of presumed provocation in the case of unlawful apprehension survived to this day?

It is clear that in England in the 17th, 18th and 19th centuries (prior to 1836) it was murder to kill a police officer, bailiff or other assisting person who was lawfully attempting to apprehend an offender. However, the verdict of murder would automatically be reduced to manslaughter if the apprehension or arrest was unlawful by virtue of any defect in the warrant, lack of jurisdiction or error in identity. That this was the law is clear from the many authorities referred to in R. v. Tommy Ryan (1890) 11 N.S.W.L.R. 171. In that case, Foster J. refers (p. 206) to two statutes (43 Geo. III c.58 - 1803; 9 Geo. IV c.31 - 1828), which expressly recognized the common law rule that where the violently attacked police officer or bailiff died

died after an unlawful attempt to apprehend, the accused was entitled to a verdict of manslaughter by reason of presumed malice. The statutes proceeded to extend an equivalent reduction to a lesser verdict where the arresting police officer or bailiff survived but might have died by reason of the violence of their resistance to unlawful arrest. Just as the illegality of the attempted arrest did not exculpate the offender completely but only reduced a verdict from murder to manslaughter when the officer died, so too, when the victim survived, verdicts which might otherwise have been, for example, malicious wounding with intent to kill (attracting the death penalty) were reduced to wounding if the attempted apprehension was illegal. Provocation, or something like it, was presumed. The object of the statutes was to avoid the death penalty and to equate the position of an offender who did not kill the illegally arresting person with that of the offender who did kill the illegally arresting person. Both types of offenders enjoyed a reduction in their sentences by reason of presumed "provocation". In both types of cases, attempts to deprive citizens of their liberty when there were formal defects in the authority to do so, were deemed to be such affronts to liberty that provocation was always presumed - whatever the true facts or degree of violence used in resistance. There were, in those centuries, no objective tests nor tests of reasonableness.

The objective test of the ordinary man and his self-control did not find its way explicitly into the law of England until the 1860's. In 1867, provocation was to be

presumed after formally irregular arrest where it was "attended by circumstances affording reasonable provocation": R v. Allen (1867) 17 Law Times Reports (n.s.) 222 at p.225. This was followed soon afterwards in a case not involving an arrest (R. v. Welsh (1869) 11 Cox 336) where the provocation was required to be serious (e.g. a severe blow) -

"something which might naturally cause an ordinary and reasonable man to lose his control and commit such an act."

Smith and Hogan, Criminal Law 6th ed. (1988), at p.336, observed that thereafter where an accused claimed provocation he probably had to pass the ordinary man test.

A brief search of the South Australian Law Reports between 1867 and 1950 does not reveal any case where the unqualified right to presumed provocation arose in a case where there was an irregular arrest through an informal defect or want of jurisdiction. If there had been a case during that period it would undoubtedly have followed English precedent.

In the present case, the fact was Constable Barr died. If the constables were or might have been illegally attempting to apprehend the appellant and if the ancient presumption of provocation had applied to this case, the appellant would have been entitled at least to a verdict of manslaughter.

The threshold question is, of course, whether the underlying apprehension-murder rule did survive and did apply in this case. As recently as 1986, this Court in The Queen v. Marshall (1986) 43 S.A.S.R. 448; (1987) 49 S.A.S.R.

133 (F.Ct) held that the apprehension-murder rule still applies in South Australia. (It also still applies in Victoria. See The Queen v. Ryan and Walker [1966] V.L.R. 533.)

The three members of this Court of Criminal Appeal were requested to reconvene a special Court of Criminal Appeal consisting of five judges to reconsider Marshall's case and the survival of the apprehension-murder rule. It was said that the rule is anachronistic because it permits a verdict and conviction for murder even though the accused had no express or implied malice, but only constructive malice. It was said that constructive malice (and the rule itself) might have been appropriate before Woolmington v. D.P.P. [1935] A.C. 462 and Parker v. R. (1963) 111 C.L.R. 610 but ought not be allowed to survive the principles enunciated in those cases.

The members of this court declined to convene a new court of five judges to reconsider Marshall's case which had so recently considered and applied the apprehension-murder rule. The rule is plainly part of the common law of South Australia - as it is in Victoria. Marshall's case was not shown to be plainly wrong and this court ought to follow it. Indeed, the facts of this case indicate, to my mind, the soundness of the policy behind the apprehension-murder rule. The fine balance between personal liberty, on the one hand, and law enforcement, on the other, was, in earlier centuries when police forces as such did not exist, maintained by the use of crude techniques such as presumed provocation. In modern times, the police force has become a much more

disciplined body and subject, in South Australia, to ministerial and regulatory control and to defined rules of conduct as well as judicial powers to exclude evidence and the availability of the right to claim damages for excessive violence. Furthermore, a disciplinary board exists to investigate and discourage excessive violence.

No case was cited to us, in spite of the exhaustive researches of counsel, which had held that a lawful arrest became "unlawful" merely by reason of the application of more force than was necessary by the arresting person. In this decade, such force might lead to disciplinary action or the exclusion of evidence or a right of action in the arrested person, but it would not, except in a case of exceptional violence, cause a complete change in the characterization of what was happening. Nor, in my opinion, would more violence than necessary cause the apprehension-murder rule to cease to apply.

Counsel argued, by analogy from the early English cases, that a similar illegality now arose, or ought to be held to have arisen, through the use of excessive force in the course of this attempted apprehension. It was argued that Constable Lewcock's repeated use of the baton to stop the appellant was sufficiently excessive use of force to change an attempted lawful apprehension into an unlawful one, thereby attracting either the ancient presumed provocation or the principles of self-defence or even taking this case wholly outside the apprehension-murder rule.

As to the latter possibility his Honour put the argument to the jury this way:

"Ladies and gentlemen, does the evidence admit of a reasonable possibility that the accused may have had that intention initially but events overtook that state of mind due to the violence of the blows which the accused said Constable Lewcock struck him? Is it a reasonable possibility that the accused did intend to avoid arrest or that he had no such intention at all but that he was then chased and beaten by the police and particularly Constable Lewcock and later Constable Barr so that any thought of avoiding arrest or any thought of using force for that purpose was no longer in his mind? That is a matter which you must consider upon the circumstances of the incident as you find them to be."

As to possible survival of presumed provocation, counsel suggested that "what was sauce for the goose was sauce for the gander". If the ancient apprehension-murder rule still applied in South Australia, the ancient defence must also have survived. He had no authority to support his argument that provocation was presumed when a formally correct and lawful apprehension was accompanied by more force than necessary. As far as my own researches go, I could not find a case where provocation was presumed except where the arrest was unlawful ab initio through lack of formal authority, lack of jurisdiction or defect in the warrant. That was not the legal position here. These two constables were lawfully entitled to arrest this appellant and to use whatever force was reasonably necessary.

Counsel argued (and the trial judge left the question to the jury) that the excessive force described by Mr Chenoweth and Mr O'Brien, which was the best view of the evidence from the point of view of the appellant, caused or might have caused an initially lawful attempted apprehension to become an unlawful attack, just prior to the stabbing.

For the reasons given, I reject this argument. I hold that the continuing blows applied by Constable Lewcock and

some applied by Constable Barr near the time of the stabbing, as described by Chenoweth and O'Brien, were reasonable and necessary. The appellant was continuing to make his escape by flourishing and thrusting with the knife in his hand, he was a continuing menace to the police who were trying to arrest him and he was a continuing potential menace to other members of the public. Forceful attempts had to be continued to ensure that he stopped, yielded up his knife and submitted to custody.

There was no defect or want of authority in these two constables. They did not need a warrant. They were merely carrying out their duty to arrest an offender on a serious charge upon reasonable suspicion. It was not contested that they entertained a reasonable suspicion, nor could it be contested. The appellant was found by them with a knife in his hand as a result of their quick appearance on the scene. The robbery of Miss Delaney was very recent and the appellant flourished his knife at Constable Lewcock. And the appellant's own evidence showed that he was determined to evade arrest and make good his escape by the menacing use of the knife.

It should be borne in mind that during the course of the delivery of the main blows with a baton, Constable Lewcock alone was in pursuit of the large and menacing figure of the armed man. He was not to know that he would soon be joined by Constable Barr. Constable Lewcock did not attempt to use his gun. (Later he drew his gun, that is, after the stabbing, when he had cornered the appellant on the train.) There were other people around. It would not have been, in

my opinion, excessive use of force if he had drawn his gun after some ineffective baton blows and fired a warning shot into the ground; and if that had proved ineffective and if he had not been joined by Constable Barr, he would have eventually been entitled, in my opinion, to shoot the escaping armed appellant in the leg. I am, therefore, of the opinion that Constable Lewcock used less force than he might have in his attempts to stop the armed appellant. It would have been foolhardy for Constable Lewcock to jump on the appellant or attempt to hold him physically while he was still armed with the knife. It was necessary for Constable Lewcock to persuade or force the appellant to drop the knife first before he seized him. And when Constable Barr joined them, it was necessary for him to do what he did to stop and disarm the appellant, on any view of the evidence.

This discussion of the facts, which is relevant at this stage to the very application of the apprehension-murder rule, is also relevant to the topics of provocation and self-defence discussed later and to the questions whether these defences should have been withdrawn from the jury.

I would hold that the common law apprehension-murder rule applied at all times to this lawful attempt at apprehension and that the ancient defence of presumed provocation did not apply. It follows that, in the absence of provocation as enunciated in Stingel (supra) (and/or self-defence as enunciated in Zecevic infra) the appellant was guilty of murder even though he may not have intended to kill Constable Barr or to cause him grievous bodily harm. It was sufficient if the appellant intentionally performed

an act of violence and if Constable Barr in fact died afterwards as a result of what he did.

(iii) Should the trial judge have withdrawn provocation from the jury.

His Honour said to the jury:

"What you will have to ask yourselves is whether on the evidence there was a reasonable possibility that the accused might have been provoked by the actions of Constable Lewcock and Constable Barr in such a way as to cause him to lose self-control and to do the violent act which caused Constable Barr's death. It will be for you to consider the nature of any provoked conduct and to say whether in fact the accused was deprived of his self-control and whether he continued to be so deprived at the very time of the stabbing provided you are satisfied that he did stab and cause Constable Barr's death or that that is a reasonable possibility. If you think the Crown has not excluded the reasonable possibility that the accused was provoked to lose his self-control and whilst continuing to be so deprived of his self control he killed Constable Barr, if he intended to kill him or cause him grievous bodily harm, his crime is not murder but manslaughter.

... If you conclude that it is a reasonable possibility that the accused might have had a sudden and temporary loss of self-control due to the acts or words of Constable Lewcock and Constable Barr, and those acts of provocation might have been of such a character as might cause an ordinary person of the age of the accused to lose his self-control, and the acts of provocation caused in the accused a sudden and temporary loss of his self-control, rendering him, as I have said, so subject to passion as to make him, at the time of the stabbing, not the master of his mind, or if you have a reasonable doubt about those matters, the Crown will not have proved that the killing was not provoked in law, and you must find the accused not guilty of murder but guilty of manslaughter."

I have held that the common law apprehension-murder rule applied in this case and that the relevant rules relating to provocation are the same as those in Stingel (supra). I turn now to the consideration of that case.

In Stingel, the High Court explained the subjective and objective aspects of provocation. The personal

characteristics or attributes of the particular accused may be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act or insult to which he claimed to be reacting but the ultimate question, posed by that part of the objective test which relates to self-control, concerns the possible effect of the wrongful act or insult so understood and assessed upon the power of self-control of a hypothetical ordinary person of the age of the accused. Age is the only qualifying attribute in that aspect of the objective test which relates to self-control. Cases like The Queen v. Dutton (1979) 21 S.A.S.R. 356 and The Queen v. Romano (1984) 36 S.A.S.R. 283 must be taken to be overruled in so far as they include factors other than age on this question of objective self-control.

In Stingel, the infatuated accused approached a parked car in a lonely spot at night and saw his former female friend engaging in sexual activity with another man. He opened the door and was told rudely to "piss off". He obtained a knife from an adjacent car and stabbed the man to death. The accused was 19 years of age. The woman had terminated her previous relationship with the accused some time before this night. He kept following her and she obtained a restraint order. The accused claimed that he lost control and did not know what happened until the knife went into the deceased.

The trial judge refused to leave the question of provocation to the jury. The High Court held that the ruling was correct because no jury, acting reasonably, could

fail to be satisfied beyond reasonable doubt that the accused's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical ordinary 19 year old.

At p.336, the court pointed out that:

"While the youth's infatuation with the woman was relevant to the subjective aspect of provocation, certainly in the context of that court order and the appellant's past harassment of (the woman) notwithstanding her discouragement of his advances, it is difficult to conceive that an ordinary 19 year old would be even surprised to be told in strong and abusive terms to go away when he intruded, as the appellant did upon the privacy of the deceased and (the woman) as they voluntarily engaged in sexual activity late at night in a darkened car."

And as to whether provocation should have been left to the jury, the Court said (p. 336):

"Be that as it may, no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the conduct of the deceased, including the insulting remark and the sexual activities in which he and (the woman) were allegedly engaging, was not of such a nature as to be sufficient to deprive any hypothetical ordinary 19 year old of the power of self-control to the extent that he would go to his own car, obtain a butcher's knife and fatally stab the deceased with it. Put differently, no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical ordinary 19 year old. It follows that the learned trial judge was correct in declining to leave the defence of provocation under s.160 to the jury." (emphasis added)

In this regard, the statutory rule and the common law rule are the same. See p.327 where the Court said:

"The function of the ordinary person of s.160 is the same as that of the ordinary persons of the common law of provocation. It is to provide an objective and uniform standard of the minimum powers of self-control which must be observed when one enters

the area in which provocation can reduce what would otherwise be murder to manslaughter ... the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of a particular accused."

In the present case, the question for the trial judge was - could a reasonable jury say in the circumstances of this case that the hypothetical ordinary person of 43 years of age might have reacted to the baton blows and attempts to get him to drop the knife by losing his self-control and stabbing Constable Barr as soon as he was confronted?

I have already given my reasons for holding that the lawful apprehension situation was continuing in existence and why Constable Lewcock was justified in striking repeatedly with the baton in the way he did, whichever account given by the eye witnesses is accepted. In my opinion, his Honour was more than generous in leaving the question of provocation to the jury because he could have, and I think should have, withdrawn provocation because "no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's reaction to (the conduct of Constable Lewcock and the confrontation by Constable Barr) fell far below the minimum limits of the range of powers of self-control which must be attributed to any 'hypothetical ordinary' man". Stingel p.337.

The right and duty to withdraw provocation from the jury has been discussed in very, many cases. I select a few.

In Holmes v. D.P.P. (1946) A.C. 588 at 597, Viscount Simon said:

"If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury to form a view that a reasonable person so provoked could be driven through transport of passion and loss of full control, to the degree and method and continuance of violence which produced the death, it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter."

In The Queen v. Duvivier (1982) 29 S.A.S.R. 217, I was the trial judge who withdrew the question of provocation from the jury. That ruling was upheld on appeal. Mitchell J. said (at p. 226):

"Was it open to the jury reasonably to find that an ordinary person in the position of this appellant who knew that his wife had once left two older children unattended overnight and he may have believed that she was prone to neglect her children, might, on overhearing his wife say on the telephone words indicating that she contemplated going away to France with another man, may have so provoked (the ordinary man) as to lose his self-control and shoot several times in her direction? I do not think that it was, and I do not think there was an issue of provocation fit for consideration by the jury."

Some very minor criticisms were made of certain directions of his Honour concerning provocation. Insofar as there might have been a minor departure from Stingel, it did not matter. It was very minor. In my event, the appellant was not entitled to a Stingel direction. Having embarked upon it, his Honour substantially followed the tests in Stingel. I would hold that no prejudice whatsoever was suffered by the appellant in this regard.

- (iv) Does it matter that the attempts at apprehension by the uniformed constables were "lawful"?
- (v) Did the blows struck by Constable Lewcock render "unlawful" their attempts to apprehend the appellant?

I have already dealt with the lawfulness of the apprehension and the inability of any violence involved in

Constable Lewcock's use of the baton to affect that lawfulness.

6. Self-defence

While there are many cases which hold that self-defence (and the reasonableness of the grounds of the accused for believing that the kind of force he used was necessary) are very much matters for the jury, I do not think that these cautions apply with the same degree of force when one of the grounds upon which the appellant might be convicted of murder is the apprehension-murder rule. Since I have already held that the force applied by Constable Lewcock was reasonable there seems little room for the argument that the appellant might have believed on reasonable grounds that the force which he used was necessary in his self-defence in the circumstances. Zecevic v. D.P.P. (1987) 162 C.L.R. 645.

7. Should the trial judge have left self-defence to the jury?

In my opinion, the learned trial judge could have, and should have, withdrawn self-defence from the jury. His Honour was more than generous in leaving it to the jury in the circumstances of this case. If the appellant's argument at the trial was correct, Constable Lewcock was simply giving the appellant a beating and Constable Barr's blocking of his path constituted false imprisonment or could reasonably be so construed. However, that construction ignores the wider context of the reasons for the constables being there in the first place and what they were trying to achieve. Some passages in Zecevic indicate that lawful arrest, even accompanied by some violence, is one of those

situations where self-defence could hardly be said to arise - except perhaps in extreme cases of violence.

Zecevic brought to an end the former distinction between repelling an unlawful attack and repelling a lawful attack. In their joint judgment, Wilson, Dawson and Toohey JJ. said at p.662:

"... 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 the threat which calls for that response. A threat does not ordinarily call for that response unless it causes a reasonable apprehension on the part of that person of death or serious bodily harm. If the response of an accused goes beyond what he believed to be necessary to defend himself or if there were no reasonable grounds for a belief on his part that the response was necessary in defence of himself, then the occasion will not have been one which would support a plea of self-defence. ... If it was done with intent to kill or to do grievous bodily harm, then unless there was provocation reducing it to manslaughter, it will be murder." (emphasis added)

(In passing I mention that the word "serious" first appearing in this passage should now read "grievous" since The Queen v. Wilson [an unreported High Court decision (delivered June 28 1992)].)

On the question of unlawfulness, their Honours said (p.663):

"In Viro self-defence is confined to a response to an unlawful attack, whereas the law as we have explained it is not so confined. Whilst in most cases in which self-defence is raised the attack said to give rise to the need for the accused to defend himself will have been unlawful, as a matter of law there is no requirement that it should have been so." (emphasis added)

Their Honours go on to mention some extreme cases which justify not confining self-defence to repelling unlawful attacks, such as repulsion of an attack by a person who, by reason of insanity, is incapable of forming the necessary

intent to commit a crime and whose initial attack, therefore, could not be said to be "unlawful". They continued (p.663):

"It is, however, only in an unusual situation that an attack which is not unlawful will provide reasonable grounds for resort to violence in self-defence."

And at p.664:

"The whole of the surrounding circumstances are to be taken into account and where an accused person has created the situation in which force might lawfully be applied to apprehend him or cause him to desist - where, e.g., he is engaged in criminal behaviour of a violent kind - then the only reasonable view of his resistance to that force will be that he is acting, not in self-defence, but as an aggressor in pursuit of his original design. A person may not create a continuing situation of emergency and provoke a lawful attack upon himself and yet claim upon reasonable grounds the right to defend himself against that attack." (emphasis added)

With respect, I would have thought that the situation described in Zecevic's case at p.664 was the very situation that existed at the Salisbury interchange when Constable Barr was stabbed. It came ill out of the mouth of the violent appellant, who had just committed a crime with the use of a knife and was still flourishing it, to cry self-defence.

Brennan J. agreed with the majority judgment of Wilson, Dawson and Toohey JJ. except on the question of not confining self-defence to unlawful attacks. His Honour said (p.666):

"Self-defence is not a charter to kill or assault those who are under a duty or who have a right to apply force to the accused. .. A person who is being lawfully arrested is not entitled to defend himself by using force to resist the arrest, even if he be innocent of the offence for which he is being arrested."

And at p.667:

"The lawful application of force, even deadly force, does not confer on the person to whom it is applied any legal authority, justification or excuse to resist it.

It follows that the defence of self-defence is not available when the force against which the accused defends himself is lawfully applied."

(emphasis added in each passage)

At p.667, Brennan J. is not in full agreement with the majority. However, the majority do concede the incongruity of extending self-defence to the arrest of a violent offender. Brennan J. would not extend self-defence to a situation like that at the Salisbury interchange. The majority would, in rare circumstances perhaps, but point out the unreasonableness of the violent offender's claim. In theory, it may be that a stage could have been reached at the Salisbury interchange where the violence of the police indicated that they had lost sight altogether of any intention to apprehend the violent offender. However, what had happened up to the time of the stabbing fell very far short of that. Brennan J's objection to extending the rule to cover defending oneself against lawful force appears on p.669-670:

"The test of belief on reasonable grounds of the necessity to do what is done in self-defence, if it be adopted as an exhaustive test, would extend the defence to cases where the accused is defending himself against lawful force. ...

"However, if the unlawful force test were to be abandoned, I would respectfully agree with what Ormiston J. said in Reg. v. Lawson and Forsythe [1986] V.R. at p.580:

'Whatever test should be substituted, it should certainly not be one which entitled an accused to create a situation of emergency and to provoke an attack upon himself, and yet claim the right to defend himself against that attack by shooting or

killing his assailant. What I have read in the authorities referred to above in no way suggested that the law ever countenanced such a response as amounting to self-defence."

The majority accepted that qualification in the passage on p.664 already cited.

Although the distinction between lawful and unlawful attack no longer applies, the trial judge is still entitled to withdraw self-defence where there are no reasonable grounds for belief in its necessity. The jury's verdict of murder shows that they rejected self-defence beyond reasonable doubt. On the appeal, there was no criticism of the directions on self-defence. I have dealt with self-defence and Zecevic for completeness and also because the "lawfulness" of the attempted apprehension was at the heart of the issue whether the apprehension-murder rule applied at all at the time of the stabbing. I conclude by pointing out that the appellant was more than fairly treated by his Honour's directions and was given an undeserved chance of a verdict of either guilty of manslaughter or of complete acquittal.

8. Manslaughter.

The information charges the appellant with murder. It does not distinguish, nor need it distinguish, between killing with intent to kill, killing with intent to do grievous bodily harm or killing by a serious violent act without intending either the first or the second result. The directions as to the elements of murder of one kind or another are left to the trial judge. The jury was not, in this case, entitled to consider the possibility of a verdict

of manslaughter until they had exhausted all of the possibilities of a verdict of murder, that is, until they had considered and discarded verdicts of murder on each of the three available bases. His Honour correctly left to the jury the possibility of a verdict of manslaughter by an unlawful and dangerous act after the other possible verdicts had been considered and rejected. The jury rejected all possible avenues offered to them of returning a verdict of manslaughter. The accused had a more than fair trial. I can see no merit in any of the grounds of appeal.

I would dismiss the appeal.

Mohr J.

I agree with the decision of White A.C.J.

Judgment Number : S3582.2

PARTIES

R (RESPONDENT)
v
LINDSAY ALLAN FRY (APPELLANT)

TITLE OF COURT : SUPREME COURT OF SOUTH AUSTRALIA
JURISDICTION : COURT OF CRIMINAL APPEAL
CORAM : THE HONOURABLE THE ACTING CHIEF
JUSTICE WHITE
THE HONOURABLE JUSTICE COX
THE HONOURABLE JUSTICE MOHR
ON APPEAL FROM : THE HONOURABLE JUSTICE MULLIGHAN
FILE NO/S : SCCRM-91-697
DELIVERED : ADELAIDE
25-AUG-92
HEARING DATE/S : 15-JUN-92 to 17-JUN-92

JUDGMENT OF THE HONOURABLE JUSTICE COX

REPRESENTATION

APPELLANT LINDSAY ALLAN FRY
Counsel : MR J D LYONS
Solicitors : MATTHEW MITCHELL

RESPONDENT R
Counsel : MS A M VANSTONE
Solicitors : CROWN SOLICITOR

Judgment Category : B

Number of Pages : 2

R v FRY

Court of Criminal Appeal

Cox J.

I would dismiss this appeal. I am in general agreement with the reasons of White A.C.J.. I add a few words about the provocation defence.

One can understand the learned trial Judge, in this complex and difficult case, leaving provocation to the jury, although I agree with White A.C.J. that there was not in fact a case of provocation fit for the jury. I would make one general comment about the subject of provocation in this sort of case. While the Crown relied upon the arrest-murder rule, it also argued that the appellant was guilty of ordinary common law murder, that is, that he stabbed the dead man unlawfully and with the intention either of killing him or of causing him grievous bodily harm. The learned trial Judge left provocation to the jury as a possible defence to both kinds of murder. He discussed the question whether the arrest or attempted arrest of the appellant was lawful, and the evidence upon which the defence relied in its claim that the police used excessive force, but the provocation direction was not qualified in the light of those issues. It seems to me, with respect, that it should have been. I can understand that a provocation defence might be available to a man who is subjected to quite excessive force by a police officer who is arresting him, but it is difficult to see how such a defence could be based upon a lawful arrest in which no more than reasonable force is used or threatened. Take the case of a prisoner who is

being quietly escorted to gaol by a prison officer after sentence. No violence of any kind is being used against him, but he is suddenly so overcome by shame and anger at his detention that he turns on the prison officer and kills him. It seems to me that a provocation defence in those circumstances would have to be rejected by the trial Judge, not merely because it could not pass the ordinary man test, but also because the law on obvious policy grounds could not allow an issue of provocation to be founded on an action - the mere escorting under restraint of a prisoner - that was no more than the victim's lawful obligation towards the prisoner. If that is right the learned Judge, if he left provocation at all, should have differentiated between the two possible factual situations and directed the jury that provocation could not be a defence if (as the Crown maintained) the constables, at the time Barr was stabbed, were engaged, to the knowledge of the appellant, in arresting him and the arrest was lawful and the constables were using no more than reasonable force in making the arrest. It is noteworthy that his Honour did make an appropriate qualification on analogous grounds when he directed the jury of the subject of self-defence. Cf. Zecevic (1987) 162 CLR 645, at 663-4, 666-7.