CASE NOTES

THE QUEEN v. TIKOS (NO. 2)[1]

Murder—Manslaughter—Use of excessive force in self-defence—Whether plea of self-defence is to be considered by the court.

The case of *The Queen v. Tikos (No. 2)*[2] seems to have added a restriction to the consideration of a plea of self-defence to a charge of murder in cases where excessive force is used. *The Queen v. Howe*[3] had been taken to have clarified the law in this area, but, after the decision of the Supreme Court of Victoria in *Tikos*, this may be doubtful, at least in Victoria.

The accused was convicted of murder and appealed; his appeal was allowed and a re-trial was ordered.[4] At the second trial the accused was again convicted of murder and he again sought leave to appeal. The grounds of appeal may be divided into two heads: (1) general objections to the trial judge's charge to the jury and (2) failure by the trial judge to direct the jury as to the requirements of an occasion of self-defence. After deciding that the first of these grounds had no substance, the court went on to consider the second at some length. Tikos had been convicted of the murder of one Patetl who had befriended him and allowed him to live at his house for a period of one week. Subsequently, Tikos returned to the house and was surprised there by Patetl. Tikos claimed that he had been threatened with a shotgun and after a scuffle had obtained possession of the gun. The accused said that he shot Patetl in self-defence as he was afraid of an attack.

In considering the question of excessive self-defence the court said:

> We would think, on principle, that it must be correct to say that the crime of murder which, in general, involves as a necessary element an intention to kill or to inflict grievous bodily harm, cannot be justified or reduced to manslaughter under a plea of self-defence unless the occasion be one which warranted the accused acting with intent to do some kind of grievous bodily harm at the least.[5]

This statement followed the earlier pronouncement on similar lines in *The Queen v. Enright*.[6] In adopting this approach the court stated that the view was in accordance with those expressed in *Howe's Case*.[7] It would seem, however, that the High Court did not intend that its judgment was to be restricted in such a way. Dixon C.J., when considering self-defence, was moved to observe:

> that elements of a plea of self-defence existed. That is to say it is assumed that an attack of a violent and felonious nature, or at least of an unlawful nature was made or threatened so that the person

[1] [1963] V.R. 306. Supreme Court of Victoria; Herring C.J., O'Bryan and Adam JJ. [2] *Ibid.* [3] [1958] A.L.R. 753; 100 C.L.R. 448.
[4] *The Queen v. Tikos* (No. 1) [1963] V.R. 285. [5] [1963] V.R. 306, 313.
[6] [1961] V.R. 663, 668-69. [7] [1963] V.R. 306, 313.

> under attack or threat of attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage. This would mean that an occasion had arisen entitling the person charged with murder to resort to force to repel force or apprehended force.[8]

These may be taken to be the circumstances upon which a person is entitled to defend himself. From this statement no support may be found for the much narrower proposition put forward in *The Queen v. Tikos*.[9]

If the principle in *Tikos* were to be followed, the result would be that a number of pleas of self-defence would be rejected which would constitute a good defence when considered in relation to the requirements set forth in *Howe's Case*. Worthy of note is the fact that Dixon C.J. used the words 'an attack of a violent . . . or at least of an unlawful nature'.[10]

Many attacks of an unlawful nature, which by the statement warrant action in self-defence, would not fall within the category of an occasion justifying the infliction of grievous bodily harm as required by the *Tikos* test. Dixon C.J. then considered the position where a person acting in self-defence had used more force than the necessity of the occasion required, and reached the conclusion that such a person is guilty of manslaughter and not murder.[11] McTiernan and Fullager JJ. concurred with Dixon C.J.[12] Menzies and Taylor JJ. delivered judgments along similar lines.[13] The decision in *The Queen v. Tikos*[14] seems to have added a not insignificant qualification to the doctrine enunciated by the High Court in *The Queen v. Howe*.[15]

In reaching its conclusions in *The Queen v. Tikos*,[16] it would seem that the court was troubled by cases in which the mode of defence was outrageously disproportionate to the attack. Indeed, such cases were highlighted by Sholl J. in *The Queen v. Tikos* (No. 1)[17] where he examined a number of examples. Typical of these is the situation in which a wife, who is about to throw cold water on her husband, in the sight and presence of friends, because he has come home late, is struck by the husband with an iron bar.[18] In endeavouring to deal with such a situation the court in *Tikos's Case* has approached the problem by asking the question—Was the situation one in which the infliction of grievous bodily harm was warranted? A more satisfactory solution to the difficulty is that proposed by Taylor J. in *The Queen v. Howe*.[19] This method proposes that the question be approached on the general basis of 'pretence of necessity'.[20] The answer would be reached by considering whether, in acting as he did, the accused acted under a real necessity to defend himself or that his claim of necessity was a mere pretence.

[8] [1958] A.L.R. 753, 757; 100 C.L.R. 448, 460.
[9] [1963] V.R. 306.
[10] [1958] A.L.R. 753, 757; 100 C.L.R. 448, 460.
[11] *Ibid.* 758, *Ibid.* 462.
[12] *Ibid.* 759-60, *Ibid.* 464.
[13] *Ibid.* 760-768, *Ibid.* 465-477.
[14] [1963] V.R. 306.
[15] [1958] A.L.R. 753; 100 C.L.R. 448.
[16] [1963] V.R. 306.
[17] [1963] V.R. 285.
[18] *Ibid.* 291.
[19] [1958] A.L.R. 753; 100 C.L.R. 448.
[20] *Ibid.* 468, *Ibid.* 762.

This test would cover the case of the husband who attacks his wife with an iron bar because he is about to become the recipient of a bucket of cold water. Such a commonsense approach would not be beyond any jury. Moreover, its adoption would mean that the important decision in *The Queen v. Howe*[21] would remain unscathed.

Whether the interpretation of the court in *The Queen v. Tikos*[22] will meet with the approval of the High Court must await decision at a later date. It is worth noting, however, that Tikos sought special leave to appeal to the High Court. The High Court,[23] in refusing special leave to appeal, stated that the reason for the refusal was that there was no evidence on which a jury could have put such a construction as to entitle the accused either to an acquittal or to a verdict of manslaughter. This refusal of leave to appeal is reported in a brief paragraph at the end of the report of *The Queen v. Tikos* (No. 2).[24] Whether the mention of this reason indicates a rejection of the reasoning of the Supreme Court of Victoria on an *expressio unius* interpretation must await decision on another day.

J. J. GOODMAN

PORTER v. LATEC FINANCE (QUEENSLAND) PTY. LTD.[1]

Mistake—Recovery of money paid—Who paid money—Materiality of mistake—Fraudulent misrepresentation—Effect of fraudulently signed mortgage—Mistake of fact.

This was an action brought by the respondent in the Supreme Court of Queensland to recover from the appellant money which it was alleged the respondent's solicitors had paid to the appellant under a mistake of fact.

The complicated facts may be briefly stated as follows: L. H. Gill whose father, X, owned property mortgaged with Y, fraudulently represented himself to be the owner of that property to the appellant in order to borrow money from him on the security of the land. Porter agreed and paid off X's mortgage to Y, the latter handing Porter the documents of title and a mortgage discharge. L. H. Gill later approached the respondent for a larger loan by way of mortgage over the land. The respondent agreed and handed £3,000 to their solicitors, who then, on instructions of L. H. Gill and the respondent, paid Porter the amount which he (Porter) had advanced to Gill, Porter undertaking to uplift the mortgage discharge and the title documents from the office of the Registrar of Titles to hand them to the respondent's solicitors. Gill gave the respondent a mortgage over the land and a bill of sale over certain chattels on the land. The frauds were discovered, Gill was arrested and convicted, but, as he was a man of straw, Latec Finance was unable to recover the money advanced. They then sued Porter for

21 *Ibid.* 753, *Ibid.* 448. 22 [1963] V.R. 306.
23 Dixon C.J., Kitto, Menzies, Windeyer and Owen JJ.
24 [1963] V.R. 306.
1 38 A.L.J.R. 184. High Court of Australia; Barwick C.J., Kitto, Taylor, Windeyer and Owen JJ.