CRIMINAL LAW REFORM COMMITTEE

REPORT ON

SELF DEFENCE

NOVEMBER 1979

WELLINGTON
NEW ZEALAND

CRIMINAL LAW REFORM COMMITTEE

REPORT ON SELF DEFENCE

TO : The Minister of Justice

I. INTRODUCTION AND SUMMARY

1. We have been asked to consider the law relating to self-defence with a view to rationalising and, if possible, simplifying the present law.

2. This review and our recommendations have to a large extent been stimulated by comments by the Judges over the years that considerable difficulty is being experienced in the interpretation of sections 48 and 49 of the Crimes Act 1961 and in directing juries on the law as stated in these sections.

3. We propose legislative amendment by the repeal of sections 48, 49, 50 and 51 of the Crimes Act 1961 and their replacement by a simple comprehensive provision.

4. Because of the immediate and practical importance of resolving the difficulties that exist with the law relating to the use of force in the protection of the person, we have not extended our investigations into the possible reform of the law relating to the use of force to protect property or the public peace or to prevent other offences.

II. LEGISLATIVE HISTORY

5. The Report of the Royal Commissioners in 1879 stated:[1]

> "We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent."

6. The sections drafted by the Royal Commissioners were then enacted in New Zealand as part of the Criminal Code Act 1893 and were re-enacted in the Crimes Act 1908 as ss.73-76.

1. *Page 11 of the Report; see also p.10 and notes A and B to those pages, and draft sections 55 and 56.*

7. The Crimes Act was reviewed in 1956 and a bill was prepared in 1957 for introduction to Parliament. There was no specific mention in the explanatory note to the bill of the clauses relating to self-defence proper, which in this respect restated ss.73-75 of the 1908 Act.

In 1959 a further bill was prepared and introduced into Parliament. In this the provisions in the 1908 Act relating to self-defence were slightly modified, and in this form were duly enacted as ss.48-50 of the Crimes Act 1961.

8. However s.51 of the Crimes Act 1961, relating to defence of a person under protection, differs significantly from its predecessor.

Section 76 of the Crimes Act 1908 provided that everyone was justified in using force in defence of his own person, or of the person of anyone under his protection, against an assault accompanied with insult. In s.51 of the 1961 Act - as in the 1957 and 1959 bills - reference to defence of one's own person and the requirement that the assault should be "accompanied with insult" have been omitted.

9. The present provisions are ss.48 to 51 of the Crimes Act 1961:

"48. Self-defence against unprovoked assault - (1) Every one unlawfully assaulted, not having provoked the assault, is justified in repelling force by force, if the force he uses -

(a) Is not meant to cause death or grievous bodily harm;
and
(b) Is no more than is necessary for the purpose of self-defence.

(2) Every one unlawfully assaulted, not having provoked the assault, is justified in repelling force by force although in so doing he causes death or grievous bodily harm, if -

(a) He causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose; and
(b) He believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Cf. 1908, No. 32, s.73

"49. Self-defence against provoked assault - Every one who has assaulted another without justification, or has provoked an assault from that other, may nevertheless justify force used after the assault if -

(a) He used the force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked and in the belief, on reasonable grounds, that it was necessary for his own preservation from death or grievous bodily harm; and

(b) He did not begin the assault with intent to kill or do grievous bodily harm and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm; and

(c) Before the force was used, he declined further conflict and quitted or retreated from it as far as was practicable.

Cf. 1908, No. 32 s.74

"50. Provocation defined - Provocation within the meaning of sections 48 and 49 of this Act may be by blows, words, or gestures.

Cf. 1908, No. 32, s.75

"51. Defence of person under protection - Every one is justified in using force, in defence of the person of any one under his protection, against an assault, if he uses no more force than is necessary to prevent the assault or the repetition of it:
Provided that this section shall not justify the wilful infliction of any hurt or mischief disproportionate to the assault that it was intended to prevent.

Cf. 1908, No. 32, s.76; Criminal Code (1954), s.37 (Canada)."

III. PROBLEMS IN THE PRESENT LAW

10. A formal gloss and commentary on these sections appears in Adams's Criminal Law and Practice in New Zealand (2nd edition) at paras 534-56. For example the text indicates these areas of concern:

(a) Where a person has provoked an assault, even though the provocation may have been no more than might have been expected to lead only to a slight degree of violence, if any, he has no defence under s.48 and can justify nothing under s.49 unless and until he is under apprehension of death or grievous bodily harm. For instance, if A uses provocative words to B, to

which B unlawfully reacts by slapping A's face, or striking him with a cane, is A bound to submit without resistance to a continuance of the slapping or caning? This differs from the position at common law.[2]

(b) Ss. 48 and 49 do not make it entirely clear by what standard the various "intentions" and "beliefs" on the part of the accused are to be judged, should he raise a defence based on either section. In short, the question is whether the accused is to be judged on an objective or subjective test.

11. In our opinion, a critical defect in the present law arises from the inherent difficulty in any set of facts in deciding who started the particular incident. It is therefore often very difficult for a Judge to decide whether to direct a jury to proceed under s.48 or s.49. In Kerr[3] Richmond J in delivering the judgment of the Court of Appeal, reviewed the position in England and said:

> "Their Lordships were able to say, in relation to self-defence, that no set words or formula need be employed in reference to it and that only commonsense is needed for its understanding. Regrettably the same thing cannot be said of ss.48 and 49 of the Crimes Act. We feel sure that many juries must find the varying tests and distinctions laid down by s.48(1), s.48(2) and s.49 quite incomprehensible: and, further, that they would in that situation tend to deal with the case in the commonsense way described by Lord Morris. We would strongly urge that ss.48 and 49 be replaced by some simpler form of legislation. This question is currently in the hands of the Criminal Law Reform Committee. It has been a source of concern to the Judges for a considerable number of years."

12. In 1971, at the request of the then Chief Justice, Sir Richard Wild, Mr Justice Richmond and Mr Justice Speight had prepared a Memorandum for this Committee. Mr Justice Richmond said:

> "The Judges have found it a difficult task to explain to juries the effects of ss.48 - 51 of the Crimes Act .... The Judges for this reason would welcome any simplification of the law which the Committee, and ultimately the Government, consider can properly be made. It is appreciated that several questions of policy are involved which are to a large degree outside the province of the Judges. For example, the present sections of the Act have obviously been drafted in a way which is designed to prevent juries having too much latitude, particularly in the case of death or grievous bodily harm ensuing. Again, they

2. *Refer 11 Halsbury's Laws of England (4th edition) paras 1180 and 1217; Archbold, Criminal Pleading, Evidence and Practice (39th edition) para 2648.*
3. *[1976] 1 NZLR 335, 344.*

> make a clear distinction between the position of a person who has provoked an assault and one who has not. A policy decision would need to be taken as to how far it is desirable to get rid of these distinctions in the interests of greater simplicity."

Mr Justice Speight agreed.

The position in England

13. The position in England was described by Lord Morris in Palmer.[4] This was an appeal to the Privy Council from the Court of Appeal of Jamaica. This extract from the speech of Lord Morris is worth quoting:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and

4. *[1971] AC 814, 831; [1971] 1 All ER 1077, 1088.*

> instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence. But their Lordships consider in agreement with the approach in De Freitas v. R.[5] that if the prosecution have shown that what was done was not done in self-defence then that issue is eliminated from the case. If the jury consider that an accused acted in self-defence or if the jury are in doubt as to this then they will acquit. The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected."

14. We considered s.3 of the Criminal Law Act 1967 (U.K.), which provides -

> "(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.
>
> (2) Subsection (1) above shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose."

The section is expressed to be limited to preventing crime or effecting or assisting in lawful arrest. Some doubt has been expressed as to the extent of this limitation.[6] It has been suggested that its wording could also refer to self-defence against an unprovoked assault. It is not necessary for us to resolve this doubt. However, the provisions of s.3, because of their simplicity, are a useful model in the context of our present enquiry.

15. Halsbury's Laws of England[7] states that the law in England relating to "Self-defence and defence of others", as at 31 January 1976, is as follows:

> "If the act alleged to be an assault is done in self-defence it is justified and no unlawful act is committed provided that no more force is used than is necessary for mere defence; and self-defence is a defence even to a charge of aggravated assault involving wounding or grievous bodily harm. If an assault is threatened, a person may use such force as is reasonable in the circumstances to repel it.

5. *(1960) 2 WLR 523.*
6. *The question is fully discussed by Carol Harlow in the article Self-Defence : A Public Right or Private Privilege? [1974] Crim. LR 528. Refer also to Julien [1969] 2 All ER 856; Professor Griew Offences Against the Person [1977] Crim. LR 91.*
7. *11 Halsbury's Laws of England (4th edition) para 1217.*

> In deciding whether the force used was reasonable, all the circumstances may be considered; the defendant's opportunity to retreat with safety and his readiness to disengage are factors to be taken into account in deciding on the justification for the use of force and whether the force used was reasonable."

16. The United Kingdom Criminal Law Revision Committee's Working Paper on Offences Against the Person (1976) refers to the desirability of a restatement of the law relating to self-defence. Paragraph 166 of the paper suggests two alternative types of provision:

> "Either a general provision that a person may use such force as is reasonable in the circumstances in self-defence or the defence of others or, alternatively, a provision to the effect that it is a defence to a charge of an offence against the person that the accused used only such force as, in the circumstances as he believed them to be, it was reasonable to use in defence of himself or his property, in defence of another or another's property, in the prevention of crime, or in effecting an arrest."

17. These alternatives are discussed by Professor E. J. Griew[8] who makes particular reference to the desirability or otherwise of a detailed provision designed to assist the Court in determining whether the use of force is justified in a particular case.

The matter was also discussed in an article by Colin Greenwood entitled The Evil Choice.[9]

IV. APPROACHES TO REFORM

18. The possible approaches to reforming the law are:

(i) The repeal of ss.48-51 and the revival of the common law principles (stated in paragraph 15):

(ii) The replacement of ss.48-51 by a provision along the lines of s.3 of the Criminal Law Act 1967 (U.K.):[10]

(iii) The simplification of ss.48-51 by amending the wording of those sections:

(iv) A simple comprehensive provision to the effect that the use of force is justified in self-defence or in the defence of another:

(v) A comprehensive provision, as in (iv) above, followed by a list of evidentiary guidelines for the Court.

8. Supra, note 6.
9. [1975] Crim. LR 4.
10. Refer paragraph 14.

19. We have come to the view that of all these approaches the fourth is the best. The first is undesirable because the Crimes Act is a code and should continue to be one. The second would not relate satisfactorily to the subject matter of ss.48-51. The third is unsatisfactory because, to achieve the result we think is needed, the sections would have to be completely rewritten. We comment on the fifth in paragraph 21 below.

20. Our reasons for favouring a simple comprehensive provision are those expressed by Lord Morris (in stating what we believe to be the present common law principles) in Palmer and referred to by Richmond J in Kerr.[11] Briefly, such a provision will require no abstruse legal thought and no set words or formula to explain it; and only commonsense is needed for its understanding. The jury will decide the question of reasonableness in the light of the Judge's summing up of the evidence. In summing up, the Judge will no longer be faced with varying statutory tests and distinctions that are extremely difficult, if not impossible, to explain simply to a jury.

21. We do not favour the addition to our proposed provision of a list of evidentiary guidelines for the Court. The Judge will in any case sum up to the jury on the evidence relating to such matters as the degree and mode of force used or threatened by the original aggressor or used in his own defence by the accused, the danger apprehended by the accused, and his opportunity (if any) to avoid the original assault or prevent it by other means. But to list such things in the legislation as matters to which the Court must have regard is in our view unwise and unhelpful in relation to self-defence, where the question is one of fact to be decided in the light of an infinite variety of circumstances in different cases. It might well introduce into the law complexities of interpretation, resulting in a further body of case law and the risk of elevating evidentiary principles into rules of law.

Onus of proof

22. For the purposes of our discussions we have accepted that the burden of proof was correctly stated in the first edition of Adams:[12]

> "Where the defence of self-defence is relied upon, the onus is on the accused to provide evidence on which a finding of self-defence could be based (if such has not appeared from the prosecution evidence); but this does not affect the overall onus which remains upon the prosecution throughout the trial to prove the accused's guilt."

11. *Refer paragraphs 11 and 13.*
12. *Adams, Criminal Law and Practice in New Zealand (1st edition) page 118.*

State of mind of the accused

23. The accused's state of mind at the time of the alleged offence is a question of fact, and so in a jury trial is for the jury to determine. When a defence of self-defence is pleaded the basic question the jury must ask itself is: did the accused intend only to defend himself, or did he use the occasion for the purpose of inflicting harm on someone else? The answer to the question will depend upon two issues. First, were the circumstances such that the accused was justified in using force at all? Second, if the circumstances did justify the use of force, was the force used no more than was necessary for the purpose of self-defence?

In our view a jury should determine these two issues on the basis of the accused's own belief as to the danger he faced, and weigh his response according to that belief. The provision we recommend to replace ss.48-51 therefore requires the jury, in deciding whether or not the accused was acting in self-defence, to have regard to the relevant circumstances as the accused believed them to be, rather than as they actually were.

For example, if the jury determines that the accused believed he was being attacked - when in fact he was not - the jury should nonetheless find that the use of force in repelling the attack was justified unless it is satisfied that the force used was more than was necessary for overcoming the danger the accused thought he faced.

On the other hand the jury, having determined what the accused believed the circumstances to be, must decide whether the force used was no more than was necessary having regard to those circumstances. That is a matter for the jury to decide and does not depend upon what the accused thought was necessary. It is an independent assessment to be made by the jury.

To restate our proposal in legal terms, we think that a subjective rather than an objective test should be applied in determining the accused's belief as to the facts, but that an objective test should be used in assessing the accused's response to the facts as he believed them to be.[13]

Excessive force

24. When a jury is satisfied that the force used by the accused was excessive, then his plea of self-defence fails. The degree of excess will no doubt be considered on the question of penalty.

13. These matters have been considered recently by the High Court of Australia in Viro (1977) 18 ALR 259.

However, in a case of murder, there is no flexibility in the statutory penalty. In New Zealand and England, where an accused raises self-defence, but the jury considers that excessive force was used, the defence fails completely. In Australia, however, where a jury considers the force used to be excessive the verdict may reduce the offence to manslaughter. There is some similarity to be seen in the provisions of s.169 of the Crimes Act 1961 which deals with provocation in a murder case. We have dealt fully with this question in our 1976 report on Culpable Homicide, and consider that it is not appropriate to pursue the arguments further in this report.

Defence of someone other than the accused

25. Section 51 of the Crimes Act 1961 provides that everyone is justified in using force, in defence of "any one under his protection." Section 41 also justifies the use of reasonable force to prevent the commission of an offence which would be likely to cause immediate and serious injury to "any person". The class of person envisaged by s.51 is plainly limited. The position at common law is not clear, but there is a tendency to expand the law to cover all situations where the strong can assist or protect the weak. For example, in Duffy[14] the appellant intervened when a man molested her sister. The appellant hit the man over the head with a bottle. Edmund Davies LJ said:

> "It should have been left to them (the jury) to say whether in view of the appellant's proved conduct, such a defence could possibly be true, they being directed that the intervener is permitted to do only what is necessary and reasonable in all the circumstances for the purposes of rescue."

We consider that the defence of using force reasonably necessary in the circumstances should not be limited as it is at present to the assistance of those within the accused's protection (s.51), or the prevention of an offence likely to cause immediate and serious injury (s.41). We consider that force should be limited only in that it must be reasonably necessary.

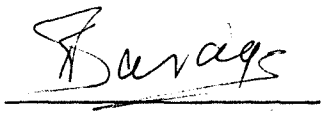
V. RECOMMENDATIONS

26. We propose that ss.48-51 be repealed and replace by the following provision:

> "Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use."

14. [1967] 1 QB 63.

27. If our recommendation is adopted, consideration should be given to the question whether the references to "provocation" in ss.52 to 54 and s.56 (which deal with the defence of property) and ss.57 and 58 (which deal with peaceable entry) should be retained.



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