



HIGH COURT OF AUSTRALIA

12 June 2024

DAYNEY v THE KING
[2024] HCA 22

Today, the High Court unanimously dismissed an appeal from the Court of Appeal of the Supreme Court of Queensland. The appeal concerned the proper construction of s 272(2) of the *Criminal Code* (Qld). Section 272(1) affords a protection from criminal responsibility for the use of force in response to a provoked assault. Section 272(2) provides that the protection in s 272(1) "does not extend to a case in which the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person", nor where that person "endeavoured to kill or to do grievous bodily harm to some person before the necessity of so preserving himself or herself arose; nor, in either case, unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable".

The appellant was convicted of murder after a violent altercation resulting in the death of another. He appealed his conviction on the basis that the trial judge erroneously directed the jury that the defence of self-defence against provoked assault, would not be made out unless, pursuant to s 272(2), they were satisfied that the appellant had first retreated before retaliating to an assault from the victim. A majority of the Court of Appeal (Fraser and McMurdo JJA) held that the trial judge had not erred. Their Honours held that the third clause of s 272(2), which requires retreat before self-defence becomes necessary, applies in any case where a person has inflicted death or grievous bodily harm. After the appellant was convicted a second time following a retrial, a differently constituted Court of Appeal unanimously upheld Fraser and McMurdo JJA's interpretation.

The High Court upheld the Court of Appeal's interpretation of s 272(2). Section 272(2) has three distinct clauses, each expressing a distinct category of case to which the protection afforded by s 272(1) does not extend. The first and second clauses are directed to whether an accused will or will not be exonerated for two classes of offences (or "cases"), namely where they have caused death or grievous bodily harm. The third clause then specifies an additional, independent condition, as indicated by the word "nor". It indicates that "in either case", that is, in a case where the accused has caused death *or* grievous bodily harm, s 272(1) will not apply unless the accused first retreated as far as was practicable before resorting to such force. The Court restated s 272(2) in accordance with this construction in terms that "[t]his protection in s 272(1) does not extend: to a case in which the person uses force which causes death; or to a case in which the person uses force which causes grievous bodily harm, unless, before the necessity of the person's preservation from death or grievous bodily harm, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable". On this construction, an accused who creates conflict through a provocative act, and then responds with force that causes death or grievous bodily harm, cannot plead self-defence without demonstrating that, so far as was practicable, they first attempted to de-escalate and undo their part in the conflict before resorting to such force.

This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.