

McCULLOUGH v. THE QUEEN

1982. Court of Criminal Appeal: Green C.J.,
Neasey and Everett JJ.

March 16-19, April 8, 1982.

Criminal Law — Offences against the person — Homicide — Murder — Defences — Self-defence — Excessive force — Principles to be applied — Criminal Code exhaustive.

Criminal Law — Criminal liability and capacity — Intoxication — Effect per se as negating intent — Criminal Code — Generally — Drunkenness — Criminal Code, s. 17.*

Criminal Law — Criminal liability and capacity — Intoxication — Effect per se as to apprehension and belief — Criminal Code — Generally — Drunkenness — Criminal Code, s. 46(2).

Criminal Law — Appeal and new trial — Miscarriage of justice — Effect of irregularity — Intemperate comments by Crown Prosecutor.

The applicant shot his neighbour and was convicted of murder. At his trial he relied upon the defences of self-defence and intoxication. The Crown Prosecutor told the jury that rather than acting in fear for his life he acted because he had a brutal and murderous disposition.

* *Criminal Code*, s. 17 — (1) The provisions of section 16 shall apply to a person suffering from disease of the mind caused by intoxication.

(2) Evidence of such intoxication as would render the accused incapable of forming the specific intent essential to constitute the offence with which he is charged shall be taken into consideration with the other evidence in order to determine whether or not he had that intent.

(3) Evidence of intoxication not amounting to any such incapacity as aforesaid shall not rebut the presumption that a person intends the natural and probable consequences of his acts.

S. 46 — (1) A person unlawfully assaulted, not having provoked such assault, is justified in repelling force by force if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence.

(2) A person so assaulted as aforesaid is justified in causing death or grievous bodily harm to his assailant if, from the violence with which the assault was originally made, or with which the assailant pursues his purpose, he acts under a reasonable apprehension that his assailant will cause death or grievous bodily harm to him, and if he believes on reasonable grounds that he cannot otherwise preserve himself therefrom.

Held, that—

- (a) the doctrine of excessive self-defence has no application under the *Criminal Code*: *Masneq v. The Queen* [1962] Tas. S.R. 254 is good law and *Viro v. The Queen* (1978) 141 C.L.R. 88 does not affect the interpretation of the *Criminal Code*;
- (b) if the causing of death in self-defence is not justified within the meaning of ss. 46 and 47 then it is culpable homicide and the question of whether it was murder or manslaughter would depend upon the application of ss. 156 and 157;
- (c) on the defence of intoxication *Snow v. The Queen* [1962] Tas. S.R. 271 is to be followed, and cases like *Helmhout v. The Queen* (1979) 1 A.Crim.R. 464 and *Reg. v. Croft* [1981] 1 N.S.W.L.R. 126 have no application to a direction pursuant to the *Criminal Code*, s. 17(3);
- (d) the test of reasonableness under s. 46(2) is a subjective test, in the limited sense that the question to be considered by the jury was whether it was reasonable for the accused in all his then circumstances to hold the relevant apprehension and to have the relevant belief;
- (e) intoxication is a relevant consideration in determining whether or not the apprehension and belief to which s. 46(2) refers was held, but such state of intoxication is not to be taken into account in deciding whether or not the apprehension and belief, if held, were reasonable or held on reasonable grounds; and
- (f) the conviction would be quashed because, while it was the Crown Prosecutor's duty to comment on the accused's state of mind, his expressions were so intemperate that the possibility could not be excluded that in convicting the applicant the jury were activated, partly at least, by indignation, disgust and fear aroused by his intemperate language: *Reg. v. Hay and Lindsay* [1968] Qd. R. 459 and *Reg. v. Roulston* (1976) 2 N.Z.L.R. 644 applied.

APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION.

Frederick John McCullough was on 25th June, 1981, convicted at Burnie Criminal Sittings before Cosgrove J. of murdering Owen Adcock contrary to the *Criminal Code*, s. 158. He appealed against his conviction on the grounds *inter alia*:

"1. The trial judge erred in law in that he failed to direct the jury that if they were satisfied that the appellant acted in self-defence but they took the view that the force he used was excessive, then they should find the appellant not guilty of murder but guilty of manslaughter.

"7. The trial judge erred in law in that he failed to adequately direct the jury on the issue of intoxication.

"8. The trial judge erred in law in that he failed to adequately direct the jury that the test to be applied to the

question of reasonableness of the appellant's belief in self-defence is a subjective test and not an objective test.

"10. The learned trial judge erred in law in that he permitted Counsel for the Crown to:

- (a) comment that the appellant 'for his own petty reasons took another human life like swatting a fly';
- (b) comment that the appellant was a 'cold blooded murderer who is prepared to lie to save himself';
- (c) comment that the appellant had 'as much need to protect himself from Adcock as Peter Sutcliffe had to protect himself from his female victims in England.'

The applicant was convicted of murder as a result of a fatal shooting which occurred in a caravan park at Rosebery on 30th November, 1980. The applicant and the deceased lived in adjoining caravans. The deceased lived with his wife and stepson, and the applicant with his *de facto* wife. The two men were acquainted but not friends. Some weeks before there had been a dispute between them, in which they had come to blows. The applicant claimed to have suffered some minor injuries in that fight. The applicant also claimed in his unsworn statement that he had suffered neck injuries in an accident in New Zealand in 1970, which injuries had been further aggravated in an industrial accident in 1976. There was evidence that the applicant had been drinking heavily during the course of the day and the early evening. During the evening the applicant and his *de facto* wife, Miss King, had a quarrel during which Miss King was screaming, and at one stage was on the ground. The wife of the deceased took Miss King into her caravan, and after a time the applicant put Miss King's possessions outside, some on the ground and some in a car. The deceased placed all of this property in the car and locked it. Later in the evening the applicant decided to remove Miss King's possessions from the locked car so that she could not leave him. In so doing he broke a window of the car. He had left a rifle inside the annexe to his caravan. When the window was broken the deceased came out of his caravan followed by his wife and stepson. Words were exchanged between the applicant and the deceased and the latter advanced towards the applicant. The applicant went to his annexe, procured his rifle, and fired four shots which hit the deceased at a distance of a few feet. The defence at the trial relied primarily on self-defence and the effect of intoxication. In his closing address, which followed that of defence counsel, counsel for the Crown commented very strongly and colourfully upon the circumstances surrounding the shooting of the deceased and the defence of self-defence raised by the applicant.

P. W. Slicer and *G. A. Richardson* for the applicant.

A. N. Hope and *A. G. Melick* for the Crown.

Slicer. The decision in *Viro v. The Queen* (1978) 141 C.L.R. 88 is so fundamental that it should be applied in relation to the *Criminal Code*. *Masnec v. The Queen* [1962] Tas. S.R. 254 contains manifest contradiction of law and the doctrine of excessive self-defence should be applied in relation to the *Criminal Code*. The test of reasonableness under s. 46(2) is purely subjective and the jury should have been directed accordingly and hence they should have been told to consider what would have seemed reasonable to the applicant in all his then relevant circumstances. The criterion of reasonableness is also subjective and hence affected by intoxication and the jury should have been directed accordingly. The judge did not give specific directions in terms of s. 17(2) and (3).

He went on to deal with other grounds of appeal.

Richardson then dealt with further grounds of appeal before dealing with ground 10. Entire address of Crown counsel was improper, prejudicial and inflammatory. *Reg. v. Hay and Lindsay* [1968] Qd. R. 459 and *Reg. v. Roulston* (1976) 2 N.Z.L.R. 644 and the Court could not be satisfied that no miscarriage of justice had occurred.

The Crown was not called upon in relation to grounds 7 and 8.

Hope. The evidence clearly showed that this was an horrific and brutal slaying e.g. the evidence of the applicant flicking the deceased's head with his boot and saying "that's one bastard gone" before firing upon the deceased's wife and stepson. Therefore it was appropriate for the Crown Prosecutor to address the jury in strong terms.

Melick then dealt with other grounds of appeal.

Slicer in reply.

Cur. adv. vult.

APRIL 8.

THE COURT, after referring to the facts, continued: We shall deal with the grounds of appeal as they are set out in the notice of appeal, together with two additional grounds.

[The Court then set out ground 1 and continued:]

In order to succeed on this ground the applicant would have to persuade us that a decision of the Court of Criminal Appeal of this State, *Masnec v. The Queen* [1962] Tas. S.R. 254 was wrong, or for other reasons is no longer good law. The applicant sought to persuade us of this by citing the decision of the High Court of

Australia in *Viro v. The Queen* (1978) 141 C.L.R. 88. Learned counsel for the applicant sought to ground his challenges to *Masnec v. The Queen* in the first place upon a passage in the judgment of the Chief Justice of this Court in *Arnol v. The Queen* 1981 Tas. R. 157, in which his Honour said at p. 164:

"I do not propose attempting to exhaustively state the circumstances under which it might be appropriate for this Court to review its own decisions, but I think that the Court would be justified in doing so when the earlier decision is shown to have been arrived at without regard to an applicable statutory provision or binding authority, when the chain of reasoning employed in the earlier decision contains a manifest — as opposed to a merely arguable — contradiction or flaw which vitiates the conclusion reached, or when in the meantime legislation, case law, or other material circumstances have undergone changes which have had the effect of altering the basis upon which the earlier decision was reached. However, it would be wrong for this Court to review an earlier authority merely because it preferred a different view of the law from that which was taken in the earlier case."

When pressed to state to the Court the threshold propositions upon which he wished to argue that one or more of these considerations applied in the present case, counsel said that there were two. The primary argument was that the decision of the High Court in *Viro v. The Queen* (*supra*) is so fundamental that it should be applied, not only in respect of that part of the common law of crime to which it relates, but also in respect of the interpretation of relevant provisions of the Tasmanian *Criminal Code*. His second submission was that the chain of reasoning in *Masnec v. The Queen* (*supra*) contains a manifest contradiction of law, which he stated in the following terms:

"The court in *Masnec* stopped the application of s. 46 of the Code at the question of culpable homicide, as set out in s. 156 of the Code, and then used a combination of s. 52 and s. 157(1)(c) to exclude the concept of self-defence from the question of intention in relation to the crime of murder."

This Court is of opinion that neither of these broad propositions is seriously arguable, and that accordingly there is no occasion for us to undertake a review of the correctness of the decision in *Masnec v. The Queen* (*supra*).

As to the applicant's primary argument, *Viro v. The Queen* (*supra*), fundamental and of great importance as it is, has no application in respect of the proper interpretation of relevant provisions of the Tasmanian *Criminal Code*, whether expressly or by implication.

The second of the applicant's two propositions as stated above is

quite unarguable, in our opinion. The Court of Criminal Appeal in *Masnec v. The Queen* [1962] Tas. S.R. 254 did not "stop the application of s. 46 at the question of culpable homicide"; nor did it "use a combination of s. 52 and s. 157(1)(c) to exclude the concept of self-defence from the question of intent in relation to the crime of murder". The Court's process of reasoning as to self-defence was quite different from that suggested in this proposition. Its reasoning can be summarised in this way. It said that the *Criminal Code* makes its own detailed provisions as to the occasions when the use of force is legally justified. "Sections 46 and 47 as to the use of force in self-defence are but two of a group of no less than twenty sections covering comprehensively the occasions on which the use of force is legally justified" (*ibid.*, at p. 262). After dealing with the effect of the provisions of s. 46 (the section most relevant to the defence in that case, as in this) the Court, in a fundamental conclusion, said (p. 263) that:

"Any force used which is not justified under either sub-section is by implication unlawful and unjustified even though used in self-defence. It may compendiously be referred to as excessive."

After referring to *R. v. Howe* (1958) 100 C.L.R. 448 and to s. 52 of the *Code*, the Court said that under the *Code*,

"... the 'nature' of homicide proceeding from excessive force is that it is unlawful and therefore culpable. Its 'quality' is determined by the mental element which accompanies it. At best it will be manslaughter, at worst murder (ss. 156 and 157)."

The Court said further, in a fundamental conclusion (p. 265) that in view of the "compelling words of s. 157(1)(c) in particular" no effect could be given to a common law justification or excuse imported by virtue of s. 8 of the *Code* in respect of excessive force used in self-defence where death results. Even so, as the Court made clear, (p. 264), the question whether the applicant was acting under the stress of necessity of self-defence may in appropriate circumstances be relevant along with other questions of fact in the jury's consideration of the question whether the required mental element existed so as to satisfy the conditions of s. 157.

Thus, over-simplified for the present purpose, the first question in respect of self-defence in a case such as *Masnec's* or the present case, is whether the causing of death was justified within the meaning of ss. 46 and 47, or the Crown is unable to prove beyond reasonable doubt that it was not, in either of which cases acquittal results. But if not so justified, or the negative cannot be proved according to the criminal standard of proof, then the causing of death was unlawful and unjustified even though caused in self-defence. Being so, it would be culpable homicide, and the question whether it was murder or manslaughter would depend upon the application of ss. 156 and 157.

We do not express any view as to whether the Court of Criminal Appeal in *Masnec v. The Queen* [1962] Tas. S.R. 254 made an error in its characterisation of s. 52, as the applicant contends. In any event the reference in that case to s. 52 was peripheral only, and if omitted would have made no difference to the reasoning.

[The Court rejected grounds 2 and 7 and continued:]

The learned trial judge gave a direction to the jury specifically related to the question of intoxication in the following terms:

“There is in this case, some evidence that the accused may have been at the relevant time — that is, the time of shooting — affected by liquor. This could conceivably have some bearing on the question of his intent and his intent to kill or cause grievous bodily harm or bodily harm, and/or his knowledge of the likely consequences, that is that what he did would cause bodily harm, or grievous bodily harm or death. Now, the proper approach, I suggest to you is to start, if it seems appropriate to you to do so, with the natural inference — and you would start with that inference if you thought it was a natural inference — that a normal person who fires bullets at another at close range intends to kill or do grievous bodily harm, or at least recognises the likelihood that death or grievous bodily harm will ensue. Then consider all the evidence, including any evidence indicating that because of intoxication the accused was incapable of forming that intention. You see, it is not sufficient to say, well I was a bit drunk and because I was drunk I shot him. I would not have shot him otherwise. But you consider evidence which would render him incapable of forming the intent to kill or to do grievous bodily harm or appreciating the likelihood of such a result. You put that evidence, if you think any exists, of intoxication to that degree along with all the other evidence, then you decide whether it remains safe to draw the inference that a person who fires at another at close range intends to do him grievous bodily harm or at least knows that he is likely to do so, bearing in mind the burden and standard of proof.”

At a later stage in the summing up his Honour said:

“On the question of intoxication, the evidence — you remember Mr. Slicer told you about it and Mr Jacobs told you about it — he certainly had a fair bit to drink that day. He was asked by the police whether he was intoxicated and he said 50/50. When you take into account what he said in the record of interview, that is his statement, and you take into account the consumption of liquor. Other evidence that bears on that question as to whether he was so intoxicated as to be incapable of forming the intent to kill or cause bodily harm. There is his memory of the events; it is a detailed statement in the unsworn statement and although confused in the record of interview, there is a considerable

amount of material there. I accept, by the way, what Mr. Slicer says about the record of interview. It is a matter for you but it seems to me there is some confusion there. You have got Sergeant Howard's evidence, Sergeant Talbot's evidence, and Inspector Russell's evidence. Well, that is the evidence that seems to me to bear on the question. You consider it."

When referring to various parts of the evidence, the trial judge drew attention to evidence of the applicant's drinking, and evidence of actions which may have indicated that he was drunk or partly drunk. In directing the jury on the question of reasonableness in relation to self-defence, his Honour said, *inter alia*,

"Are you satisfied beyond reasonable doubt that the accused, when he shot Adcock, one, two, three or four at the beginning, that he did not then believe on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm? In other words you are asked the question: Did he believe on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm by holding up a rifle with a safety catch on, by barring his approach with a rifle, by retreating into the caravan, by one of these means, taking him as he was there and then, attributing to him the reasonable judgment of a person in his circumstances with his background?"

The main complaint about these directions relative to intoxication is that the judge did not give a proper direction in terms of s. 17 of the *Code*. It appears to us that in fact the trial judge endeavoured in his direction to adhere closely to the interpretation of ss. 17(2) and (3) as stated by the majority judgment of Burbury C.J. and Cox J. in *Snow v. The Queen* [1962] Tas. S.R. 271, which was an authority binding on him and the leading authority on the point. Their Honours there said (p. 282) referring to the speech of Lord Denning in *Attorney-General for Northern Ireland v. Gallagher* [1963] A.C. 349, at p. 380, [1961] 3 W.L.R. 619, at p. 640,

"It will be noted that Lord Denning stresses that the degree of intoxication must be such as to render the accused incapable of forming the specific intention. Those are the words of s. 17(2). Partial intoxication not resulting in incapacity to form a specific intention is not under our section relevant as it is under s. 28 of the Queensland and Western Australian *Codes*. It must under our *Code* be intoxication so gross as to result in incapacity to form the intention. It would, however, be adding an unwarranted and unsafe gloss to the words of our *Code* to use Lord Denning's exposition that 'this degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing'. The words of the section are themselves clear. But we emphasise that the issue is whether intoxication

has reached the stage that it would render the accused incapable of forming the specific intention. There appears to be some illogicality in subs. (3). If upon the evidence the jury finds that degree of incapacity (or are left in reasonable doubt whether the intoxication produced it or not) it is difficult to see why they should then be concerned with the other evidence as the subsection states. If the accused is incapable of forming the intention presumably he cannot in fact have the intention — whatever the other evidence is.”

After further exposition of the meaning of and effect to be given to s. 17(3), their Honours stated this fundamental conclusion (at p. 289):

“Where drunkenness is raised on the evidence in a case where specific intent must be proved the jury might conveniently be told that they should first look at the accused’s act as if it had been done by a sober man, and ask themselves whether they would infer from the circumstances that such a man ought to be taken to have intended the result his action in fact produced; if they think that inference ought to be drawn they should then consider the evidence as to the degree of intoxication of the accused; if they think that the intoxication is of such a degree that the accused would be incapable of forming that intention (or if they are left in reasonable doubt on the question) they would then take that into consideration with the other evidence in order to determine upon the whole of the evidence whether the Crown has proved beyond reasonable doubt the necessary specific intention or whether they are left with a reasonable doubt that the accused in fact had that intention; but if they had no reasonable doubt that the degree of intoxication was *not* sufficient to deprive the accused of the capacity to form the intent then they should leave the evidence of intoxication out of consideration upon the issue of intent and determine it upon the other evidence in the case.”

The learned trial judge, as stated earlier, directed the jury in accordance with those statements in the majority judgment in *Snow v. The Queen* and there was no error in his direction. Cases such as *Helmhout v. The Queen* (1979) 1 A. Crim. R. 464, and *R. v. Croft* [1981] 1 N.S.W.L.R., 126 at 158, cited by counsel for the applicant, have no application to a direction concerning intoxication pursuant to s. 17(3) of our *Code*.

[The Court set out ground 8 and continued:]

As we understood the argument of learned counsel for the applicant, two contentions were advanced in support of this ground. The first was that the test of reasonableness under s. 46(2) of the *Code* is a wholly subjective one; and therefore the jury should have been directed that in considering whether the applicant’s

apprehension (that the deceased would cause death or grievous bodily harm to him) was reasonable, and whether his belief (that he could not other than by causing death or grievous bodily harm to the deceased preserve himself from death or grievous bodily harm) was held on reasonable grounds, respectively, they should consider what would have seemed reasonable to the applicant in all his then relevant circumstances, including his partly drunken condition.

The second submission was that in directing the jury as to the defence of self-defence under s. 46(2), the learned trial judge should have told them that the questions whether the applicant acted under an honest and reasonable but mistaken belief as to the severity of the deceased's attack upon him, and as to the degree of force on his own part necessary to repel it, were relevant to the issue of reasonableness under s. 46(2).

The relevant instructions which his Honour did give to the jury in relation to the question of reasonableness under s. 46(2) were in the following terms:

"A reasonable apprehension . . . means reasonable judgment, such reasonable judgment as you would expect him, as he was then placed, to form. In other words what you would reasonably expect from him at that time and place. And the same thing on reasonable grounds what you would reasonably expect from him at that time and place.

...

Did he believe on reasonable grounds that he could not otherwise preserve himself from death or grievous bodily harm by holding up a rifle with the safety catch on, by barring his approach with a rifle, by retreating into the caravan, by one of these means, taking him as he was there and then, attributing to him the reasonable judgment of a person in his circumstances with his background?"

At a later stage, after being asked by counsel for the applicant to re-affirm that the test of reasonableness is a subjective test, his Honour said this:

"... I told you that when you are considering the question of a reasonable apprehension or a belief on reasonable grounds that he could not otherwise protect himself — you know what I am referring to, of course, do you not? — that you take what is reasonable to him, in those circumstances that he found himself in. You judge him: what could he reasonably believe in those circumstances? Do you understand that? Well, Mr. Jacobs said it is what you believe is reasonable. Well, that is sort of half right. It is not quite right. It is not an objective test of what the whole community thinks is reasonable, it is what you as members of the community think would have been reasonable for him as he stood there then. Do you understand that?"

Again, it is apparent that his Honour based these directions upon part of the judgment in *Masnec v. The Queen* [1962] Tas. S.R. 254, at p. 263, where the Court said:

“Subsection (2) of s. 46 operates by way of justification in cases where death or grievous bodily harm is caused to an assailant whether intentionally or otherwise. Its primary application is however to cases of an intentional killing. It will be justified if—

- (a) from the violence of the assault or with which the assailant pursues his purpose, the person attacked acts under a reasonable apprehension of death or grievous bodily harm, i.e., he must in fact have apprehended the harm predicated and his apprehension should in his then circumstances be regarded by the jury as an exercise of reasonable judgment on his part, and
- (b) he believes on reasonable grounds (to be judged as under the preceding paragraph) that he cannot otherwise preserve himself therefrom.”

In our opinion the learned trial judge in these passages properly directed the jury that the test of reasonableness under s. 46(2) is a subjective test, in the limited sense that the question to be considered by the jury was whether it was reasonable for the applicant in all his then circumstances to hold the relevant apprehension and to have the relevant belief (cf. *Reg. v. Muratovic* [1967] Qd. R. 15, at p. 20). It is true that the learned trial judge did not tell the jury that one such circumstance to be taken into account was the applicant's state of partial intoxication (if they thought he was in that state), but since that was one of his then circumstances the jury would have taken it into account, and it would have been proper to do so, in relation to the issue whether the applicant in fact held the apprehension and the belief to which the subsection refers. But it would have been a wrong direction to tell the jury that they could or should take such state of intoxication into account in deciding whether or not the applicant's apprehension and belief, if he held them, were reasonable or held on reasonable grounds. The criterion of reasonableness is in its nature an objective one, and in our view it would be incongruous and wrong to contemplate the proposition that a person's exercise of judgment might be unreasonable if he was sober, but reasonable because he was drunk. Any more positive or detailed direction than the learned trial judge gave was unnecessary, but if a more specific direction were to be given it should be in the terms that a person's state of intoxication may be taken into account in considering whether or not he held the apprehension and belief to which s. 46(2) refers, but not in respect of whether such apprehension and belief were reasonable or held on reasonable grounds.

The applicant's other contention under ground 8 amounted to an argument that the jury should have been instructed that,

pursuant to s. 14 of the *Code*, if the applicant was subjected to an unlawful and unprovoked assault by the deceased, and if he honestly and reasonably but mistakenly apprehended that the deceased would cause him death or grievous bodily harm, and if he honestly and reasonably but mistakenly believed that he could not preserve himself therefrom other than by causing death or grievous bodily harm to the deceased, such honest and reasonable but mistaken apprehension and/or belief should be taken into account in considering whether the applicant used justified force in self-defence, pursuant to s. 46(2). Such a proposition is clearly without substance, because s. 14 refers to an honest and reasonable but mistaken belief "in the existence of any state of facts the existence of which would excuse such act or omission". An apprehension that a person is about to cause one death or grievous bodily harm is not a belief in a state of facts, nor is a belief that one cannot preserve oneself otherwise than by causing death or grievous bodily harm to the assailant. Both are exercises of judgment or opinion, as the passage above-cited from *Masneec v. The Queen* [1962] Tas. S.R. 254 affirms. The concept of honest and reasonable but mistaken belief in a state of facts can of course have a place in respect of whether there has been a justified use of force in self-defence, pursuant to s. 46. For example, if a person is advancing upon another with apparent aggressive intent, pointing a pistol at him and threatening to shoot, an honest and reasonable but mistaken belief held by the apparent victim that the pistol is loaded might provide, together with the other facts stated, the ground of the reasonable apprehension and the belief on reasonable grounds to which s. 46(2) refers. But in this case there was no suggestion of any possible evidentiary basis for the existence of a mistaken belief in a state of facts.

Accordingly, there is no substance in ground 8.

[The Court then rejected grounds 3 and 4 and the two additional grounds, set out ground 10 and continued:]

Counsel for the applicant, without objection, also relied upon passages in the address by counsel for the Crown other than those specified in this ground. Although we have considered them in relation to the whole address, the passages in Crown counsel's address to the jury to which we have paid particular attention are as follows:

- A. "It's a serious case as you know. I make no apologies for the fact I don't intend to mince my words because I suggest we've got before us, a man who's done an awful thing — one, I suggest, of the worst murders that one can imagine, because that whilst it may not have some surrounding circumstances that some have of killing of young children or mutilation of bodies, this man stands before us, I suggest, as a man who has, for his own petty reasons, with nothing

approaching justification, just taken another human life the way that somebody else might swat a fly. A man, who from what he did and what he said to the Police, so clearly regards another human life, like the swatting of a fly, the snuffing out of a match. So I don't intend to mince my words about what I suggest is a despicable man before the Court this week."

- B. "I want to read to you briefly a comment that a member of the American Civil Liberties Union said to the American Senate this month. That was — 'The intentional killing of human beings is an act so awesome, so destructive, so irremediable that no killer should be looked upon with anything but horror' and I suggest that is a reasonable outline of the sort of case we've got before us. A circumstance of horror, there's been no suggestion by the defence I put to you that Mr. Adcock was anything else but a decent, hardworking and loved man. A man who — you know from the circumstances of this night, joined in assisting a young lady when she was in physical and emotional difficulties."
- C. "All we have got to back that up is the word of a man who I suggest lies elsewhere in this document, who I suggest is a cold-blooded murderer who is prepared to lie to save himself."
- D. "He doesn't deny or mention the significant evidence I suggest of Mrs. Adcock, the disgusting evidence of McCullough going and flicking the head of Mr. Adcock with his boot and saying 'That's one bastard gone'. Doesn't mention that and Michael Simpson of course confirms that the words were used, words to the effect of 'That's one bastard gone'. He doesn't mention that. Doesn't that evidence, that movement of the head show something very disgusting about this man?"
- E. "Is that self-defence or is that just another example of the way McCullough carried on that night and had carried on on other occasions? 'You annoy me, you make me angry, I'll do whatever I like. I'll exhaust your life the way somebody else might snuff out a match. You make me angry, I'll do that'."
- F. "But it's not unreasonable, it's desirable I suggest that the law does what it does do, but before you can go round killing people, you've got to be satisfied that his — on some reasonable test, that he is really going to cause you death or grievous bodily harm if you don't, otherwise some people could wipe out half the countryside and say, 'well look I really thought that they were going to do something to me because I was injured in a car accident or because I've got

some defect in my skull' or any other one of many things, that have perhaps half the community wiped out if there's many more people like McCullough in it, . . ."

- G. "Ladies and Gentlemen, the Crown has been suggesting to you, does suggest to you, that this is the act of a pathological cold-blooded killer. A person who has got no remorse for what he's done, who gets angry and acts in such a completely unacceptable way. A man who shot Adcock, Mr. Adcock who had no chance to speak, to know what was going to happen to him — to plead for his life, who finishes his life with words like 'Oh my God', without even his wife, who is so close, being sure of the exact words he says as he's dying. In this community I suggest that life is the most important thing we have. I suggest that probably more is spent on preserving, on extending human life and curing people than anything else. The amount spent on medicine, medical research, hospitals and so forth, in every country of the world. You know that [when] somebody is missing, lost at sea or in the countryside, the community will quite reasonably I suggest spend enormous sums of money to try and recover that person to save their life. We have a man in this Court who acts like — as I said before, like somebody who would swat a fly or flick out a match, that's how he regarded the life of another man. I suggest that it's not unreasonable to claim that he had about as much need to protect himself from Owen Adcock, from death or grievous bodily harm at the hands of Owen Adcock, that Peter Sutcliffe had in England to protect himself from his 20 female victims, because we have, quite clearly a man who I said had no chance to know what was happening to him, armed with his dressing gown, bare feet. We've got a family that's lost a brother and son, a wife that's lost her husband, a man who it's never been suggested by the defence was anything but a decent hardworking man whose life is just taken like that, at the whim of this man who says 'He made me angry so I shot him'."

These excerpts are reproduced here in the same order as they were delivered. The statement marked "A" was made almost at the beginning of counsel's address and that marked "G" almost at the end. The transcript may be corrupt in minor respects, but we are satisfied that in substance it reproduces faithfully what was said.

The address of counsel for the Crown followed that of counsel for the accused. The learned trial judge summed up immediately after counsel's address and the jury returned their verdict on the same afternoon as counsel for the Crown had concluded his address. Apart from emphasising that the jury were the sole judges of the

facts and that the comments of counsel were not evidence, the learned trial judge did not instruct them to disregard the comments made by counsel for the Crown, or say anything which might have mitigated their effect.

The proper role of prosecuting counsel was described by the editor of *Kenny's Outlines of Criminal Law*, 19th edn., pp. 611, 612:

"A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. For this latter advocate has a private duty — that of doing everything that he honourably can to protect the interests of his client. He is entitled to 'fight for a verdict'. But the Crown counsel is a representative of the State, 'a minister of justice', his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused. 'It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts.' 'It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done'."

That passage was cited with approval by W. B. Campbell J. sitting as a member of the Court of Criminal Appeal in *Reg. v. Hay and Lindsay* [1968] Qd. R. 459. However, it should also be said that the observance of those canons of conduct is not incompatible with the adoption of an advocate's role. Counsel for the Crown is obliged to put the Crown case to the jury and, when appropriate, he is entitled to firmly and vigorously urge the Crown view about a particular issue and to test and, if necessary, to attack that advanced on behalf of the accused. But he must always do so temperately and with restraint, bearing constantly in mind that his primary function is to aid in the attainment of justice, not the securing of convictions. As the New Zealand Court of Appeal said in *Reg. v. Roulston* [1976] 2 N.Z.L.R. 644, at p. 654:

"... it has always been recognised that prosecuting counsel must never strain for a conviction, still less adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack upon the accused. Such conduct is entirely inappropriate and a basic misconception of the function of any barrister who assumes the responsibility of speaking for the community at the trial of an accused person. Naturally enough

a proper balance needs to be maintained. The view expressed in *10 Halsbury's Laws of England* (3rd ed) para 791 that prosecuting counsel 'should regard themselves as ministers of justice assisting in its administration' ought not to lead to the assumption of a role so emasculated as to merit Lord Devlin's remarks in *Trial by Jury* (1966 ed) 122-123:

'... in some places the pendulum has swung so far, and the ministry has moved so close to the opposition, that the prosecution's case is not adequately presented, and counsel, frightened of being accused of an excess of fervour, tend to do little except talk of reasonable doubt and leave the final speech on the facts to the judge'.

The feel and atmosphere of one trial may make it reasonable and even necessary for tactics to be employed that would seem out of place and disproportionate to the circumstances of another. Nevertheless, it is wrong for Crown counsel to become so much the advocate that he is fighting for a conviction and quite impermissible to embark upon a course of conduct calculated to persuade a jury to a point of view by the introduction of factors of prejudice or emotion. If such a situation should develop and there is a real risk that the conduct complained of may have tipped the balance against the accused then an appellate court will not hesitate to follow the safe course and order a new trial."

In our view, in making the comments which we have set out above, counsel for the Crown stepped well beyond the bounds of what was reasonably necessary for the proper conduct of the case for the Crown. We accept that as the issue of self-defence was before the jury it was appropriate for counsel for the Crown to comment upon the applicant's state of mind and the circumstances surrounding the shooting to a greater extent than would otherwise have been the case. However, the comments made by counsel which we have set out above went a good deal further than was necessary for that purpose. His emphasis upon the sanctity of life and the horrible nature of the crime of murder, together with his characterisation of the applicant as a "despicable" and "disgusting" man who felt no remorse and who was prepared to kill someone as another person might "swat a fly" or "flick out a match" were calculated to prejudice the jury against the accused by arousing feelings of disgust and revulsion towards him. Those feelings were likely to have been reinforced by the feelings of sympathy towards the deceased and his widow which counsel sought to evoke. Further, in the passage marked "G" the reference to Peter Sutcliffe (whom we were told, without objection, and we judicially notice, was a person known as "the Yorkshire ripper" whose arrest, trial and conviction for murder had received a good deal of publicity during the months immediately

preceding the applicant's trial) together with the implied suggestion that the applicant was the sort of person who if he were not restrained by the law, might be responsible for having "half the community wiped out", were likely to engender feelings of fear and apprehension in the jury.

The conclusion that in making the remarks which he did counsel exceeded the bounds of propriety, would not in itself be sufficient to justify our allowing this appeal: the crucial conclusion which we have reached is that there was a real risk that the jury were improperly influenced by those remarks. We consider that the trial process was compromised in that the possibility cannot be excluded that in convicting the applicant the jury were actuated, partly at least, by indignation, disgust and fear aroused by the intemperate language employed by counsel for the Crown. That is enough to demonstrate that a miscarriage of justice within the meaning of the *Criminal Code*, s. 402, occurred and that the verdict cannot be allowed to stand.

*Leave to appeal. Appeal allowed.
Conviction quashed. New trial ordered.*

Attorney for the applicant: *G. A. Richardson.*

A.G.M.