THE SLAIN CHICKEN [1] THIEF

SOME ASPECTS OF JUSTIFIABLE AND EXCUSABLE HOMICIDE

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The question — In what circumstances may a man take another's life in the protection of his property, the prevention of a felony and the arrest of a felon? — raises fundamental issues for the lawyer, the moralist, the philosopher and the sociologist. In *The Queen* v. *McKay*[2] this question was posed, highlighted by the circumstances of a dramatic case, for the attention of three courts and of nine judges. So scant is modern authority on this problem that their treatment of it demands attention, particularly since, for a variety of reasons which will here be considered, the solutions they offered failed to receive community and political acceptance. An insight into the moral and political health of a community may be manifest in the decisional processes — legal and political — of such a case.[3]

The distance separating the poles between which the argument has oscillated is indicated by the contrast between two early nineteenth century cases — *Purcell* and *Moir*.

According to Kenny,[4] in 1811, Mr. Purcell, a septuagenarian of County Cork, was knighted for killing four burglars with a carving knife. Megarry[5] suggests that the gallant ancient killed only three burglars, but agrees that he was knighted for his endeavours.[6]

The extreme contrast is the case of *Moir* in 1830. Captain Moir was, according to Dicey,[7] "a well-meaning man imbued with too rigid an idea

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[1] Chickens are peculiarly larcenable. Properly approached they create no disturbance, they lack the intelligence to resist, are readily asportable, relatively unidentifiable, and easily converted into currency or consumed. It is perhaps for these reasons that the leading cases on the justification of the use of lethal force against someone interfering with moveable property concern the killing not of rustlers, not of sheep stealers, but of chicken thieves — *Scully* in England ((1824) 1 C. & P. 319), *Beverley* in the United States 1935, *infra* n. 58, and now *McKay* in Australia.

[2] (1957) A.L.R. 648.

[3] In *The Moral Decision* (1955) E. Cahn offers a fascinating study of moral values in the context of twenty-one cases which he describes as "prismatic", as revealing the spectrum of moral forces lying behind the judicial processes.

[4] *Outlines of Criminal Law* (15 ed. 1942) 117, n. 3.

[5] *Miscellany-at-Law* (2 imp. rev. 1956) 366.

[6] The *Saturday Review*, Nov. 11, 1893, p. 534 carried the following account of Mr. Justice Willes' reply to a question as to what should be done by one who looked into his drawing room and saw a burglar picking up a clock, the burglar being ignorant of the observer: "My advice to you, which I give as a man, as a lawyer and as an English judge, is as follows: In the supposed circumstances this is what you have a right to do, and I am by no means sure that it is not your duty to do it. Take a double-barrelled gun, carefully load both barrels, and then, without attracting the burglar's attention, aim steadily at his heart and shoot him dead". See, to like effect, *Rex* v. *Rungle*, "Codd's Last Case" in A. P. Herbert, *Codd's Last Case and Other Misleading Cases* (1952) 136.

[7] A. C. Dicey, *Law of the Constitution* (8 ed. 1920) 489-490.

of authority. He perished from ignorance of law. His fate is a warning to theorists who incline to the legal heresy that every right may lawfully be defended by the force necessary for its assertion". Dicey relates that Captain Moir, troubled by trespassers, gave notice that he should fire at any wrong-doer who persisted in the offence. He executed his threat, and, after fair warning, shot a trespasser in the arm. The wounded lad was carefully nursed at the captain's expense. He unexpectedly died of the wound. The captain was put on his trial for murder; he was convicted by the jury, sentenced by the judge, and, on the following Monday, hanged by the hangman. The 1879 Criminal Code Bill Commissioners[8] tell a different tale concerning Moir.

> Mr. Moir having ordered some fishermen not to trespass on his land by taking a short cut, found the deceased and others persisting in going across. He rode up to them and ordered them back. They refused to go, and there was evidence of angry words, and some slight evidence that the deceased threatened to strike Mr. Moir with a pole. Mr. Moir shot him in the arm, and the wound ultimately proved fatal. Before the man died, or indeed was supposed to be in danger, Mr. Moir avowed and justified his act, and said that in similar circumstances he would do the same again. This land, he said, was his castle, and as he could not without the use of fire-arms prevent the fishermen from persisting in their trespass, he did use them, and would use them again. Lord Tenterden took a very different view of the law. He told the jury that the prevention of such a trespass could not justify such an act, and he seems to have left to them as the only justification which on these facts could arise, the question whether the prisoner was in reasonable apprehension of danger to his life from the threats of the deceased. Mr. Moir was found guilty of murder and executed.

There are admittedly many differences between the case of Mr. Purcell and that of Captain or Mr. Moir; but, whatever the true facts in each, it is clear that Purcell was knighted and Moir executed.

The Queen v. *McKay* will be discussed under the following headings:

I. THE FACTS.
II. THE JUDICIAL DECISIONS.
III. THE RELEVANT LAW.
IV. PRESSURE GROUPS AND THE COMMUNITY.
V. THE POLITICAL DECISION.

I. THE FACTS

Any brief statement of the facts of a complex human event is likely to be imprecise. Often, it will be found that judicial (and academic) divergences in opinion concerning a case are ascribable to differences in emphasis on its factual aspects, or even to disagreements about the facts themselves. *The Queen* v. *McKay* is remarkable because the relevant incriminating facts were never in dispute; they were drawn substantially from the accused's own version of the events.

Gordon William McKay, aged 27, lived with his wife and three children[9]

[8] *Report of the Royal Commission on The Law Relating to Indictable Offences* (1879) *Cmd.* 2345, p. 44n.

[9] A fourth child was born during the course of the trial.

on a poultry farm belonging to his father in Glenroy in the State of Victoria. He earned his living as a postman but devoted part of his time to the conduct of the poultry farm. For some time there had been persistent thefts of poultry from the farm, evidence being given that in the past three years one thousand chickens had been stolen. McKay had, without success, diligently tried to prevent these thefts and once, some months previously, had captured a chicken thief who, upon trial, was convicted and fined £10. To aid him in these efforts, McKay had constructed a system of alarm bells on the doors of the fowl pens, which were intended to ring in his house and to inform him of the presence of an intruder and, to a degree, where on the farm the intrusion was taking place.

At first light on the 9th of September, 1956, an alarm rang in McKay's house. McKay took a .22 calibre repeating rifle, followed a path between the pens to conceal himself from the intruder, and reached a point about 140 feet from the intruder, whom he could now observe bending down looking into a fowl pen. McKay rested his rifle on the top strand of a wire fence. Then, in McKay's words to the police, — "I aimed the rifle at him to hit him between the hips and the feet and I fired. He turned and started to run and I fired a second time. When I fired a second time he dropped three fowls he was carrying but he didn't stop and I fired three more times . . . I didn't think I would kill him, I only wanted to wound him". McKay told the police that he did not call out or try to detain the intruder before he fired because "I didn't want him to get away", and, after the usual warning and on invitation to make a formal statement, said: "I will make a statement. I shot him and I meant to shoot him. He had no right to be stealing the fowls". Towards the end of the statement McKay said: "When I fired at this man, I aimed at him and I wanted to wound him but not to kill him. I consider I am entitled to wound a man who was stealing fowls on my property, especially when we have notices up 'Trespassers Prosecuted' ".

It was common ground that McKay meant to wound the thief and that he had kept the rifle ready and loaded on top of the wardrobe in his room against just such an intrusion. On the facts, the only difference of any substance between the prosecution and the defence was whether McKay had told investigating detectives, "I didn't care if I killed him or not. He is a thief".

The intruder's name was Walter Mark Wicks. One of McKay's shots entered Wick's right lung, pierced the heart and killed him. Which of the shots was the lethal one was not established; it was probably not the first, and the trial judge seemed to think it was the last. The trial judge ruled that, by virtue of s. 69 of the Crimes Act, 1928 (Vic.) Wicks was engaged upon a felony[10] in stealing chickens.

II. THE JUDICIAL DECISIONS

In a trial for murder before Barry, J. of the Victorian Supreme Court the above facts were put before the jury. McKay did not give evidence on his own behalf, but made an unsworn statement from the dock in which he

[10] Section 69 of the Crimes Act, No. 3664 (1928) — No. 5917 (1955) (Vic.) "Every larceny whatever is the value of the property stolen shall be deemed to be of the same nature and shall be subject to the same incidents in all respects as grand larceny was before the first day of April One thousand eight hundred and twenty-eight". Thus Wicks was engaged on a felony despite any absence of evidence of the value of the fowls stolen or attempted to be stolen.

denied any intention to kill Wicks and explained that he shot to wound Wicks in the leg in order to stop him from escaping. He added that he feared that if he disturbed the thief, the thief might injure his wife, his family and himself and he made reference to a friend whose father, a poultry farmer, was battered to death by a thief whom he had disturbed in his fowl run.

Barry, J. in discussion with counsel in the jury's absence, said:[11]

> . . . what troubles me in this case is . . . whether or not I should direct [the jury] that the only alternatives open to them here are murder or manslaughter. In other words, the conduct of the prisoner is so unreasonable that there is no basis on which they could find he is not guilty of at least manslaughter. On the other hand, there is the general rule that all questions of reasonableness are for the jury, but there must be some evidence on which such a conclusion can be reached.

To this the Crown Prosecutor replied: "I have thought, your Honour, that a strong comment would probably be preferable to a direction", and Barry, J. indicated that such was his inclination.

Early in the direction to the jury, Barry, J. expressly adopted the following words from the 1879 Criminal Code Commission Report:[12]

> 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.

These words, said Barry, J., gave the jury the fundamental principle which should guide them in deciding on McKay's guilt or innocence.[13] He expressly withdrew from the jury any justification by way of self-defence or defence of family, saying

> . . . the prisoner was in no actual danger from the thief; the thief had not offered him any violence, and, indeed, was unaware of his presence until the first bullet was fired. The prisoner was armed with a repeating rifle which was fully loaded, and to that extent he was master of the situation because as a fact we know the thief was not armed. On the material before you there was no reason at all for the prisoner to believe that the thief was armed. The prisoner did not call on the thief to submit himself to capture, but he began shooting without warning and without any demand for surrender. The thief, who had not shown any actual violence or any inclination to use violence, began to run after the first shot was fired, and you will remember that when the first shot was fired the thief would reasonably imagine that his life or his safety was being endangered. When the thief ran, and even after the thief abandoned his booty — three fowls which he had taken — the accused continued to fire at him . . . A man is entitled to use such force as is reasonable in the circumstances to prevent the theft of his property, but he is not permitted under the law to take the life of a thief . . . when the thief

[11] Transcript at 57.
[12] *Report* cited *supra* n. 8, at 11.
[13] Transcript at 63.

has not shown violence or an intention to use violence. The owner of a property, or the occupier of a property, is entitled to require a trespasser to leave the property, but he is not entitled to kill the trespasser upon his property.[14]

There were, Barry, J. directed the jury, three possible lines of justification of McKay's conduct—

1. that he was acting in reasonable defence of his property.
2. that he was exercising his legal right to use reasonable force in the discharge of his duty to prevent the commission of a felony, and
3. his legal right to use reasonable force in the discharge of his duty to apprehend a person who has committed a felony in his presence.[15]

Concerning all three possible lines of justification, Barry, J. said (and here was laid the foundation for one subsequent attack on the direction):

> . . . the citizen is exercising powers which are permitted to him in the first instance for his own self-protection, and in the second and third instances, for the protection of the community of which he is a member. It is necessary, in the exercise of the rights which the law confers upon him, that he should behave honestly; if he is exercising a right to protect his property, he must not use that occasion to give expression to spleen or feelings of revenge or resentment. The right to protect his property is conferred upon him in order that he may hold to what is rightfully his in the community, but, as I have already pointed out to you, he is not justified, merely for the protection of his property, in killing or inflicting grievous bodily harm or substantial physical injury upon the person who interferes or seeks to interfere with his property. Similarly with regard to the exercise of the right to prevent the commission of a felony and the right to apprehend a felon. If a citizen intentionally kills or inflicts a grave physical injury upon a person who is committing a felony or who, having committed a felony, seeks to escape, the citizen is then acting as an instrument of justice. In these circumstances he decides for himself that the felony has been committed, and he decides that escape is intended. It is an obligation upon him, therefore, that he should exercise his legal right, which is to use force, honestly and without any improper motive. If, instead of discharging his duty in accordance with the purpose for which the law entrusts the right to him, he acts out of a desire for revenge or in resentment or for the purpose of punishing the person who is committing the felony, then the citizen would not be exercising the right honestly and properly; if using the occasion, not for the purpose for which the law permits it to him, but for the purpose of satisfying some private grievance, he intentionally kills the felon or brings about his death by the intentional infliction of grave physical injury, he would be guilty of murder. Another state of affairs may arise, however: a citizen may seek to prevent the commission of a felony, or he may seek to apprehend a felon, and, without intending to kill the felon but honestly exercising the rights which the law allows, he may cause his death by the use of more force than is reasonably necessary, and in such circumstances he would be guilty of manslaughter.[16]

The trial judge's direction on the facts was not seriously challenged; one aspect of the challenge to it was that in the above direction he had confused

[14] *Id.* at 65-66.
[15] *Id.* at 66.
[16] Transcript at 67-68.

motive and intention and that a man may well be delighted with the legal right he now possesses to injure his enemy without losing that legal right. The merits of this criticism will later be considered.[17]

Barry, J. concluded his direction as follows:

> If you think that the accused fired with the intention of killing the thief, and that at the time when he fired he was under the influence of resentment or a desire for revenge or a desire to punish the thief, then he is guilty of murder. If you think he was honestly exercising his legal right to prevent the escape of a man who had committed a felony and that the killing was unintentional but that the means which the prisoner used were far in excess of what was proper in the circumstances, then you should find him guilty of manslaughter. If, on some view of the facts which escapes me, you are able to say that the prisoner's conduct was reasonable and that death was an unintended consequence of the reasonable exercise of force shown while exercising a legal right, then it would be open to you to acquit the prisoner.[18]

The Writer was present at the trial and heard the charge to the jury. It commenced at a few moments after 2.15 p.m. and lasted for just over an hour. It was not read to the jury, but was a summing-up given *extempore* in the traditional manner, expounding the law only in so far as it related to the facts before the jury. The presentation seemed to this hearer to be lucid, forceful and adequate. The jury retired for one hour and ten minutes, and returned into court to ask for a further direction on manslaughter, which Barry, J. gave as follows:

> . . . if a person brings about the death of another person in the course of committing an unlawful act, then it is open to a jury to convict the person who caused the death of manslaughter. Here the Crown puts to you that the view submitted to you that the prisoner might have brought about the death of Wicks without intending to kill him but in the exercise of a right to use force to prevent him from escaping does not lead to acquittal but should lead you to convict the prisoner of manslaughter, because it is put to you that in the circumstances, even if he was honestly using the rights which the law permits him to use to prevent the escape of a person who had committed a felony, the means that he resorted to for the purpose of exercising those rights were so far in excess of what was reasonable that his action in firing at the thief amounted to an unlawful act.[19]

After three hours and twenty minutes — that is, after a total retirement of four and a half hours — the jury returned a verdict of guilty of manslaughter with a strong recommendation to mercy. Barry, J. imposed a sentence of three years' imprisonment, saying,

> Prisoner at the bar, the duty of pronouncing sentence upon a man of good repute with the family responsibilities which you have is a painful one, but there is a good beyond the good of the individual which must be consulted in every community, and that is the good of the community as a whole. In this community we live by the law, and, living by the law, it is necessary that those who live within the community should observe the law and should refrain from taking the law into their own hands. Because you took the law into your own hands deliberately and with premeditation a man was deprived of his life, and it is necessary in the

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[17] See p. 423, *infra*.
[18] Transcript at 78.
[19] Transcript at 83.

> interests of the community that punishment should be imposed upon you in order to show that such conduct cannot be permitted. The jury has added a recommendation to mercy, and I shall give full effect to that. The sentence which I shall impose upon you will be affected also by the realisation that punishment of you and the deterrence of other people in the community who might be disposed to take the law into their own hands are the primary objects which I desire to achieve. I shall bear in mind also that punishment imposed upon you will fall more heavily upon your wife and your children than it will fall upon you. Taking all those matters into consideration, it is still necessary that the sentence which I should impose upon you should be one that is substantial enough to show the stern disapprobation which the law must exhibit for conduct of the kind of which you have been properly convicted.[20]

On appeal to the Court of Criminal Appeal (Lowe, Dean, Smith, J J.) the conviction was affirmed (Smith, J. dissenting), but the sentence was reduced to one of eighteen months' imprisonment. Before considering the objections taken to the trial judge's direction to the jury, Lowe, J. formulated what were in his view the propositions of law relevant to the facts of the case.[21]

> 1. Homicide is lawful if it is committed in reasonable self-defence of the person committing it, or of his wife or children, or of his property, or in order to prevent the commission of a forcible and atrocious crime . . . Whether the position is the same in the case of all felonies is, I think, not clear but we need not determine the question here.
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> 2. Reasonable self-defence is not limited to cases in which the life of the person committing homicide is endangered or grave injury to his person is threatened. It is also available where there is a reasonable apprehension of such danger or grave injury. There is such a reasonable apprehension if the person believes on reasonable grounds that such danger exists . . .
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> 3. The homicide in order to be justified must be necessary and the jury are to enquire as to the necessity of the killing . . .
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> 4. "There must be no malice coloured under pretence of necessity; for wherever a person who kills another acts in truth upon malice and takes occasion from the appearance of necessity to execute his own private revenge, he is guilty of murder". (1 Hawkins, Pleas of the Crown 79).
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> 5. Motive is to be distinguished from intention. If the killing is held justifiable, motive is irrelevant, but evidence of motive is to be considered in determining whether the killing is justifiable . . .
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> 6. If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon but the person taking action acts beyond the necessity of the occasion and kills the offender the crime is manslaughter — not murder . . .

Lowe, J. then considered the details of the direction and the objections to it. He agreed with the trial judge that there was a complete absence of evidence of facts upon which any justification of self-defence or defence of one's family could be based and added,

> It should be remembered that what justifies the actor is not apprehension in fact alone but apprehension on reasonable grounds. The applicant in his statement from the dock did say that the disturbing of the thief might injure his wife, family and himself, but beyond his saying that he had a friend whose father, a poultry farmer, had been battered to

[20] *Id.* at 85. [21] (1957) A.L.R. 648, 649.

> death by a thief who was disturbed in his fowl pen, I know of no evidence of reasonable grounds for his statement. I cannot think that this statement is such as to require the judge to leave this aspect to the jury.[22]

Only one ground of objection to the direction caused Lowe, J. any difficulty. It was that

> . . . the judge had mixed up motive and intent and that this confusion related to both murder and manslaughter. In particular it was argued that the charge would reasonably convey to the jury that if the applicant, when he fired at Wicks, was to any degree under the influence of resentment or a desire for revenge or to punish the thief the shooting could not be justified.[23]

However, he rejected this objection, saying:

> What the judge is insisting on in the challenged passages is, I think, that the rights given are given for particular purposes and those purposes only, and that improperly to use the occasion not for those purposes but for the satisfaction of feelings of spleen, revenge or resentment could not be justified. I should have thought that matter scarcely arguable but for two phrases 'honestly and without any improper motive' and 'under the influence of resentment or a desire for revenge or a desire to punish the thief'. These phrases, however, must not be severed from their context. I cannot think that any jury hearing the whole charge would think that although the circumstances made shooting necessary, and although the applicant was exercising one or more of his rights yet nevertheless, if he was to any degree under the influence of such feelings, as revenge, etc., he would be guilty of murder . . . It is of course true that motive and intention are not the same and . . . I must not be taken to give any support to a view that a shooting which is necessary is not justified, if the person shooting is actuated by or under the influence of such motives as revenge or satisfaction.[24]

Dean, J. agreed with the conclusion reached by Lowe, J. and with his interpretation of the trial judge's charge to the jury, and added: "Viewing the incidents of the morning alone, it seems to me to be an unreasonable view to take to say that the appellant, in the circumstances in which he found himself could honestly and reasonably think it necessary for his purpose to shoot as he did".[25]

Smith, J. dissented, holding that the jury had been mis-directed and that it could not be said that the misdirections caused no substantial miscarriage of justice. His judgment is a valuable analysis of the relevant law. The two main misdirections according to Smith, J. were, first, the trial judge's direction to the jury that as McKay was armed with a loaded rifle he was to that extent master of the situation "because as a fact we know that the thief was not armed" which may have "mislead the jury into thinking that the question whether it was necessary to shoot should be judged by reference to the facts as ultimately ascertained",[26] and not on the facts as McKay might reasonably have believed them to have been which, in the view of Smith, J., might have included a reasonable belief that Wicks or a possible confederate acting as get-away-man was armed. The second allegation of misdirection that Smith, J. accepted as justifying a retrial was the suggested confusion of motive and intent already discussed.

In particular Smith, J. held that when Barry, J. directed the jury that

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[22] *Id.* at 653. [23] (1957) A.L.R. 648, 651. [24] *Id.* at 652.
[25] *Id.* at 654. [26] (1957) A.L.R. 648, 658.

there must be an honest exercise of the right to use force, that the occasion must not be used "to give expression to spleen or feelings of revenge or resentment", and that the legal right must be exercised "honestly and without any improper motive", the jury might have erroneously concluded that if McKay's motives were mixed, and though proportionately and reasonably exercising his legal rights he felt deep satisfaction in their exercise in that he was thereby revenging himself on a thief, they should convict him at least of manslaughter.

By what was a considerable exercise of imagination, Smith, J. was able to lend colour to the first alleged ground of misdirection. The only evidence to support it was McKay's statement from the dock when he referred to the fear he felt for himself and his family when he shot Wicks, and to his memory of the fate of his friend's father at the hands of a chicken thief. For a jury to decide that he reasonably feared for himself or his family, there should be some material from which it could be inferred that there were reasonable grounds on which McKay might have believed Wicks or a confederate to be armed, despite the absence of any direct evidence of facts giving rise to such a fear.

The line of argument which Smith, J. regarded as sufficient for that purpose was stated by him in the following terms:

> To my mind the period over which the thefts had continued and their frequency and regularity, as described by the appellant, made it reasonable for the jury to conclude, and to hold that the appellant had reasonable grounds for concluding, that they were not casual unconnected thefts, but were the work of some group of thieves who were systematically pillaging the farm. I think further that, upon the appellant's account of the events, the fact that the thieves were able to keep up the thefts and, except on one occasion, to remain undetected, despite the substantial efforts made to prevent them from doing so, suggests that some system of look-outs may have been used, and that consequently anyone who interfered to prevent a theft and caught one of the thieves might well find that he had to cope with more than one intruder. Moreover, when the thefts continued after the conviction of a thief, who, on the footing we are now considering, might, as it seems to me, quite reasonably have been thought to be one of a gang, it was I think, obviously necessary for a man in the appellant's position to reckon with the risk that the gang would be feeling hostile and revengeful towards him. And his account of the events following upon that conviction would, to my mind, suggest that the thieves had quite probably become aware of the existence of the alarm system and of the fact that when he came out to look for them he came armed. If they persisted in their depredations despite such knowledge was there not reasonable ground for fearing that they might have taken counter measures by arming themselves with weapons of some kind in order to be able to put the appellant out of action if he should ever manage to come upon them and call on them to surrender? To my mind the jury was entitled to think so. And I think that upon the appellant's account of the facts it was a serious question whether any sensible man in his shoes would not have felt that to call on Wicks to surrender would involve exposing himself to a substantial danger of an incapacitating attack either from Wicks or from some confederate, which would enable Wicks to escape with the stolen property.
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> I therefore consider that it was fairly open to the jury to find that

> they were not satisfied beyond reasonable doubt in relation to the first shot fired, that the appellant had no reasonable grounds for believing his action in firing it to be necessary to prevent the completion of the felony and the escape of the felon. In relation to the four later shots the position had altered in some respects, but I think that it was still open to the jury to take the same view. Although there had ceased to be any danger to the appellant from Wicks, at least until he should reach cover, the fact that he would try to escape was now apparent and the danger of injury to the appellant from any confederates who might be present was increasing with each moment that passed.[27]

The substantial defect in this line of argument is that no evidence whatsoever was given to support it; it was not advanced by the prisoner nor was it urged by his counsel — no mention was made of a gang, nor of organised look-outs, nor of lurking armed confederates, nor of McKay's belief in their existence, and, indeed, such is not the pattern of chicken theft in Australia.

What of the suggestion that the trial judge confused motive and intent in his direction to the jury? It is submitted that the correct view of the law is that stated by Lowe, J. — "If the killing is held justifiable, motive is irrelevant, but evidence of motive is to be considered in determining whether the killing is justifiable".[28] The statement by Hawkins with which Lowe, J. preceded the above proposition[29] does not contradict this — "There must be no malice coloured under pretence of necessity; for wherever a person who kills another acts in truth upon malice and takes occasion from the appearance of necessity to execute his own private revenge, he is guilty of murder".[30] If the accused was not merely pretending to have a legal justification in order to conceal his criminal intent and if his conduct was otherwise justifiable, the fact that he took satisfaction in his right to wound or kill the enemy against whom he felt spleen, revengefulness or resentment, would not render him criminally responsible, *but* evidence of such motives would be relevant and admissible as to the view of the facts the accused reasonably took, the necessity of his conduct in relation to those facts and the proportion between his conduct and the threat from the felon on those facts.[31] Plainly, this was what the trial judge intended the jury to understand.

A majority in the Court of Criminal Appeal doubted that McKay was prejudiced even if there were any lack of clarity in the direction. It is not the easiest of distinctions for a jury, that though ill-motive may be evidentiary of the existence of a right it will not be destructive of a right otherwise existing, but it is hard to conceive that any juror would gain the impression that though the law otherwise gives a right to do a certain act it denies that right if you take pleasure in doing so.

The appeal against conviction was dismissed. The appeal against the

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[27] (1957) A.L.R. 648, 662-663.

[28] *Id.* at 649.

[29] *Ibid.*

[30] 1 Hawkins, *Pleas of the Crown* 79, hereinafter cited as "Hawkins *P.C.*".

[31] J. Hall, *Principles of Criminal Law* (1947) 153-54, analyses the contrast between motive and intent in homicide and concludes that hatred or revenge never "supersedes the apparent necessity of the measures taken in self-defence but rather that solution of the controverted question — was it self-defence or an unnecessary killing? — is sometimes aided by considering the motives of the accused". He reports a Georgia decision (*Golden* v. *George* (1858) 25 Ga. 527) in which this is put with high colour: "One may harbour the most intense hatred toward another; may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart's blood and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into account". See too the direction to the jury by Coleridge, J. at *nisi prius* in *Driscoll* (1841) Car. & M. 217.

sentence was successful, the sentence of imprisonment being reduced from three years to eighteen months, Lowe, J. giving the following reasons for this reduction:

> The learned trial judge . . . took into consideration the matters urged upon us — the fact that the applicant was not an ordinary criminal: that his previous character had been good; that he had been goaded beyond endurance by previous thefts and the apparent inability of the police to protect him from such depredations, and that he believed he had a right to act as he did. The judge also took into account the strong recommendation of the jury. But a man's life had been taken without justification and he thought that to punish the offender and to deter others a sentence of imprisonment should be imposed. In such circumstances I should not ordinarily interfere with the sentence imposed. But in this case we have been urged to say that the justice of the case will be met by releasing the applicant on a bond and the request if not supported is at least not opposed by the Crown. Indeed the Solicitor-General asked whether the purposes of the law had not been sufficiently vindicated by what had now taken place. In my opinion in spite of these strong appeals it would be wrong not to impose imprisonment in this case. This Court exercises no prerogative of mercy but is bound to award such punishment as it thinks proper in the circumstances. It is in the highest public interest that the view of the trial judge as to the sacredness of human life should be upheld, and that the public should realise that deliberate action without justification which causes death must be severely punished. It is only because we have had before us additional evidence which was not called before the trial judge and which showed in more detail the extent of the previous annoyance to which the applicant had been subjected, and which told of an accident some years previously which may have affected his mental irritability, that I think we can interfere at all with the sentence imposed and reduce it. In the light of the very special circumstances we all think that if the conviction is upheld the sentence should be reduced from three years to eighteen months imprisonment.[32]

An application for special leave to appeal to the High Court was made on the 31st of May, 1957. The judgment of the High Court, Dixon, C.J., Webb, Fullagar, Kitto, Taylor, JJ., was as follows:

> We think that this application for special leave must fail because, taking the most favourable view of the facts submitted by the accused, we do not think that a jury could reasonably find that he was entitled to acquittal. This Court, in the exercise of its jurisdiction to grant special leave to appeal, intervenes in criminal cases only for some special reason. We think that in this case, on the facts as they appear, a justification entitling the prisoner to complete acquittal could not be made out, and the difference of opinion in the Supreme Court as to the direction given by the learned Judge at the trial is, in these circumstances, no ground for granting special leave. Even if the direction was, as Smith, J. considered, inaccurate, it did not result in a miscarriage of justice, having regard to the facts of the case.
>
> The application for special leave to appeal will therefore be refused.[33]

The High Court thus did not find it necessary to pass upon the dis-

[32] Transcript of judgments on appeal at 12-13. This part of the judgment of Lowe, J. is omitted in the Argus L.R. report of the case.

[33] Unreported.

agreements between the majority and minority in the Court of Criminal Appeal. It would seem that the trial judge and the majority judges in the Court of Criminal Appeal were in substantial agreement upon the law, however, and that even the dissent by Smith, J. does not indicate any real disagreement, but proceeded from the manner in which he construed the charge.

Before discussing the further developments in this case, an attempt will be made to state the law on this topic; reliance will be placed on the direction by Barry, J. and the judgments in the Court of Criminal Appeal in *McKay*, for they constitute a major part of what little modern authority exists.

III. THE RELEVANT LAW

In deciding questions of justification, there is one inescapable preliminary issue: must the accused justify his conduct

(a) on the facts as they were, or

(b) on the facts as he reasonably believed them to be, or

(c) on the facts as he believed them to be?

It is submitted that (a) cannot be required of him. For justification by way of self-defence or the defence of another there is compelling authority that if the accused can justify under (b) that will suffice[34] and it would be improper to apply a different and more restrictive method of establishing the fact situation in which the accused should be tested for one line of justification as distinct from another.[35] Exceptionally, an accused will have a defence on test (a) where he would lack it under (b). In *Dadson*[36] a constable observed one Waters carrying wood away from a copse, called on him to stop, and upon Waters running away shot at and wounded him. Dadson was convicted of wounding with intent to do grievous bodily harm upon a direction by Erle, J. denying to Dadson any justification for his felonious act. Waters' act was in fact a felony in that he had twice previously been convicted of stealing wood and by statute[37] such stealing after two previous summary convictions was a felony. However, these previous convictions of Waters were unknown to Dadson. For that matter, it was accepted that he did not know the different rules for arresting a felon and a misdemeanant. The Court for Crown Cases Reserved[38] agreed with the direction given by Erle, J. and affirmed the conviction, saying "The prisoner was not justified in firing at Waters, because the fact that Waters was committing a felony was not known to the prisoner at the time". Here was a situation where the accused was justified on the facts as they were but not on the facts as he

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[34] *Rose* (1884) 15 Cox C.C. 540, particularly *per* Lopes, J.; *Griffin* (1870) 10 S.C.R. (N.S.W.) 91, particularly per Stephen, C.J. at 100; *Hewlett* (1858) 1 F. & F. 91, and see A. V. Dicey, *Law of the Constitution*, (8 ed. 1920) 496 on this case; *Driscoll* (1841) C. & M. 214; *Deana* (1909) 2 Cr. App. R. 75; Beale, "Homicide in Self-Defence" (1903) 3 *Col. L.R.* 526, and the authorities cited 526, n. 4.

[35] The decision in *Viliborghi* v. *State* ((1935) 45 Ariz. 275) of the Supreme Court of Arizona is an example of the acceptance of the view that the accused's guilt should be tested on the facts as he reasonably believed them to be in a situation where both self-defence and the defence of property was pleaded. A conviction was reversed because the trial judge had directed the jury to test the question of justification on the facts as they were, instead of on the facts as they thought the accused reasonably thought them to be. See also *State* v. *Metcalfe* (1927) 203 Iowa 155.

[36] (1850) 2 Den. 35.

[37] 7 & 8 Geo. IV, c. 29, s. 39.

[38] Wightman, Talfourd, Vaughan, Williams, JJ., Martin, B., Pollock, C.B.

reasonably believed them to have been. Test (b) being regarded as decisive he was held rightly convicted.

The first step, then, is to affirm that the facts on which the accused should be tested by the jury are those which he believed to exist, and which the jury consider a reasonable man placed as he was would believe to exist. It adds nothing to this formulation — "the facts as he reasonably believed them to be" — to state it as "the facts as he reasonably and honestly believed them to be", "honestly" here being tautologous, there being no semantic difference between "believed" and "honestly believed".[39]

Can we take the next step and test the accused's alleged justifications or excuses on the facts as he believed them to be even though a reasonable man placed as he was would not have reached that conclusion? At the present stage of the development of the criminal law it would appear, despite persuasive arguments to the contrary,[40] that the reasonableness of the belief remains a legally required statement of the adjudication of the fact situation to which the law is to be applied, and does not, as it should were deterrence the sole purpose of the criminal law, merely constitute persuasive evidence of the existence of the belief.

All members of the Court of Criminal Appeal in *McKay* accepted this view of the law[41] and were prepared to consider the facts as a jury might reasonably think McKay might reasonably have thought them to have been.

It is important, if order is to be brought into a complexity of suggested justifications or excuses to exclude from consideration certain situations which did not arise in *McKay* and which will not be further discussed other than by way of argument by analogy. In *McKay* no problem of the protection of the house from a felon, and the possible special rules concerning retreat, proportion and necessity in relation to the house[42] (which in the United States have come to be called the "castle doctrine") needed to be considered. Similarly, other than on the view of the facts expressed by Smith J. as reasonably possible to have been held by McKay, no issue of self-defence or defence of one's family from injury to the person arose in *McKay*. By statute Wick's offence was a felony — the problems of the protection of property against misdemeanants did not arise. Further, in that Wick's offence was not a felony involving or threatening violence to any person, violent and atrocious felonies may be excluded from consideration.[43] Finally, in that Wicks was committing and/or had committed a felony in McKay's presence we can exclude situations, possibly different in law, where the crime was not committed in the presence of the accused. We are left with three possible grounds of justification or excuse:

1. The defence of property from a non-violent non-atrocious felony.
2. The prevention of a felony, and
3. The arrest of one who is committing or has committed a felony in

[39] Though tautologous, it may nevertheless be sound practice to direct a jury in terms of an "honestly" held belief. The use of "honestly" may be a convenient and effective negation of any supposed right of the accused to use the occasion as a pretext.

[40] *Wilson* v. *Inyang* (1951) 2 K.B. 399. *Bonnor* (1957) V.L.R. 227, 253-4, *per* Barry, J.; *Marshall* (1830) 1 Lew. 76; Glanville Williams "Mistake in Criminal Law" (1951) 14 *Mod. L.R.* 485, and *Criminal Law — The General Part* (1953) 168-171; J. V. Edwards, *Mens Rea in Statutory Offences* (1955) 48-9.

[41] Though their application of it to the case itself differed, Smith, J. accepting as reasonable a degree of speculation from the evidence which the majority of the court rejected.

[42] *Hussey* (1924) 41 T.L.R. 205.

[43] See Archbold, *Criminal Pleading* (33 ed. 1954) 943 and cases and authorities there cited on the rules of justification for acts of resistance to violent, forcible or atrocious felonies.

the presence of the accused.

All three are likely, more than most rules of law, to vary with the order and stability of the society in which they are to be applied. If an organised police force is lacking, if all crimes are punished severely and many are punished capitally, there will be every incentive for the criminal, if detected, to use violence to complete his crime once he has embarked upon it, and to use violence to escape arrest. If all felonies are punishable by death, the felon who would otherwise be taken increases his chance of continued existence by violent resistance to anyone who opposes him. As a corollary to this, a person protecting his property against such a felon cannot exercise any fine discrimination as to the degrees of force he will use in this enterprise. Where such is the legal order, he is confronted with a situation in which it pays the felon to be violent — if the felon is taken he knows he is likely to be executed, while if he succeeds in escaping he is unlikely later to be captured. Further, if in fact a felony is being or has been committed, the citizen does no public injury by killing the felon — he is saving the community expense by doing the work of the courts and the executioner for them. In sum, if a community relies on condign punishment and the force of a good citizen's right arm to control crime, the justifications we are considering should be of very much greater width than where it provides an organised and law-abiding police force as one of the agencies to enforce criminal sanctions roughly proportionate to the criminal's injury and threat to the community.

It was argued for McKay not merely that he had a right to prevent Wick's felony and to arrest Wicks, but that he was under a duty to do so, and the trial judge adopted that method of expression. For a legal as distinct from a moral duty here to exist there must, presumably, be a criminal or civil action enforcing or providing remedy for its non-performance; the only relevant legal process would be the misdemeanour of misprision of felony. However, misprision of felony has itself changed fundamentally with increasing community reliance on an organised police force and decreasing reliance on individual citizens in the work of law enforcement. In his *History of the Criminal Law in England*, Stephen did not undertake the task of tracing the growth of misprision and of defining its function, but merely referred curtly to his *Digest*. In 1887, in the last edition of the *Digest* which he edited, he wrote,[44] "Everyone who knows that any other person has committed felony and conceals or procures the concealment thereof, is guilty of misprision of felony". In a note he added,[45] "The definition of misprision of felony is extremely vague".

The last reported English judicial consideration of this offence occurred in *Aberg*[46] in 1948 in the Court of Criminal Appeal where Goddard, L.C.J. said: "Misprision of felony is an offence which is described in the books, but it is an offence which has been generally regarded nowadays as obsolete or falling into desuetude. Although . . . there have been recent cases[47] . . . in which counts for misprision of felony have been preferred, I desire to say that if in any subsequent case it is thought necessary to put in a count for misprision of felony, it would be desirable that great care should be taken to see what, according to more modern authorities, are the constituents of

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[44] *Digest of the Criminal Law* (1887), Art. 157.

[45] *Id.* at 372.

[46] (1948) 2 K.B. 173.

[47] See, for example, *Casserley* "The Times", May 28, 1938 — woman convicted of the misprision of the manslaughter of her husband by her lover.

that offence". To like effect, Dr. Glanville Williams has commented[48] that the usual definition of misprision, for example that quoted above from Stephen's *Digest*, "would make it an offence for a mother to fail to inform the police that her eight-year-old son has taken a cake from the pantry, knowing that it is wrong to do so".[49]

In *Hosking*, a recent unreported decision in New South Wales,[50] District Court Judge F. C. Stephen held that for a conviction of the misdemeanour of misprision of felony it must be shown that the accused took some material gain, benefit or emolument from his concealment of the felony.

On Judge Stephen's view, which receives some support in Halsbury[51] and which conforms with the general view of the citizen's law enforcement function, McKay could not be said to have been guilty of the misdemeanour of misprision of felony had he made no attempt to hinder Wick's activities. To argue that he had a legal duty to intervene is to apply law relevant to the social conditions of the fifteenth century to the vastly different social organisation of the twentieth century.

If we lacked an organised and state-wide police force and if the theft of a chicken were punishable by death, McKay's actions would take on a very different legal character. For this reason, early authorities on these three suggested grounds of justification must be treated with great reserve — the problems which they were designed to meet are demonstrably different from those we now face.[52]

During the latter half of the nineteenth century, contemporaneously with the gradual establishment of organised police forces in England and the gradual amelioration of the severity of criminal sanctions, two principles, probably first stated by East,[53] though based on then existing strands of authority,[54] gradually came to be regarded as essential to the existence of these justifications — the principle that the protective, preventive or arresting act must be *reasonably necessary* to the criminal harm threatened or committed and the principle that the injury risked by such act must bear a *reasonable proportion* to the harm threatened or encompassed by the criminal.[55]

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[48] *Criminal Law — The General Part*, (1953) s. 69.

[49] Archbold *op. cit.* 1074, offers a definition which would encompass liability in Glanville Williams' hypothetical case but adds, "there is no record in recent times of a prosecution having been instituted for breach of this duty".

[50] Quarter Sessions, Sydney, July 21, 1954, noted in (1955) *Criminal Law Rev.* 291.

[51] 10 Halsbury, *Laws of England* (3 ed. 1954) 315.

[52] See 1 Hawkins *P.C.* 115 and 2 *id.* 81; 1 Hale, *Pleas of the Crown* (3 ed.) 481ff, 2 *id.* 76; 77, 119; Foster, *Discourse on Homicide* 270ff; 1 East, *Pleas of the Crown* 272, 273, 298; 3 *Co. Inst.* 56.

[53] 1 *P.C.* 298.

[54] See 1 Hawkins *P.C.*, c. 28, s. 11, who formulates something like a doctrine of "necessity" when he writes that it is justifiable to kill the fleeing felon where "he cannot possibly be apprehended alive by those who pursue him". Hale *op. cit.* 494, speaks of such a justification where the felon "cannot be otherwise taken". East 1 *Pleas of the Crown* 298 pursues the same line of analysis suggesting that if the felon could have been taken without such severity it is manslaughter at least. To similar effect, Foster, *Discourse on Homicide* 271; 4 Blackstone, *Comm.* 181-2, is on his own (and in error) in making the entire issue turn on whether the felon was or was not punishable capitally — "the law of England . . . will (not) suffer with impunity any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death" (Blackstone's emphasis) — this was and is only one weight in the balance of justification. Two early cases supporting this development are *Mead* v. *Belt* ((1823) 1 Lew. 1846) and *Wright* v. *Court and Others* ((1825) 4 B. & C. 596). In the former, Holroyd, J. at the York Summer Assizes in 1823 directed the jury, in a case of this nature, that "if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder". In the latter, in an action of trespass and false imprisonment against a constable for using handcuffs in effecting an arrest there was judgment for the plaintiff for lack of an agreement by the defendants that it was necessary to prevent the plaintiff's escape (or because he had previously attempted to escape) to handcuff him.

[55] " . . .We are no longer in an age of pedantic legal scholarship when dusty learning

The quotation of the words of Lord Blackburn, Stephen, Lush and Barry JJ. from the 1879 Criminal Code Commission, which the trial judge in *McKay* used to give the jury the general approach of the law to the problem they confronted, accepts this development.[56] Smith J. expressly adopted[57] these two principles — "The act done must have been necessary, in the sense that the mischief sought to be prevented could not have been prevented by less violent means; and what was done must not have been out of proportion to that mischief". It is the application of these two principles which has narrowed the private citizen's right to defend his property so that he will never be justified, under that head of justification alone, in killing or in inflicting grievous bodily harm or substantial physical injury to the criminal, whether he is a felon or a misdemeanant who is attacking or seeking to seize his property. Apart from the particular rules concerning the house, there can never be a proportionate balance between inflicting or risking personal injury to the criminal and the injury to property which he threatens. Thus, in *McKay*, on no state of facts as they existed, or as they might reasonably have been thought by McKay to have existed, could he be justified in shooting at Wicks to wound him in any part of his anatomy, merely to protect the chickens. Of course, this does not mean that he may not be justified in so doing in order to prevent a felony or to arrest a felon; merely that the social conscience is now such that the protection of property cannot give a justification for such an act.

Leaving to one side the question of a felonious intruder in a dwelling, the conclusion may be offered, therefore, that to protect property a citizen is never justified, under this head of justification, in inflicting substantial physical injury on the criminal attacking or seizing that property.[58]

There remain the other two possible heads of justification which were at issue in *McKay* — the prevention of a felony and the arrest of one who is committing or has committed a felony in the presence of the accused. Concerning these two, Smith, J. advanced[59] a twofold test which, it is submitted, is an accurate statement of the relevant law:

1. "Did the accused honestly believe on reasonable grounds that it was necessary to do what he did in order to prevent the completion of the felony or the escape of the felon?; and

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will operate to restrain or retard the process of displacing older and less familiar doctrine by generalisations from principles which appear applicable and are held in high esteem". Dixon, J. (as he then was) "The Development of the Law of Homicide" (1935) 9 *A.L.J.* Supp. 64, 68.

[56] See p. 417 *supra.*

[57] (1957) A.L.R. 648, 657.

[58] The justification by way of protection of property is thus normally of narrower ambit than justification by way of preventing a felony or arresting a felon. *Carpenter* v. *State* (1896) 62 Ark 286, 310-311: "Life is too valuable to be sacrificed solely for the protection of property". *State* v. *Metcalfe* (1927) 203 Iowa 155. In *Beverley* ((1935) 237 Ky. 35), another chicken case, the Court of Appeals of Kentucky said expressly that "the law does not justify the taking of human life . . . to prevent a felony not involving the security of the person or home or in which violence is not a constituent part". The Royal Commission on A Code of Criminal Law, Queensland, 1899, under the Chairmanship of Sir Samuel Griffith report to similar effect (p. 85, clause 278): "It is lawful for any person who is in peaceable possession of any movable property, and for any person acting by his authority, to use such force as is reasonably necessary in order to resist the taking of such property by a trespasser, or in order to retake it from a trespasser, provided that he does not do bodily harm to the trespasser". This recommendation was accepted and became s. 273 of the Queensland Criminal Code and s. 251 of the Western Australian Criminal Code. S.44 of the Tasmanian Criminal Code is to similar effect, though it excludes from possibility of justification only such force as "is not intended and is not likely to cause death or grievous bodily harm" and thus may allow the use of somewhat more protective force than in the other Australian Codes, or, it is submitted, than at common law at its present stage of development.

[59] (1957) A.L.R. 648, 657.

2. Would a reasonable man in his position have considered that what he did was not out of proportion to the mischief to be prevented?"[60]

Smith J. was of the opinion that a jury might reasonably answer both questions in the affirmative; the trial judge, the majority in the Court of Criminal Appeal, and the members of the High Court must be taken to have found that, on the evidence, a jury must answer one and probably both of these questions in the negative.

During argument on the application for special leave to appeal to the High Court, Dixon, C.J. is said to have summed up one view of McKay's actions by the pithy observation — "He was not acting as a captor; he was acting as an executioner".

Accepting that McKay could not in law justify shooting with intent to wound Wicks, of what offence should he properly be convicted — murder or manslaughter?

McKay's act of shooting was sufficiently causally connected with Wicks' death, in fact and in law, to constitute the *actus reus* of both murder and manslaughter.[61] We have seen that his act was neither justifiable nor excusable. He admitted to an intent to wound Wicks and there is strong authority that such an intent — an intent to wound — is a sufficient *mens rea* to support a conviction of murder. In *R.* v. *Miller*[62] the Victorian Court of Criminal Appeal reviewed the authorities on whether an intention to inflict grievous bodily harm constituted a sufficient *mens rea* to support such a conviction, concluded that it was, and defined an intention to inflict grievous bodily harm in terms which would include any intention to wound by a rifle shot — and this is "express" not "implied" malice aforethought.

If, then, it is decided that there existed both the necessary *actus reus* and the requisite *mens rea* for murder and that the accused's actions were neither justifiable nor excusable, how can a verdict of manslaughter be reached other than as a compromise verdict? The answer would appear to be this: if the accused reasonably believed that he faced a situation where the law allowed him certain rights of protecting his property, or preventing a felony, or arresting a felon, or some similar justification, and he used means that went seriously beyond those necessarily required by or proportionate to the threat he reasonably believed he faced, and in doing so killed the felon, he should be convicted of manslaughter.[63]

In his direction to the jury, Barry J. stated[64] the law on this point as follows:

> If one person intentionally kills another or brings about his death by the intentional infliction of grave physical injury, he is guilty of the crime of murder unless the killing takes place in circumstances which, according to law, constitute just cause or excuse. The death of a human being, if it does not constitute the crime of murder, may constitute the crime of manslaughter; if a person kills another unintentionally in the course

[60] The cases and authorities on the principles of proportion and necessity discussed and cited above support the application of these principles to justification by way of prevention of a felony and arrest of a felon. It is submitted that the fourth word — "honestly" — being tautologous, should be deleted from the first question. The Australian Codes, to a degree, rely on these two principles — Queensland Code ss. 254, 258, 283; Western Australian Code ss. 231, 235, 260; Tasmanian Code ss. 26, 31, 32, 39, 52.

[61] See Glanville Williams, "Causation in Homicide" (1957) *Crim. L. Rev.* 429.

[62] (1951) V.L.R. 346; (1951) A.L.R. 749.

[63] See proposition 6 by Lowe, J. *supra* p. 420, which he supports by reference to Stephen's *General View* 112; *R.* v. *Scully* (1824) 1 C. & P. 319; *Cook's Case* (1639) Cro. Car. 537-8; *Commonwealth* v. *Beverly* (1935) 237 Ky. 35.

[64] Transcript at 65.

> of the performance of an unlawful act, he is guilty of manslaughter. An unlawful act may be one which is unlawful in its nature or which becomes unlawful because of the manner in which it is done. In certain circumstances the law permits force to be used, but the use of more force than is reasonably necessary in those circumstances may, it if results in death, constitute manslaughter; the use of the force would amount to an unlawful act because it had exceeded what was reasonable in the circumstances.

Lowe, J. accepted this direction as "in unexceptionable terms".[65] If this is applied to the facts as the jury might believe McKay reasonably saw them, the legal conclusions are as follows:

(1) If McKay, placed as he was at the time of shooting, saw no real threat to his chickens and believed he could by other means protect his property or prevent the completion of the felony or arrest the felon, and yet determined to shoot because he at last saw an opportunity to revenge himself upon a chicken thief — murder.

(2) If McKay, placed as he was at the time of shooting, realising the threat to his property or the need to prevent the completion of the felony or to arrest the felon, used force which he thought appropriate to these purposes but which was excessive because on the facts as he reasonably believed them to be it was neither necessary to achieve these purposes nor proportionate to the threat to him from the thief, he should be convicted of manslaughter. (This verdict remains the proper one even though revenge and resentment towards chicken thieves or this particular thief coloured his attitude.)

(3) Only on the view of the facts elaborated by Smith, J.[66] but not presented at the trial, by which McKay may have reasonably believed that he or his family was in danger from the thief who may have been reasonably believed to be armed, or assisted by an armed confederate, could an entire acquittal be the proper result.

For complete accuracy the above propositions must be rephrased in accordance with the decision in *Woolmington*[67] so that the jury will only convict of any offence if they believe beyond reasonable doubt in the accused's guilt, the onus of disproving any justification resting on the prosecution.[68]

The practical truth of the matter is, however, different. As a matter of prediction of the results of cases of this nature, it can be said that a jury will convict of manslaughter in such circumstances as occur in *McKay* only when they are convinced beyond reasonable doubt that the accused's acts were *grossly disproportionate* to the threat he faced or *grossly unnecessary* to achieve the purposes which support the legal right. Nor are juries likely to expect too high a standard of judgment here. They will not expect of persons accused of unnecessary or disproportionate use of their rights of protecting property, preventing felonies and arresting felons any judicious balancing of interests — they will readily appreciate that in the words of Holmes J., "detached reflection cannot be demanded in the presence of an uplifted knife".[69] In fact there are no principles of proportion or necessity

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[65] (1957) A.L.R. 648, 649.

[66] See *supra* p. 422-23.

[67] (1935) A.C. 462.

[68] *Chan Kan* (1955) A.C. 206. The prosecution will not, of course, have to take up this burden of proof unless it obviously arises on the facts or some evidence of justification is given by the defence.

[69] *Brown* v. *U.S.* (1921) 256 U.S. 335. This same principle applies in the law of torts where it becomes necessary to consider the contributory negligence of the plaintiff and to ask if he took that care for his own safety that might reasonably be expected of a reasonable man — the "agony of the moment" may weigh heavily in making this judgment: *The Bywell Castle* (1879) 4 P.D. 219; *Jones* v. *Boyce* (1816) 1 Stark. 493; *Tree* v. *Crenin* (1913) W.A.L.R. 47.

underlying the operational effect of these justifications of conduct otherwise criminal; what underlies them is the likelihood of juries convicting only when situations of either obvious lack of necessity or obvious disproportion can be shown to exist.

Prior to leaving the problems of law that arose in *McKay*, the following hypothetical case might be considered: When the caretaker has approached to within 140 ft. of the thief, instead of resting his rifle on the wire fence and shooting, he climbs through the fence, levels his rifle at the thief, and walks towards him. The thief glances around. The caretaker calls out his own version of "Stand or I shoot". The thief turns, stands up, is revealed to be unarmed, has three chickens in one hand, and, after looking at the caretaker for a moment, turns and runs with athletic speed towards an open gate. The caretaker aims to shoot him between hip and ankle and then all else follows as in the actual case. Should the caretaker be convicted of manslaughter?

If the argument advanced above is accepted, the caretaker will have no justification for shooting to protect the property. He will, however, be justified in using those means which, in the circumstances, he can reasonably believe to be the only ones likely to prevent the completion of a felony and to arrest a fleeing felon. In practice, where borderline problems of proportion and necessity arise, it is usual for the Crown not to prosecute or the Coroner not to commit for trial, and, whatever the exact state of the law, it can be predicted that in the unlikely event of there being a prosecution a jury would not convict the accused of manslaughter, for they would be unwilling to find that his actions were grossly disproportionate to the need to effect an arrest.

So much for the judicial processes and the law surrounding the *McKay* decision; but the case also demands consideration as an important social and political issue in the Victorian community.

IV. PRESSURE GROUPS AND THE COMMUNITY

The National Utility Poultry Breeders Association, the Victorian division of the Associated Poultry Farmers of Australia and other representative organisations of the poultry industry were determined, consistent and assiduous in their public protestations that McKay was a victim of the law's failure clearly to define their rights to protect their property against chicken thieves, the inadequacies of the penalties imposed on chicken thieves, and the insufficiency of police protection of chicken farms. Their views received wide and sympathetic publicity.

The Attorney-General, in reply to published requests for the heavier punishment of this type of larceny, expressed his opinion[70] that the present maximum penalty of five years' imprisonment was adequate and that nothing was to be gained by increasing it.

Spokesmen for the police stated[71] that no extra men had been ordered to watch poultry runs for fowl thieves but that "where any series of thefts is reported we make special efforts to investigate and so protect the interests of the poultrymen". The day after these statements it was reported[72] that

[70] According to "The Herald", (Melbourne), June 3, 1957, p. 13, col. 5.
[71] *Id.* col. 7.
[72] "The Sun" (Melbourne), June 5, 1957, p. 5, col. 4.

Glenroy, the suburb where McKay lived, was to get more police protection, to which the Chairman of the Poultry Committee of the Australian Primary Producers Union is reported[73] to have said, "but the trouble with poultry thieves is that they are all over the State, not just at Glenroy".

The refusal by the High Court of special leave to appeal intensified the public campaign, the Secretary of the National Utility Poultry Breeders Association saying,[74] "Poultry thieves will think we are too frightened to shoot now and a gun is the only thing that worries them".

Various branches of the poultry industry petitioned the Attorney-General for McKay's release. A group of residents of the Glenroy district also petitioned.

The three daily newspapers in Melbourne, were frankly on the side of those criticising the state of the law and campaigning for McKay's release, the "Herald" commenting[75] editorially that "there is evidence that the general body of law-abiding people would have taken a more lenient view of the case of McKay than did the courts before whom he was tried". The "Sun" editorial took the same line[76] — "The State Government would be aiding the cause of justice as ordinary people understand it, if it showed clemency in the case of Gordon McKay, the young poultry farmer who is in goal for having shot a thief on property he was guarding".

Then it was reported[77] that six of the jurors who tried McKay had, on February 19, the night the trial ended, offered the defence counsel their jury fees, a total sum of £30, to give to Mrs. McKay. The defence counsel properly refused this money, which was handed to a reporter who undertook to send it to Mrs. McKay in the maternity hospital where her fourth baby had recently been born. The report of this gesture of the six jurors was delayed for over three months; by this time it had become of significance to the campaign.

The whole tone of the press reports of the case was to stress the provocation to which McKay had been subjected and to infer either that the state of the law was that anyone who shot and killed a thief would be convicted of manslaughter at least, or that normally the law did not move against people who shot thieves but that for some unexplained reason of persecution McKay had been convicted.[78] The issue was posed as whether or not a poultryman had a right to protect his property from thieves. The relevant legal principles were ignored and the balance between, on the one hand, the threat to the property and the need to prevent the felony and arrest the felon, and, on the other, the means used by McKay to effect these purposes, was nowhere clearly reported.[79] Nor did it emerge from the press reports that a jury, directed to weigh these values, fully conscious of the deep annoyance to McKay of the persistent thefts, had yet convicted him, presumably seeing him as executioner rather than as protector. One columnist offered the quin-

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[73] *Ibid.*

[74] According to "The Herald" (Melbourne), June 4, 1957, p. 3, cols. 6-8.

[75] June 4, 1957.

[76] June 5, 1957.

[77] "The Herald" (Melbourne), June 5, 1957, p. 1, col. 8.

[78] Clive Turnbull (in "The Sun" (Melbourne) June 4, 1957, p. 6), expressed the latter view as follows: To McKay,who might echo the words of the Scotsman . . . "I didna ken!" We, as a community, reply, "Well, ye ken the noo!" We are really taking it out on McKay.

[79] The need for such a balancing of competing interests is well-stated by Dicey who saw the legal principles here as "a compromise between the necessity, on the one hand, of allowing every citizen to maintain his rights against wrongdoers, and the necessity, on the other hand, of suppressing private warfare. Discourage self-help and loyal subjects become the slaves of ruffians. Overstimulate self-assertion, and for the arbitrament of the Courts you substitute the decision of the sword or the revolver". A. V. Dicey *op. cit.* Appendix, n. iv, pp. 489-497.

tessence of this misreporting[80] — "McKay, goaled for 18 months for a poultry thief's manslaughter, was a victim of the letter of the law". Fed with this type of absurdity a majority of the public formed the view that McKay was improperly convicted and excessively punished.

V. THE POLITICAL DECISION

On the fifth day after the rejection by the High Court of McKay's application for special leave to appeal, and at the height of the press campaign for clemency for McKay, the Attorney-General announced the decision of the Governor-in-Council to release McKay. It was reported[81] that the decision to release McKay was made personally by the Attorney-General who also fixed the terms of McKay's release — a bond in his own recognisance of £100 to be of good behaviour for thirteen months.[82] The Attorney-General is reported[83] to have said that he had taken into consideration the three months McKay had spent in goal and "while in no way condoning the offence it was felt in all the circumstances that it would be proper for me to recommend to the Lieutenant-Governor that clemency should be exercised".

Sociologically, perhaps the most remarkable aspect of the Attorney-General's decision was its timing. If, say, three months after the rejection of McKay's special leave to appeal by the High Court, that is to say, six months after his incarceration, he could have been relatively quietly released, the best interests of the community and of McKay might have been served. To release him at the very peak of an intensive newspaper campaign and on the fifth day after the High Court's decision could not fail to be construed by the public as a reflection both on the state of the law and on the judiciary. That public opinion should be focused on any inadequacy of the law is, of course, an entirely desirable thing; but that the weight of the Executive (which is responsible for the administration and enforcement of the law) should be added to a campaign of criticism in which the state of the law and the legal processes are consistently misrepresented can surely have only socially mischievous consequences.

On release McKay expressed his desire to be reinstated in his job of postman. The Director-General of Posts & Telegraphs promised sympathetic consideration of McKay's request and subsequently, waiving general Federal civil service practice to the contrary, reinstated McKay. Various branches of the poultry industry then took steps to raise funds to defray McKay's legal expenses. McKay is reported to have said, when expressing his desires to be re-employed as a postman: "But that still won't pay me for the time I spent in gaol". Unlike Mr. Purcell of County Cork, McKay has, as yet, not been knighted.

There is no intention here to advocate the infliction of any greater suffering on McKay and his family. It is submitted, however, that an essential value for society to maintain and protect is that of the sanctity of life; that the function of the criminal law is not only to punish the offender but to educate

[80] J. Hetherington, "The Age", June 6, 1957, p. 1, col. 1.
[81] "The Age", June 6, 1957, p. 1, col. 4.
[82] Crimes Act, No. 5664 (1928) — No. 5917 (1955) s. 564: "The Governor in all cases in which he is authorised on behalf of His Majesty to extend mercy to any person under sentence of imprisonment may extend mercy on condition of such person entering into a recognizance before a justice as hereinafter mentioned".
[83] "The Age", June 6, 1957, p. 1, col. 4.

the community in orderly and peaceful group-living; that the actions of the judiciary and jury in this instance were a sensible discharge of that function; that the press ignorantly and irresponsibly demanded interference with these processes; and that the governmental authorities unwisely yielded to their demands. The community does not progress from violence to order by allowing too free a rein to violent self-help; the lessons of history, of comparative sociology, and of political institutions establish this beyond question. In their thoughtful endeavours to balance the need to allow a reasonable degree of self-help and some measure of law-enforcement responsibilities to the individual citizen, and the need not to permit any unreasonable violence to achieve these ends, the courts in *McKay* effectively applied changing and maturing common law principles to a difficult social situation. It is regrettable that their work was largely undone by a misinformed public opinion and by precipitate, irrational, political action.