A

R v NGUYEN

Court of Criminal Appeal: Priestley JA, Smart J and Ireland J

14 December 1994; 20 April 1995

Criminal Law — Defence matters — Self-defence — Willing fight — Manslaughter — Whether defence available.

B

Held: (1) Self-defence which makes a killing lawful has as its starting point a person who, not wanting to fight, is attacked or threatened with attack in a way leading the person to believe self-defence is necessary for the person's own protection from harm. Such situations do not include those where what is going on is a fight which the fighters have willingly joined in, whether to carry on or settle a quarrel, for some other reason. (407D)

(2) If a person enters into a fight for reasons other than self-defence, and that person is suddenly faced with injury or death because of the nature of the fighting, and because of that threat the opponent is injured or killed in what is in one sense self-defence, that is not the sort of self-defence the Crown must negative in showing (where the issue arises) that the injury or killing is unlawful. (407D-412B)

C

Zecevic v Director of Public Prosecutions (Victoria) (1987) 162 CLR 645, followed.

R v Sharp [1957] 1 QB 552, considered.

R v Honeysett (1987) 10 NSWLR 638, distinguished.

Obiter: where a fight is going on according to broadly understood conventions intended to prevent serious harm and one fighter suddenly breaks the conventions by producing a lethal weapon, then the usual issues of self defence would apply. (407F)

D

Note:

A Digest — CRIMINAL LAW (3rd ed) [56-57]; (2nd ed) [77]

CASES CITED

E

The following cases are cited in the judgments:

Browne v Dunn (1893) 6 R 67.
M v The Queen (1994) 69 ALJR 83; 126 ALR 325.
R v Bird [1985] 1 WLR 816; [1905] 2 All ER 513.
R v Honeysett (1987) 10 NSWLR 638.
R v Howe (1958) 100 CLR 448.
R v Lawson and Forsythe [1986] VR 515.

F

R v Sharp [1957] 1 QB 552.
Taylor v Director of Public Prosecutions [1973] AC 964.
Zecevic v Director of Public Prosecutions (Victoria) (1987) 162 CLR 645.

APPEAL

This was an appeal against conviction on the basis that the trial judge was in error in directing the jury in relation to the issue of self defence.

G

S R Norrish QC, for the appellant.

P G Berman, for the respondent.

Cur adv vult

20 April 1995

A

PRIESTLEY JA. On 15 December 1990, Mr Minh Duc Le and Mr Quynh Huu Nguyen were fighting in the backyard of a house at 112 Sydenham Road, Marrickville. Mr Nguyen stabbed Mr Le in the abdomen with a knife. Mr Nguyen's wife and sister, on one version of events, also struck Mr Le with metal implements. Some hours later Mr Le died.

By March 1993, the Crown had reached the point of preparing a draft indictment charging Mr Nguyen, his wife and his sister with murder. A trial B date was set. Before the trial began the Crown agreed to accept a plea of guilty from the sister on the lesser charge of malicious wounding. Accordingly, on 31 March 1990, Mr Nguyen's sister pleaded guilty to an indictment charging her with maliciously wounding Mr Le on 15 December 1990.

The trial of Mr Nguyen and his wife for murder then began.

On 9 June 1993, the jury found Mr Nguyen guilty of manslaughter. His wife was acquitted.

C

The trial judge, Allen J, sentenced Mr Nguyen to a minimum term of two years and three months imprisonment from 9 June 1993 and an additional term of nine months to commence on 9 September 1995 and expire on 8 June 1996.

Mr Nguyen appealed against his conviction. He did not seek leave to appeal against sentence.

There were three grounds of appeal: (1) error in the trial judge's directions to the jury on self-defence; (2) error by the trial judge in his directions relating self-defence to the evidence; and, (3) that the verdict was unsafe and D unsatisfactory and was a miscarriage of justice.

The transcript of the trial proceedings exceeds 1,500 pages. Evidence was given by a number of people who lived in the house at 112 Sydenham Road, by people who lived in the neighbourhood, by police officers, medical practitioners, ambulance officers, by the appellant, and others.

In the circumstances of the present case, the requirements of the "unsafe and unsatisfactory" ground of appeal as most recently stated in *M v The Queen* (1994) 69 ALJR 83; 126 ALR 325 have meant that I have had to review the E transcript. However, as the three grounds of appeal, including the "unsafe and unsatisfactory" ground, all relate to the issue of self-defence which arose at the trial, I will seek, in dealing with the facts, to summarise only those necessary for an understanding of the arguments put on behalf of the appellant in support of the grounds of appeal.

The house at 112 Sydenham Road was on a corner of Sydenham Road and Frampton Avenue. The front entrance faced Sydenham Road. The house had a F front verandah with what was described as a fly screen door or a security door, and then from the verandah a wooden front door. From the front door a hallway led through the house with two bedrooms on either side, then behind them other rooms including a kitchen and a room mainly used for eating. The hallway ended with a door which led into the back yard. Behind the house on one side of the back door was a carport and on the other side a room described as a storeroom; also there was a garage on that side. There was some open space between the carport and the back fence. Wide double gates in the back fence G gave access to a lane behind.

Mr Minh Duc Le and his wife Lap Tran occupied one of the bedrooms in the house, with their children. The house was owned by Mr Vinh Duc Le and his

wife. This couple occupied another of the bedrooms in the house, with their children. Mr Vinh Duc Le and Mr Minh Duc Le were brothers. Mr Vinh Duc Le's wife, at the trial referred to as Hai Nguyen, was the sister of the appellant. The appellant's wife was Mrs Nga Thai Nguyen.

(From here on, to avoid confusion, I will call these persons by their first names, that is, the appellant, Quynh; his wife, Nga; the owner of the house, Vinh; his wife — the appellant Quynh's sister — Hai; the brother who died after the fight, Minh; and his wife, Lap.)

The night before the fight, Friday 14, December 1990, there was an argument between Hai and Lap. There was conflicting evidence about this at the trial, but it seems certain that one way or another it was reported to Quynh. His evidence was that he was told Minh had threatened Hai in the course of this argument. His evidence also was that he had direct and indirect reason to believe that Minh was a violent man.

The conflicts in the evidence as to how Quynh came to hear of the Friday night argument and what he was told about it were material to the jury's consideration of the credibility of some of the witnesses. However, I need not say much about them, because whatever the detail may have been, there seems no doubt the events of Friday night caused Quynh to decide to go to the house at 112 Sydenham Street next morning.

This he did in company with his wife Nga. Quynh took with him a small garden hoe. They were let into the house. Inside, Quynh spoke to Vinh, saying he wanted Vinh to agree to Quynh's taking Hai and her children away from the house to live elsewhere where they could be properly looked after away from problems caused by Minh and his wife. Vinh agreed to this. There was no real issue about this at the trial.

It is about what happened after that point that accounts vary widely. Broadly speaking, Vinh and Lap gave versions of events pointing directly towards an intention on Quynh's part to kill Minh. All relevant witnesses said that at a stage after Quynh and Vinh had agreed on what was to happen to Hai and the children, Minh came into the hallway towards the end away from the street and aggressive words were exchanged between him and Quynh, standing in the hallway closer to the front door. Vinh's account of events from then is that Quynh showed his hoe; Minh made off out of the house towards the back gates which he was trying to unlock in order to go through them and escape from Quynh; on seeing this happening Quynh ran out the front door around the corner into Frampton Avenue, down Frampton Avenue to the lane; he then came upon Minh from outside the back gates, attacking him before he could get away; he hit Minh with the hoe; the handle of the hoe broke; Quynh then drew a knife and stabbed Minh.

No other witness supported Vinh's account of Quynh running outside and around the house, although Lap's account of events equally pictured Quynh as the aggressor.

There were some difficulties in the versions of Vinh and Lap. Further, on a collateral issue it appeared quite clearly that Vinh was a determined liar. Allen J made it plain to the jury in his summing-up that the jury might find it very difficult to accept anything that Vinh or Lap had to say about the details of the fight. He also pointed out however that even if the jury disbelieved their evidence, there was a serious case for them to consider based upon other

aspects of the evidence which it was open for them to accept, taken together with Quynh's own account.

In summary, Quynh's final version was that he had taken with him the small hoe but no knife; when Minh appeared in the hallway Minh had a knife; when Minh went to the back gate he was trying to fasten it shut; Minh was not trying to get away from Quynh, he was trying to ensure that Quynh could not get away from him; Minh was threatening to kill Quynh, and was gathering metal gardening implements to use as weapons; Quynh then rushed at him from inside the house while Minh's back was turned; Quynh's intention was to put Minh out of action long enough for Quynh to get away; Quynh hit Minh with the small hoe high on his back; the handle of the small hoe broke; Minh then attacked Quynh with a large hoe; in trying to defend himself against this Quynh, using a knife which someone put in his hand, deliberately stabbed Minh in the abdomen with it, not intending to kill or badly hurt him.

As well as the evidence he gave to this effect at the trial, there were before the jury two earlier accounts of the relevant events given by Quynh. The first was a quite informal one given while he was receiving hospital attention, within hours of the fight, for injuries he suffered in it. The second was given thirteen or fourteen hours after the fight, in an interview recorded by the police.

The first account appears from evidence given by Constable Deans in answer to the Crown Prosecutor:

> "Q. Did you and the accused wait in a cubicle in the casualty section of the Royal Prince Alfred Hospital? A. Yes, we did.
>
> Q. Are you able lo tell us how long in total you spent with the accused Quynh that afternoon? A. Approximately two hours.
>
> Q. Can you give us just a rough estimate of the time it was when you first saw him and the time it was you last saw him? A. The first time I believe I saw him was just after midday at the Marrickville Police Station until just after 2 pm.…
>
> Q. Did you see any signs of distress during the time you were with him? A. Not distress, no. He was very talkative.
>
> Q. Whilst you were with him in the cubicle of the casualty section of the Royal Prince Alfred Hospital did the accused Quynh say some things to you? A. Yes, he did.
>
> Q. Firstly, did he say those things to you in answer to any questions by you? A. No.
>
> Q. Did he say them unprompted by any questions by you? A. Yes. …
>
> Q. Would you tell us what it was the accused Quynh said to you whilst you were waiting in the cubicle at the hospital? Just pause for one moment. A. Certainly, Mr Quynh said 'I got to speak to him. The trouble with my sister. He not good to her'. In relation to the incident he said 'He has big' and with his hands he described a long heavy object with a curved end.
>
> Q. He said 'He has big'? A. Yes, whilst at the same time with his hands gesturing a long object with a curved end.
>
> Q. Yes? A. Then he continued and said 'I have just little one, broken'. Then he said 'I didn't want to fight but if don't fight not good for my sister'. Then he paused and said 'If two fight maybe one kill' and as he said that he shrugged his shoulders. Mr Quynh continued and said 'If two fight that is fair'. He again said 'If two fight that is fair'. He repeated this

about six or seven times over a period of time and then he went on and said 'I must be strong for my sister'."

Constable Deans gave this evidence in chief without reference to his note book in which he had made notes of the conversation on the day it happened. In cross-examination Constable Deans agreed that he had not recorded the whole of the conversation in his note book. In cross-examination he was shown his notebook and some further information was got from him:

"Q. When you asked what had caused the injury to his head by the doctor the accused said, 'A big one for work in the garden'? A. Yes.

Q. And then said, 'When door open I' — just read that paragraph there, would you please? A. When asked what had caused the injury to his head by Doctor I have recorded, 'A big one for work in the garden', and then I have written on the next line, 'When door open I hit only little one, broken'.

Q. And you have those words in quotation marks? A. Yes.

Q. That reflects the fact that is what you wrote down as the accused was actually saying it? A. Yes. …

Q. Are you sure the accused said, 'If two fight maybe one kill'? A. Yes.

Q. And, 'If two fight that is fair'? A. Yes.

Q. Are you sure he said, 'If don't fight not good for sister'? A. Yes.

Q. He also said, 'I don't want to fight', he said those words? A. He said those."

The second pre-trial account given by the appellant is contained in the record of an interview between Detective Sergeant Logan and him at Marrickville Police Station which began about ten hours after his conversation with Constable Deans at the hospital. The substantive parts of that interview were as follows:

"Q10. I have been informed that about 11 am on Saturday the 15th December 1990, you went to 112 Sydenham Road, Marrickville. Is that correct? A. Yes.

Q11. Did you go with anyone to that address? A. With my wife.

Q12. For what purpose did you go the address? A. I went there to take my sister back to Fitzgerald Street.

Q13. Why were you going to take her from the Sydenham Road address? A. Because Duc Minh LE threatened her.

… A. My sister lives with her four children and her husband, Vinh Duc LE, and also his brother Duc Minh LE, and his wife Lap Thi TRAN, and their five children.

Q15. How did you enter the premises when you arrived there? A. I knocked on the front door, and one of the children let me in.

Q16. Did anybody enter the house with you? A. Yes, my wife.

Q17. Who did you speak to inside the house? A. Vinh Duc LE.

Q18. What did you speak to him about? A. I asked him why he let his brother mistreat my sister. I just told him that this is his family problem. He has to decide and think of everything by himself.

Q19. Where did this conversation take place? A. In the bedroom of my sister. …

Q21. Who was present during that conversation? A. Four persons. Myself, Vinh Duc LE, my sister Thi Hai NGUYEN, and my wife.

Q22. Was the matter resolved? A. Vinh Duc LE said he can't do anything about it.

Q23. What happened after that discussion? A. I saw Duc Minh LE standing in the dining room with a knife. He was standing with his right arm up, with the knife in his hand. The knife was facing towards his stomach, and held as if he was going to stab somebody or something.

Q24. What happened then? A. I went outside the front door. I had brought a hoe from my home. I picked it up, and went inside.

Q25. What happened then? A. After that, we were facing one another and arguing. I didn't intend to hit Duc Minh LE with the hoe. After that I told him that if he kept mistreating my sister, there would be a fight between him and me.

Q26. What happened then? A. Duc Minh LE said that he wouldn't let me live, that he would kill me anywhere.

Q27. What happened then? A. I just think the matter was finished. We both thought we would keep our positions.

Q28. What happened after that? A. He say that I can't leave the house alive. Duc Minh LE then went outside, and he kept saying, 'Come out, Come out'. I stayed for about 10 minutes, because I did not want to fight him. I saw that he had picked up a big hoe (indicates about 1.5 m long). I had no way to escape because he would have been watching the front door.

Q29. What did you do then? A. I thought that the fight was unavoidable. He say for me to come out, and he opened the door then. He say come out, if you don't come out then I come in. Then he went and locked the back gate.

Q30. What did you do then? A. When the other man went to lock the back gate, I ran out the back door, and hit him with the handle of the hoe.

Q31. Where did you hit him? A. Across the back near the bottom of his head.

Q32. What happened then? A. The handle of the hoe broke in half. After I hit him, I thought the blow would have slowed him down. I hope I just get away, but he turned back and hit me on the top of the head with the hoe he was carrying. A little while later the blood started to come down my forehead into my eyes.

Q33. Was Duc Minh LE still armed with the knife at this time, or just the hoe? A. I don't remember whether he had the knife or not.

Q34. What happened then? A. After that I felt that I could not avoid this fight. I don't remember who put the knife in my hand. For self-defence, I aim the knife at Duc Minh LE's side, (indicates point on right side of abdomen).

Q35. Who was in the backyard when the fight started between you and Duc Minh LE? A. I don't remember.

Q36. I have been informed that you and your wife, Duc Minh LE and his wife, and Vinh Duc LE and your sister, were in the back yard, along with Yu Ying CHEN. Is that correct? A. I don't know.

Q37. I have been informed that after you hit Duc Minh LE across the head with the hoe, you then stabbed him in the stomach with a knife. Is that correct? A. No.

Q38. In you answer to Question 34, you said that you aimed the knife at his right side. Did you stab him? A. Yes, I did but slightly.

… A. Yes (NGUYEN stands up, and points to a position approx 10-12 centimetres to the right of his navel).

Q40. Did you stab him again, after the first time? A. I don't remember.

Q41. Did any person try to intervene whilst the two of you were fighting? A. Vinh Duc LE tried to take the knife away from me, but I couldn't see anything because of the blood in my eyes.

Q42. Who else was in the backyard at that time? …

Q58. Is there anything further you wish to tell me about this matter? A. Yeah, when I went there I didn't intend to have a fight. I intended only to say something to Vinh Duc LE.

Q59. Have you sustained any injuries as a result of the fight with Duc Minh LE? A. Yes, I have a few stitches in my head, and the skin off the knuckles of my left hand. I have some stitches in my left nostril. I am just a bit bruised."

The account that Quynh gave at his trial was much more extensive than the two he gave on the day of the killing. In evidence in chief he told of how he came to be calling on Vinh on the Saturday morning of the conversation with Vinh, of Minh overhearing what he said at the end of the conversation, and then:

"A. He came out of the kitchen and he was standing like that holding the knife like that (witness demonstrates with his arm crooked up so the hand is at waist level, next to the waist with the right hand holding the knife with the knife pointing forward).

Q. And what did you think when you saw Minh holding the knife in that way? A. At that time I was frightened. I was afraid that he would attack me.

Q. Did you do anything? A. I went out and took my small hoe to show him that I have got something with me and that tool is larger than his knife and it could be equal or even superior to his knife.

Q. Why didn't you just go out the front door and go away if you were afraid? A. Because the front door was locked. I could not leave and go home.

Q. So you got the hoe. Was the hoe still in its original position where you put it? A. Yes, it was.

Q. And after you got the hoe did you go anywhere? A. I stepped in one or two steps towards the timber door and I was holding the hoe like that (witness indicates with his right hand up in the air slightly above shoulder level).

Q. Where you in the hallway or still outside the wooden door when you had the hoe in that position? A. I already went through the timber door and I was already in two — about two steps in. …

Q. What was the next thing that you saw or heard after you had gone about two steps into the hallway? A. I told him 'Next time if you hit my sister again we'll fight'.

Q. Who did you say that to? A. I said that to Minh.

Q. Where was Vinh when you said that? A. Vinh was standing between us.

Q. Was Vinh in the hallway or in some other part of the house at that time? A. He was standing in the hallway between the two of us.

Q. Where was Minh? A. He was in the … eating area …

Q. What happened then? A. Then he said 'You won't leave, wherever and whenever I see you I kill you'. …

Q. After he said that what was the next thing that happened? A. The two of us were silent.

Q. Did anybody else speak? A. Nobody said anything.

Q. How long did that silence last for? A. About two minutes, something like that. …

Q. So there was that period of silence. What happened after that period of silence ended? A. At that time Minh was not holding the knife in that position like before. He was holding his knife turning it around the other way. …

Q. Did you think anything as a result of seeing Minh with the knife pointing in the other direction? A. Seeing him holding the knife like that and him being silent, and I was also silent, I thought that there won't be a fight and I thought that everything is settled. He was having the same opinion as he had before and I was always —

Q. Is that what you thought? A. Yes, that's right.

Q. Go on please. A. He was having the same opinion as before and I was keeping my own.

Q. What was the next thing that happened after the silence ended? A. I was thinking about asking somebody to open the door and let me out.

Q. What happened then? A. Then I heard Vinh say 'You like to fight a lot. Why don't you have a fight today?"

On Quynh's account, immediately on hearing this Minh said "You can't come out of that house alive" and went into the back yard, shouting challenges to Quynh. Minh began gathering a shovel, iron bar and hammer in one spot in the back yard. He kept calling to Quynh to come into the back yard and fight. This went on for what Quynh said was about ten minutes. Whatever the accuracy of the period it seems clearly to have been a significant one. During this time the appellant did not try to leave the house through the front door. He said he thought it was locked. At the end of the period he saw Minh closing the two back gates with his back to the appellant and then ran at him from inside the house ("very fast, the best I could do") and hit him between the shoulders with the handle of the small hoe which broke. His account of what happened next was as follows (this is in the appellant's own words extracted from the question and answer form of the evidence).

"He did not bend down, he just turned around. He was very strong. He held up the big hoe and he held it very high and then he hit me. The blow hit me only on the left hand. When I got the injury I was holding the wooden handle with both hands. I was blocking his blow with the handle. I stepped back some steps and he was coming forward and he went on holding up the hoe and hitting down. He did not hit me down straight but at an angle. I sat down. I was standing and as I was scared I very heavily sat down and I turned around. As was sitting down I turned around my face towards the other side because his hoe was coming from that side down. I sat down to avoid his blow. At that time I didn't realise it, I only knew afterward, I was hit on top of my head. At that time I saw he had

really the intention of killing me. I could not wait any more and I had to become strong and I had really to attack. When he held up the hoe once more I rushed in and I held up the handle. I was pushing him, he was pushing me. I was trying to take that hoe out of his hands and he was also pushing me. He wanted to push down. At that time I saw that my eyes are being blurred and it was all dark. I thought that I was seriously injured. All I know is I was feeling that my vision was blurred and it was all dark and I was feeling very frightened. Next I felt something that was tapping against my left hand. I glanced. I saw a knife. I hold it. I was still holding the handle of the hoe with my right hand. At the time I was feeling as if I was very seriously injured and I was close to death. The darkness in front of my eyes became darker. Minh then pulled the handle of the hoe back very hard and I lost my grip on the handle with my right hand. Next he held up the hoe like before on an angle. I was very scared. I stepped back some steps. He was coming forward and he stepped some steps forward as well. I could feel my body in contact with the wall of the storeroom. He began to hit down on me. I avoided his hoe and at the same time I was coming closer to him to avoid his hoe and then I hit him, I stabbed him with the knife still in my left hand, (indicating the right side waist area). He was attacking me very very hard. At that time he was holding the large hoe and he wasn't holding it very high up. He was holding it very close to the blade and he was hitting down and down. I knew really clearly that at that time he wanted to kill me. When he was pulling away his hand the hoe, I was feeling very tired and at that time I wanted really to live and I was thinking only at that time, "It's a matter of life and death". I was doing my best to concentrate and to look at the blade of that large hoe that Minh was holding but my eyes were very blurred and more blurred than before and at that time I was thinking that probably maybe I was dying, so I stabbed him where I have indicated. I stabbed him in that part of the body because I saw that clearly he had the intention of killing me. I wanted to stop him. I didn't want to inflict any serious injuries to him and I didn't want to kill him. I didn't use the whole force in my arm. All I knew is that I had hit the wall. I didn't have the time to think about anything. I only thought about being really quick to avoid his hoe because if I was just a little bit slow he would hit me and kill me and I didn't want to stab him in the area of the heart to kill him. That's why I chose to hit him there. After I stabbed him he didn't stop and he was hitting even harder than before. I was very afraid and I saw all black in front of my eyes and I went on doing like that with my hands (demonstrating weaving and ducking with repeated stabbing in a forward direction). His the last blow came here (indicating the left nostril). Then I saw someone between us."

The trial judge directed the jury that for the Crown to establish the charge of murder against Quynh the jury had to be satisfied beyond reasonable doubt of the following:

"(1) That the victim was killed — that he died.

(2) That his death was caused by the intended act of the accused, that is, an act which the accused intended physically to perform.

(3) That the act was unlawful.

(4) That the act was done by the accused with the intention of causing death, or grievous bodily harm to the victim.

(5) Where material before the jury raises as a possibility that the act causing death resulted from provocation by the victim the Crown has proven beyond reasonable doubt that it did not result from such provocation."

Shortly afterwards he told them that to establish the lesser offence of manslaughter the Crown must establish beyond reasonable doubt the following:

"(1) That the victim was killed, that is that he died.

(2) That his death was caused by the intended act of the accused.

(3) That the act was unlawful.

(4) That the act done by the accused which caused the death of the victim was such that any reasonable person in the circumstances in which it was done would have realised that the act was dangerous, that is that it posed a significant risk of serious injury to the victim."

Then he went on to explain the law concerning one of the most significant issues at the trial — self-defence.

He told the jury that in a case where self-defence emerged as an issue, the Crown did not establish that the act of the accused had the ingredient of unlawfulness necessary to support a charge either of murder or manslaughter unless the Crown showed beyond reasonable doubt that the accused had not been acting in self-defence at the time of the killing.

He further explained that in the present case the Crown, to show that the accused had not been acting in self-defence, had to establish beyond reasonable doubt that the accused either (i) did not believe the stabbing was necessary in his self-defence, or (ii) there were no reasonable grounds for such a belief on his part.

These directions were not criticised at the trial or in the appeal. It was common ground that they correctly applied the law as laid down by the High Court in the leading case of *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645.

The jury's verdict of guilty of manslaughter shows they must have found proved beyond reasonable doubt each of the four ingredients of the manslaughter charge told to them by the trial judge. This means they found the Crown had established beyond reasonable doubt that the killing was unlawful, which in turn means that they accepted as proved beyond reasonable doubt either that the appellant had not believed the stabbing was necessary in his self-defence or that there were no reasonable grounds for that belief or both.

I have now set out enough of the circumstances of the case to make comprehensible what were the points taken for the appellant under the three grounds in the notice of appeal referred to earlier (at 2 above).

In written submissions counsel for the appellant dealt first with the first two grounds of appeal (those concerned with Allen J's directions to the jury). In the oral argument however he began with the unsafe and unsatisfactory ground. I will do the same.

The first step in the argument was the submission that in view of the verdict of manslaughter against the appellant and of not guilty as to Hai, the jury must have rejected the evidence of Vinh and Lap. This meant, it was argued, that a number of propositions involved in their accounts, such as the appellant having been armed with a hoe and a knife at all times, must also have been rejected.

At one point the next step in the argument seemed to be that "the jury's rejection of the Vinh/Lap accounts meant that it was not reasonable for it to conclude, as a reasonable possibility, that the appellant was *not* acting in self-defence". I do not think however that the appellant's submission on the unsafe and unsatisfactory ground remained as elementary as this. In its most realistic form, it recognised the need for the court to examine the other material in the case, and on the basis of that examination to decide whether the jury could not reasonably have been satisfied beyond reasonable doubt that the Crown had shown that Quynh was not acting in self-defence when he stabbed Minh. It was submitted that after such examination the court would conclude that the jury was bound to have a reasonable doubt about the alleged unlawfulness of the killing.

A matter discussed in the oral argument, which causes difficulty to the appellant, is Constable Deans' account of what the appellant said to him very shortly after the fight. Counsel for the appellant submitted that what Quynh said in that time was consistent with his assertion that the Crown had not negatived self-defence. I do not agree. If the jury accepted Constable Deans' account, then it was open to them to find that uppermost in Quynh's mind in the state of excitement and apprehension that he must have been in after the fight — (he was very talkative", said Constable Deans) — were the ideas that "if two fight that is fair", "I didn't want to fight but if don't fight not good for my sister", and "I must be strong for my sister".

Such statements by Quynh would show that he was justifying what he had done on a basis quite different from that of the self-defence which makes a killing lawful. That kind of self-defence has as its starting point a person who, not wanting to fight, is attacked or threatened with attack in a way leading the person to believe self-defence is necessary for the person's own protection from harm. Such situations do not include those where what is going on is a fight which the fighters have willingly joined in, whether to carry on or settle a quarrel, or for some other reason. Once such a fight is under way, the person who has, ex hypothesi, got into it for reasons other than self-defence, may often, because of the nature of fighting, be suddenly faced with injury or death, and to prevent that, self-defence in one sense will be necessary, which may lead to the injury or death of the opponent. That sort of self-defence, if it ends in the killing of the opponent, is not the sort of self-defence that the Crown must negative in showing (when the issue arises) that the killing has been unlawful. The last sentence may need qualification in some circumstances, as for example, if a fight is going on according to broadly understood conventions intended to prevent serious harm and one fighter suddenly breaks the conventions by producing a lethal weapon. That kind of possible qualification does not arise in the present case.

Allen J left to the jury the question whether Quynh was a willing fighter or an unwilling one who found himself obliged to fight in his self-defence. As I have already noted, Constable Deans' evidence was important in regard to this question. Counsel for Quynh did not cross-examine Constable Deans on his evidence in such a way as to indicate that Quynh was contesting the truth of Constable Deans' report of the conversation. Further, when examining Quynh in chief, his counsel led no evidence from him raising any question about the truth of Constable Deans' report. When Quynh was asked some questions about it in cross-examination however, he contradicted some of what Constable

Deans had said. Because of the practice based upon *Browne v Dunn* (1893) 6 R 67, this later led to considerable discussion about an appropriate direction to the jury. In the end agreement was reached between Crown and defence counsel and the trial judge that a direction in a particular form should be given, and in due course that direction was given. The central part of this direction to the jury was as follows:

> "… There was no challenge to Constable Deans as to the accuracy of what he said the accused Quynh stated in the cubicle in the hospital and you might well infer, accordingly, it is not challenged on behalf of the accused Quynh notwithstanding how honestly the accused Quynh may be unable to now to recall it personally. Really you are left in the situation that you could more readily infer that Constable Deans was telling you the truth and telling you it accurately because of the way the case has been conducted for the accused. But you should not infer from that that the accused Quynh has not been truthful to you in saying that he does not now remember it."

Allen J continued with observations not unfavourable to Quynh reminding the jury they should remember the circumstances in which the conversation with Constable Deans took place. The judge had himself remarked when the form of direction was agreed on with counsel that he felt it was somewhat favourable to the accused. Nevertheless, it is quite plain when the whole of the relevant part of the summing-up is read, that not only was it left open to the jury to accept Constable Deans' evidence, but also, even after the favourable aspects of the directions given by the judge are taken into account, they may well have thought, and with sound reason, that the only sensible conclusion for them to reach was that Constable Deans' account was both a truthful and accurate one.

If the jury did reach that conclusion then it seems to me it would have been properly open to them to treat what Quynh had said to Constable Deans as the most reliable indication of his motivation at the time of the fight and to have discounted the later more exculpatory versions accordingly. On this basis the jury would properly arrive at the conclusion that the Crown had established beyond reasonable doubt that although Quynh was in one sense undoubtedly defending himself in the fight with Minh, he had not been acting in self-defence in the relevant legal sense of those words, but for the different purpose of fulfilling his obligation to his sister.

These considerations are in my opinion in themselves enough to show that the unsafe and unsatisfactory ground must fail. There are further considerations which provide alternative bases for reaching the same conclusion.

One concerns the knife with which Quynh stabbed Minh. Where did it come from? This would be a question natural for the jury to focus on. Quynh's account was that at the stage of the struggle with Minh when each of them had both hands on the handle of the large hoe he felt something tapping at his hand, he glanced, saw a knife and took hold of it. He did not see what was tapping at his hand, nor is there evidence from anyone in the transcript that I have seen saying that anyone handed Quynh a knife. Vinh and Lap both said they had seen Quynh in possession of a knife. It seems to me to have been open to the jury, even if they regarded the evidence of Vinh and Lap as generally worthless because of their anxiety to see Quynh found guilty, to have accepted them on at

least this one point as furnishing by far the most likely explanation of where Quynh providentially got the knife while struggling with Minh.

Another matter which it was open to the jury to decide adversely to Quynh was a point very material to his overall case of self-defence. He said that the front security door was locked, so that when he saw Minh about to lock the back gates he realised there would be no way out, and in view of Minh's threats to kill him the course he adopted of striking first was reasonably in his own self-defence, in all the circumstances. There was some evidence from witnesses independent of either Vinh and Lap on the one hand and Quynh and his supporters on the other to the effect that the front security door was not locked. Although there was evidence either way on this point, I think the jury would have been entitled to consider that the evidence from the independent witnesses was more reliable than that of what was in effect one of the two adversarial sides in the case. If the jury accepted that the security door was not locked, then it was well open to them to conclude further that there was no reason, if Quynh was fearing for his life and did not wish to be involved in a fight, why he should not remove himself from the danger by leaving the house by its front entrance.

All in all, I do not think that the jury, on the material before them, could be said to have been unreasonable or wrong if, after considering the evidence of Quynh himself and the other matters in evidence not dependent on the evidence of Vinh, Lap and others with a reason to be hostile to Quynh, they came to the factual conclusions that Quynh arrived at the Sydenham Road house on the Saturday morning, armed with a small hoe, expecting trouble with Minh, mindful of the wrongs that he believed Minh had done to his sister and the need for him to look after her, and, as he saw his obligations, ready to fight Minh if Minh wanted to fight.

Subject to considering the two remaining grounds of appeal (grounds 1 and 2), my opinion is that the jury were entitled, on the foregoing basis, to find that the Crown had negatived lawful self-defence beyond reasonable doubt.

The two remaining grounds of appeal raised two points about the self-defence directions. While conceding that Allen J correctly directed the jury (on a number of occasions) in accordance with *Zecevic*, appellant's counsel submitted there were two particular passages containing significant misdirection.

In the first passage his Honour said:

> "The law does not countenance a fight in which someone is challenged, where someone accepts the challenge and they fall to and fight, or where they verbally challenge each other and commence a fight. What the law countenances — what the law says is lawful is self-defence, not a fight in the sense of a challenge issued and a challenge accepted. If it was a fight in that sense it is not self-defence and it is no answer to either murder or manslaughter."

In the second passage he said:

> "The questions posed by the concept in law of self-defence directly arise. Did the accused stab Minh as an incident of the fight which he was having with Minh, the fight in which each was having a go at the other, or did he stab him because he believed it was necessary for him to do that in self-defence, and, if so, were there objectively reasonable grounds for that

> belief? I remind you that what is done as an incident of continuing aggression is not self-defence."

A

The first submission about these directions was that they effectively withdrew from the jury's consideration the issue of self-defence, if the jury were satisfied that the appellant had joined in the fight with the deceased. This was said to be wrong because the issue of self-defence is still available even to an accused who voluntarily entered into a fight or an affray. *R v Honeysett* (1987) 10 NSWLR 638 was relied on as an example of this proposition and it was said also to have been accepted in *Zecevic* (at 663-664).

B

I do not think the passages in either *R v Honeysett* or *Zecevic* relied upon by the appellant support the appellant's submission in the particular circumstances of the present case. What Hunt J actually said in *R v Honeysett* was that self-defence was an issue which could be raised by an accused in answer to a charge of affray (at 640) for which he relied on *R v Sharp* [1957] 1 QB 552. There were two points decided by the English Court of Criminal Appeal in that case, one later over-ruled and the other approved by the House of Lords in *Taylor v Director of Public Prosecutions* [1973] AC 964. The one approved was the one relevant for Hunt J's purposes in *R v Honeysett*. In *R v Sharp*, two men who had been fighting in the street and had succeeded in badly damaging one another were charged jointly with having made an affray. The presently relevant passage in the judgment of the Court of Criminal Appeal (Lord Goddard CJ, Cassels J and Hinchcliffe J) said (at 561):

C

> "… The recorder directed the jury that it did not matter who started the fight or who was to blame, and that in the present case no question of self-defence arose. Indeed, he said more than once and with emphasis that self-defence for the purpose of this case was quite immaterial.
>
> In our opinion, this goes too far. If two men are found fighting in the street one must be able to say that the other attacked him and he was only defending himself. If he was only defending himself and not attacking that is not a fight and consequently not an affray. A man may well defend himself and then pass to the attack, which is very likely what happened here, or, in repelling an attack he may use more than necessary force, and again, that may be the case here … But it appears to us inescapable that this raised questions for the jury."

D

E

In its context, what the court meant by the sentence "If two men are found fighting in the street one must be able to say the other attacked him and he was only defending himself" seems to me to be quite plain. If an accused does say that, then it will be a question for the jury whether it comes to the conclusion that the Crown has not excluded that view of the facts or, on the other hand, has established that in fact the accused was engaged in a fight in the sense used in the next sentence of the judgment where clearly the word is used to describe a fight where the fighters have fallen to fighting because they have both decided to fight, as distinct from the case where one person has attacked or threatened another who did not want to fight but who responded to the attack or threat in self-defence which may reach the stage, as the court mentioned in the next sentence, where the person originally attacked passes to the attack. The English Court of Criminal Appeal was making the point that in the case before them what sort of fight it was was a jury question and the court had been wrong to direct the jury that it was not for them to decide whether what had happened

F

G

between the two men was a fight in the sense explained by the court in contrast to a fighting situation forced on one by the other.

The passage set out above from *R v Sharp* is the most explicit one about the distinction between a willing and a forced fight that I have come across in the modern cases (and it is not very explicit). The idea itself seems to me to be a sound one, inherent in the idea of self-defence as a response to a situation thrust upon a person against the person's will. In the extremely thorough review of the history and law of self-defence in *R v Lawson and Forsythe* [1986] VR 515, (Young CJ and McGarvie J and Ormiston J), the idea seems to be implicit in much of the discussion but is referred to directly only in the citation from *Stephen's Digest of the Criminal Law (Crimes and Punishments)*, 4th ed (1887), of art 200(d), which began "If two persons fight and quarrel, neither is regarded as defending himself against the other …" (at 563). As Ormiston J noted, Dixon CJ, in *R v Howe* (1958) 100 CLR 448 at 463, referred to Stephen's par (d) and adopted it, (although in a way which seems to me to have been very guarded).

The idea is however clearly stated in older works regarded as authoritative, frequently by reference to the distinction between homicide upon chance-medley in self-defence (which resulted in acquittal) and manslaughter. The former happened when the slayer had not begun to fight or having begun had endeavoured to decline any further struggle, and afterwards being closely pressed by his antagonist killed him to avoid being killed himself (this was also called homicide excusable in self-defence): the latter case, the crime of manslaughter, was when the parties were "actually combating [one another] at the time when the mortal stroke is given": 4 Bl Com 184; *Easts Pleas of the Crown* (1803) at 280. The passage from Stephens *Digest* above referred to remained unchanged in the last edition of that work, published in 1950 (at 253-254). The idea is also implicit in a series of English decisions culminating in *R v Bird* [1985] 1 WLR 816; [1985] 2 All ER 513: see particularly at 820 D-E; 516 E-F per Lord Lane CJ.

The passage from *Zecevic* also relied on by the appellant in the present case on this point does not seem to me to be inconsistent with the view I have been putting. The passage particularly relied on (which begins at the top of 664) is not dealing with a fight in which both fighters are willing and neither fighter has attempted to back off, but with one where one of the fighters, the accused, has created the situation in which force might lawfully be applied to apprehend him or cause him to desist. In their joint reasons, Wilson, Dawson and Toohey JJ said that the only reasonable view of the resistance by the accused in that situation to the force being applied to apprehend or cause the accused to desist will be that the accused was acting not in self-defence but as an aggressor in pursuit of the accused's original design. They then commented (at 664):

> "… 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."

This idea seems to me to be quite consistent with the view that a person willingly engaged in a fight may not rely on self-defence to justify the lawfulness of any act causing harm to the other in that fight. The two ideas are distinct, but seem to me to have a common origin in the basic meaning of self-defence when used in a legal context as a ground of lawfulness.

Summarising what I have said earlier (and risking repetition in the hope of achieving a clear statement), the authorities support the view that the idea of self-defence depends on a person, attacked or threatened with attack, who does not want to fight, being unable, acting reasonably, to avoid fighting in self-defence. In such a situation the rules stated in *Zecevic* apply. But if the fact is that the person wants to fight, then questions of self-defence do not arise.

On this basis, although the appellant's first argument against the two passages from Allen J's summing-up earlier set out is correct in asserting that he effectively withdrew from the jury's consideration the issue of self-defence if the jury were satisfied the appellant joined in the fight with the deceased, counsel's phrase "joined in the fight" is a reference, when used in a legal context, to fighters joining in a fight in the sense I have sought to explain above; and in my opinion, once this is understood (and I think it would have been plain to the jury) Allen J's approach was right: if the appellant willingly joined in fight with Minh in that sense, then the issue of self-defence was not available to the appellant. Allen J rightly left this to the jury to decide; and, in the event they decided it in favour of the appellant, he gave them full and accurate directions on what then would be the next issue for them to decide, the question of self-defence as crystallised in *Zecevic*.

For the reasons I have set out in dealing with the unsafe and unsatisfactory ground, I think it was a question for the jury whether the appellant had joined in the fight with Minh in the relevant sense and that there was ample evidence upon which they could find the Crown had proved beyond reasonable doubt that it was at least a fight of that kind in which Quynh engaged with Minh. (I say "at least", because it seems to me that there was evidence upon which the jury could properly have found that Quynh should be regarded as the aggressor in the fight.)

In my opinion the first ground of appeal fails.

The second ground raised a further point directed to the two passages earlier set out. This point was that the way Allen J put those two passages to the jury created the danger of conveying to the jury that what were essentially issues of fact were being elevated to the status of legal propositions. I do not think there is anything in this submission. In my opinion Allen J left to the jury as a question of fact to be decided by them whether the fight was one the appellant joined in as at least as much the aggressor as Minh or whether it was a fight forced upon him by Minh. If the jury found the former to be the fact, then the judge's direction was, in my opinion correctly, that questions of self-defence did not arise; if the latter finding were made, then the jury had to consider all the self-defence questions about which they were correctly instructed by his Honour.

In my opinion this ground of appeal fails also.

I should note that the points argued in this Court concerning his Honour's directions were not raised with him at the trial. Rule 4 of the *Criminal Appeal Rules* therefore precludes the appellant from relying on grounds of appeal 1 and 2 unless the Court grants leave.

The trial was fought, with the assistance of Legal Aid to the accused, in an almost unbelievably thorough manner. If considerations of expense, time and efficiency are set on one side, the case showed Rolls Royce procedural justice at its best. So far as I can judge from the transcript, counsel managed to co-operate with the trial judge in the proper conduct of the case in a fully

appropriate way and yet maintain firmly at all times the interests of their clients. The thoroughness with which the case was conducted leads me to think that every matter which occurred to counsel as being necessary to raise on behalf of the accused both during the giving of evidence and the judge's final summing-up to the jury, was raised, and that it is unlikely that anything was overlooked by inattention. Nevertheless, because the first ground, if there was any merit in it, would be one going to the heart of the appellant's case, I think leave should be granted to the appellant under r 4. The position seems to me to be different in regard to the second ground of appeal and I would refuse leave under r 4.

In my opinion the appeal should be dismissed.

SMART J. I agree with Priestley JA.

IRELAND J. I agree with Priestley JA.

Appeal dismissed

Solicitor for the appellant: *T A Murphy*.

Solicitor for the respondent: *S E O'Connor* (Solicitor for Public Prosecutions).

M L BARR,
Barrister.