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IN THE SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA AT DARWIN
No. 111 of 1995

Case Study: "Self Defence at Trial"

THE DIRECTOR OF PUBLIC PROSECUTIONS

V

HELEN PATRICIA SECRETARY

CORAM: KEARNEY J

REASONS FOR RULING ON CROWN SUBMISSION

(Delivered 12 December 1995)

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The ruling on whether the issue of self defence should be left to the jury

The accused stood her trial from 27 November 1995 to 4 December, after pleading not guilty to a charge that at Kulaluk on 20 November 1994 she murdered one Darren Nelson, her de facto husband. After the Crown had called its witnesses and closed its case, the defence called the accused and an expert witness Dr Lawrence. The defence case closed on Friday afternoon, 1 December. In the absence of the jury the Director of Public Prosecutions Mr Wild QC then submitted that, on the evidence as it stood, the issue of self defence should not be left to the jury, in light of the proper construction of the provisions of the Criminal Code on self defence. Mr Lawrence of counsel for the accused opposed this application. I deal with their respective submissions later. On Monday morning, 4 December, I ruled orally on the Crown's submission as follows: □

"I have considered the issue over the weekend and I express my opinion as follows and rule as follows.

I consider on the evidence of [sic, in] this case, taken in [sic, at] its highest in favour of the accused, that she cannot rely on section 28(f) of the Criminal Code to contend that her shooting of the then sleeping man, Darren Nelson, was justifiable homicide.

In other words, on the evidence, I consider there is no case fit to go to the jury on the basis that the Crown may fail to establish beyond reasonable doubt that this killing was not justified because the accused, when she fired the rifle at Darren Nelson, may have been acting in selfdefence in terms of the Code.

I'll give reasons in due course for that opinion, but I indicate it turns on the construction of the relevant provisions of the Code, particularly paragraph (f) of section 28, and definition (b) of the term 'assault' in section 187."

These are the reasons for that ruling, requested by Mr Lawrence.

It is convenient first to note how the Crown and the defence framed their respective cases.

The Crown case, as opened

In opening the Crown case to the jury Mr Wild observed ☐

"there's not much argument - - - that Helen Secretary shot her husband, the argument will be whether she was justified or excused in [shooting him]; and that's what the evidence is going to be about, and that's what the argument will be about during the course of this case."

He referred later in his opening to the need for the Crown to prove that the killing was "unlawful", and that this raised "the question of justification or excuse". He referred to the partial excuse of provocation, before turning to justification in terms of the "other possibility" of "self defence". As to that, he referred to various statements by the accused after the shooting which³ indicated that there was some degree of necessity, as far as she was concerned², to shoot the deceased; and that it was on that basis that the Crown expects self⁴defence to be an issue here². He said:☐

³You might think, just on first blush, that the fact that the man was then asleep makes it difficult; and that's the view the Crown will urge you to take in due course.²

He then referred the jury, in essence, to the provisions of ss28(f) and 187(b) of the Code, in relation to the evidence which the Crown would adduce, viz ☐

³[The] Criminal Code doesn't allow the taking of a life, except in very special circumstances. And, for example, if a person - - - deliberately kills somebody, in order to defend [herself], it must be from such an assault - - - that [she] was then in fear - - - of death or grievous harm being caused [to her].

The [Code] defines 'assault' to mean either an actual assault ☐ and you'll understand clearly enough what that is, someone coming at you ☐ or [a] threatened assault. - - - a threatened assault - - - might be what this case is about. The man is asleep, so he can't be actually assaulting; but the record of interview indicates that when he woke up he was going to give [the accused] a hiding. That's what [the accused] says. So, the assault must be an actual assault or a threatened assault where the person - - - being the person

you're about to kill - - - [has] an actual or apparent ability to effect his purpose, and the purpose is evidenced by bodily movement or threatening words.

Think of that in terms of this sleeping man and of the threats that [the accused] says he made before he went to sleep, and see whether or not self-defence, in your mind, flows in that case.²

The Crown then adduced evidence over the next 4 days.

The Defence case, as opened

Before going into evidence Mr Lawrence opened the defence case to the jury at some length; it occupied some 17 pages of transcript. He stressed that ☐

- - - [the accused] says she's not guilty, by virtue of self-defence. That is the defence case here.²

Having noted that the charge involved the shooting of a man as he slept, Mr Lawrence stressed the need to examine³ the whole picture² since³ the law does in certain circumstances justify, allow, excuse, the taking of another's life², and in this case the accused was acting in self-defence. He rightly stressed that the burden lay on the Crown to negative self-defence, beyond a reasonable doubt.

He took the jury to some of the concepts in Code s28(f), and referred to 'Objective' and 'Subjective' tests. He then referred to the circumstances in which force causing death is justified under Code s28(f), and to the evidence pertinent thereto in this case, viz: ☐

³What the [Code s28(f)] says is that where the force used by an accused person is likely to kill or do serious injury, that's justified if the following conditions are satisfied.

Firstly, if there was an assault or a threatened assault; and I'm sure it's obvious to you now that we're relying on the concept that there was a threatened assault here upon the accused, which was being defended by her.

Secondly, at the time the nature of that - - - threat of assault was such as to cause [the accused] reasonable apprehension that death or grievous harm would result. - - -

And thirdly, the force used by her was not unnecessary; that is, it didn't go beyond what was reasonably necessary for her self-defence.

- - - [As to the assault by way of threat] we rely on the words uttered by the [deceased] lying down on a mattress in the bedroom: (E)When I wake up it's going to start, I haven't finished with you yet'. [The accused said]: (E)He was going to wake up and he was going to kill me, you know; because he said he was going to do it, I was scared, feared for my life'. [That is the accused's] first explanation to the police in that interview that you saw yesterday afternoon.

Now of course the Crown will be saying - - - [these words of the deceased are] relatively innocuous words, we shouldn't really fear anyone, and if they did cause them any fear then they wouldn't react in the way this person did. And of course - - - semantically the words themselves, if - - - looked at - - - in a vacuum, are relatively innocuous; but we're not going to look at this in a vacuum, we're going to look at it within the backdrop of the whole picture. We're going to look at it in context.

Another way of describing self-defence, which you'll have to be across to judge this

case, is [this]: if the accused person reasonably believed that the person she killed was about to do her similar damage or grievous harm, and by virtue of him either coming at her or threatening her to the same effect and an ordinary person, similarly circumstanced, would be likewise reasonably fearful, then [she is] justified in using [that] force against that person which [she] believes is necessary and proportionate to the situation. - - -

An easy example, of course, is if X is coming at Y with a gun or a knife, and Y picks up a gun or a knife and kills him ☐ ☐ We haven't got that here, of course. Another example, less simple, would be, and the law accommodates this: a situation where a terrorist has a hostage imprisoned in a locked room, and he tells his hostage (On the third day, I'm going to kill you', but on the second day the [hostage] manages, by good fortune or whatever, to disarm his captor and kill the terrorist.

Self-defence would accommodate that. You would decide whether that person was justified, whether that killing was unlawful; and [to do so] you would look at the law on self-defence, and decide whether the Crown had proved beyond reasonable doubt that it was unlawful.

In many ways you might think, on the evidence you've heard so far, that [the accused] wasn't a million miles away from being a hostage in her own home.²

Mr Lawrence said that the defence did not³ really have much of an argument with the prosecution case - - - [as to] what happened and what was done.² He stressed that the defence was concerned, however, to reveal the full history of the relationship between the accused and the deceased, so as to put in context³ what happened and what was done.² He said: ☐

³In many ways the defence case will be the story of Helen Patricia Secretary. It will be a life story, by necessity, a somewhat sad and unfortunate life in most respects, something that you might think shouldn't happen; but it has, and you must take it on board when you judge her, and you must take it on board when you judge what she did and why, and what she thought when she did it.

The defence case - - - is that it's about one thing; it's about fear. It's about fearfulness.

- - - the essence of this woman's plea of not guilty by self-defence, by necessity requires her to tell the court - - - about the things that were done at the hands of the deceased over a period of years to various people, [to herself] and the children.

- - - and what is - - - crucial to the defence case is that, over a period of years, there was a physical and psychological warfare committed by [the deceased] upon this accused and their children; verbal abuse, racial abuse, physical assaults, psychological torture committed on the accused. And it is absolutely all ☐ important for you to know that, to properly judge this woman's actions on 20 November last year.

- - - You can't acquit her because you think this is a case of [the deceased receiving his] just deserts. - - - we ask for an acquittal because [an acquittal] is this woman's entitlement in law. Self-defence, within these facts, will make your verdict 'Not guilty' - - - .

It is a case about domestic violence. It is a case about cruelty, power, subjugation, denigration, humiliation, physical assaults; it is a case about fear. The defence case is -- that those aspects were escalating at a rapid rate of knots, climaxing in the almost inevitable events of 20 November last year. -- the deceased, who was a wife basher, had graduated from alcohol and marijuana to chemical drugs. He was injecting [himself with] chemical drugs, drugs purchased for him by his wife, his slave, the accused. Over the last few months his behaviour became even more abusive, more violent, more scary.

We now know that it got to the extent where [the accused] attempted to bring a restraining order against him [on 21 October 1994]. To what effect? Very little. Probably petrol on the fire. That was breached. We've heard that evidence this morning.

So we get to October/November [1994]. The escalation continues. You have the deceased, a man who's -- to most intents and purposes, certainly in the last 24 hours of his life -- derailed; on drugs, acting wildly, violently. There's firearms aplenty in the house; there's ammunition aplenty in the house. -- the defence case is [that] on the facts, you will find that death was on the menu in those last few days, weeks.

Things had got so bad, that the women at Kulaluk had actually got together because of their worries and fears. -- They went -- to the police station, to no great effect. They were worried, as you now know from their evidence, about [the accused] suffering at his hands. They were worried because of the guns. The police come and seize the guns [shortly prior to 18 October 1994] and what does that do? If anything, the escalation has been fanned.

Shortly after this, the guns -- taking, [the accused] is beaten by him with a belt. Shortly after that, as she escapes with her children, she goes to Nightcliff Police Station [on 18 October 1994]. Then she goes to court [on 21 October 1994]; she gets a restraining order banning him from Kulaluk. She stays in the women's shelter a few days [from 18 to 21 October].

The [deceased] manages to take a couple of the older daughters out to Gunn Point for a while [from 18 to 21 October], and while he's out there, he writes her a letter, addressed to Helen, delivered to her by Daphne Talbot [at] the women's shelter. And that letter will go in as evidence in the defence case. It will chill you, ladies and gentlemen, it will chill you because in many ways it's a classic letter from a repentant, apparent wife -- basher, seeking forgiveness, promising he will change his ways and the like, and in the letter there is a sinister lie where he tells her that he and [Darren] Junior have got rid of that last rifle [the .308, later used in the killing on 20 November]. Remember we heard Sergeant Smith this morning saying that [the accused] made another statement to police after they seized the 3 [sic, 2] rifles, about her concerns about the last rifle.

Well the deceased allayed her, or attempted to allay her fears, about that gun, by lying to her in the letter. He said that he and Junior had thrown it in the bin at Rite Price. That will be evidence in the defence case which will go to this gradual escalation of violence, and the gradual escalation of fear.

-- what is important to the defence in this case is that you are apprised of the full factual background, the whole scenario, without which you can't properly judge the accused person.

Our factual background is a lot -- fuller than -- the Crown evidence in chief, and

where our facts differ ☐ and they don't differ as [sic, so] much ☐ the difference [with our case is that the flesh is put on the bones; and what you must appreciate is that this factual background is essential, particularly in those last couple of weeks [to 20 November]. And what we will be saying the facts are, which are relevant to your assessment of this case ☐ and ☐ it's not just the five or six or three minutes in house 10 at 11 o'clock or whenever on 20 November, it's all this [background] you have to know about.

And what the defence case is, is that that [return by the deceased on 21 October of the 2 girls] was bait laid knowingly by the deceased. You heard [the accused] in her interview go on about [the kids, the kids', GE Why didn't you leave him?' said Sergeant Smith, the obvious question, and I'll come to that in a minute. She says: GE There was the kids, the kids, there was always the kids'.

What's most important to [the accused]? You've heard that evidence already: her kids, her family comes first. And so that's the defence case.

The deceased, the person he was, that you now know him to have been, put those children back as bait and it worked. She bit. She went back [from the women's shelter] to her country, her people [at Kulaluk] where she has familial ties through to her grandmother, Topsy Secretary, and she went back to be with her children.

And to and behold, what happens? A day or so later, the deceased returns, and you'll hear evidence from [the accused] that he returned on a fairly regular basis, despite that court order banning him from Kulaluk.

--- we will be relying upon the incident --- round about the --- 10th or 11 November. We're talking about a week to go [before the killing]. This is the defence case, this is the full picture, the picture you need to know. [The deceased] turns up at night. Jacqueline [the accused's 15 year old half-sister, whom the deceased had impregnated, who's been through her worries and traumas, via home with father and then at the women's shelter herself, she's come back [to Lynette Shield's house at Kulaluk]; went to the Bingo, come back and there he is on the doorstep, drunk aggressive, intimidating her; intimidating 12 year old David, Lynette's son.

He hits [David]. Lynette's concerned. She goes up [to the accused's house]. She complains to [the accused]. It's [the accused's] husband, it's [the accused's] restraining order, and it's Lynette's son [who has been hit], and it's Lynette herself [calling to the accused]: GE What are you going to do about [the deceased]? You've got to get him off [the premises at Kulaluk]. [The deceased] follows [Lynette] aggressively to [the accused's house]. He [there] intimidates Lynette. He attempts to assault [Lynette]. Technically in law, it probably was an assault; he pushed the bed [on the verandah of the accused's house] towards her. Lynette decamps.

--- [Lynette] calls the police. ---

The Police turn up that night [at the accused's house]. --- And things seem to reconcile. [The accused] gives some explanation [to the Police] that [the deceased is] in bed, he's asleep, everything's all right, and [the Police] leave. And [from] the next day he remains [at the accused's house]

And what you know on the factual chronology of this case is, that the next week, which is about the last week of Darren Nelson's life, the whirlpool increases. The escalation increases. His behaviour ☐ think of his behaviour. You must, for it is he that we feared.

What does he do in that week? Assaults continue. He describes everything as 'Happy families'. Well, you heard the Crown witness, Lynette Shields, on 'Happy families', sister of [the accused], sister ☐ in ☐ law of [the deceased], knowing him for as many years and to such an extent that she knew him. She knew there was nothing happy about that family. And [the accused] will tell you there wasn't anything happy. There was nothing different to what there always had been, only it was worse. It was a house of fear, and 'Happy family' was a ruse.

It was such a 'Happy family' that [the deceased] was seen to sit in the kitchen with family photographs, cutting his head out of them. Complaints [to the deceased] were issued by [the accused]. Assaults were meted out [to her by the deceased], as a consequence. You've heard that evidence already. That's how 'Happy' a family situation we were in here.

Fear, worry, 'Apprehension' ☐ that's the term that the Criminal Code uses ☐ are all rising as the weeks go on. [The deceased is] telling people, Lynette Shields, he's going to kill his wife; he's going to shoot his wife. He's telling people he's dug her grave. He's on drugs.

This is the 'Happy family'. This is the quintessential backdrop upon which you, ladies and gentlemen, the defence will say, have to put this 2 minutes on 20 November into context. You can't judge a citizen charged with murder, in a vacuum.

That takes us to the weekend, [of 19 and 20 November]; and it gets worse, believe it or not. 19 November, the Saturday, we're going down to Yarralin. You've heard some of the evidence now, and [the accused] will give the evidence of that trip, and what a trip! We're dropping off Victor Campbell and Jeanita and the kid, Joseph I think [at Yarralin].

Now, we would ask you to look at that evidence and look at how people felt then, when you judge [the accused] and what she did at around about 11 o'clock on the 20th, the next day. On the evidence of the Crown so far, clearly [the accused] didn't want to go [to Yarralin], because she was scared. On the evidence of the Crown so far, her sister Lynette didn't want [the accused] to go, because she was scared for [the accused's] life. Nothing less [than her life] either. We're not talking about hidings here, more hidings; we're talking about escalation, growth, deterioration, death is on the menu. - - -

'Why did you want to go to Yarralin?' asked Mr Wild QC. 'Because [the accused] was going', answered the witness [Jacqueline Treves]. 'Fair enough. We move on. Cross ☐ examination by Mr Lawrence: 'Why, Jacqueline, did you want to go to Yarralin because [the accused] was going?' 'Because she was scared for [the accused]. That, in a nutshell, gives you the difference between what the defence case is, which is the full picture, and what the Crown case is, which is a skeleton.

'[Jacqueline's] sister [the accused] fears for her life; she [Jacqueline] accompanies her. Lynette doesn't want [the accused] to go, because she fears for [the accused's] life. [The accused] doesn't want to go. - - - She goes. But bear in mind this, we're in the territory now of graves being dug, threats of death, not wanting to go out bush.

You've heard the evidence of Lynette, the Crown witness, telling us that [the accused]

went over to her to say: (E)Don't baby-sit for me. He wants me to go out bush with him and I don't want to go'. Lynette said: (E)Yes, I'm not baby-sitting because I'm scared for you'. Lynette's husband, likewise. That's the backdrop.

Then on the Saturday [19 November] before we go [to Yarralin], we're assaulted, for good measure. Threatened with a knife. Rise in tempo. [The deceased] points the knife at [the accused's] face, according to a Crown witness, Jacqueline Treves. That's the territory we're in, that's the country we're in, the geography that you're in, [in which] you have to judge this woman. The defence relies upon that.

Forget the vacuum, forget the two minutes [at 11 am on 20 November]. Don't compartmentalise. It defies reason. It's unfair. Wouldn't be right.

Threatens us with a knife, and then what does [the deceased] do? - - - He cuts the telephone. See, the defence is saying that all the avenues are being cut off.

We went to the Police, we got the restraining order. What does that do? It flames the fire. Now there's phones cut off. We go down [to Yarralin]. It's a relatively uneventful trip down. We're forced to take (E)No Doz' [tablets]; we don't want to. We get rid of the other people [at Yarralin] and the tempo changes, the atmosphere changes.

What you then must consider, the defence will say, you must take on board that last 12 hours or whatever it was from Yarralin back to Kulaluk, which all culminated in the death of Darren Nelson.

We have a trip which is nothing short of a terror trip; [the deceased is] speeding, he's driving off the road, he's swearing, he's abusing [the accused]. He gets out the car a couple of times and wanders off into the bush and leaves us there. Consider his conduct when you consider what we perceived [on Sunday 20 November] he was going to do when he woke up; and he told us he wasn't finished with that, hadn't started.

Here's a man shooting up drugs, going off into the bush with his wife and his girlfriend who's 8½ months pregnant while all this is going on. How would you think the defence will say, if you were in her shoes knowing him as [she] did, and watched what's happened to him over those last tragic weeks, months, of his life?

Eventually we get home [on Sunday morning 20 November] and it's [into] the last hour or so [before the killing] happens, and the defence case is that - - - there's no great difficulties with the factual chronology there. [The deceased] comes in [to the house], he's angry, he's in a rage, he's shouting, he's swearing, he picks on Tina [the accused's 9 year old half-sister], he picks on [the accused], he throws [Tina] out; Lynette doesn't take her [away immediately] though, because she's worried for [the accused]. All these things the defence asks you to rely on, when you consider the defence case.

[The deceased] comes out [to the kitchen], slams the glass [of water] on the counter, throws water around. People there are worried; [the accused is] worried, Lynette's worried, Jacqueline, they're all worried. Then he gets [the accused] in the [bed] room and he assaults [her], punches [her], throttles [her]. He tells [her] to make up the bed, she does, and then she sends young Junior to the shops and he comes back. And then [the deceased] orders [the accused] to get the cassette, she does that, and when she's back in the [bedroom] he issues those threatening assaulting words: (E)When I wake up it's going to start'.

It's at that point, ladies and gentlemen, [the accused] will give evidence, that's the point

when she decided to do what she did, by virtue of the fear, by virtue of the graduation of [those] years, months, weeks, of fear and terror.

Now, that is the defence case. What we will say is that what she did in those circumstances was reasonable. We will say that she genuinely felt, with good reason, that when [the deceased] arose from his slumber her life was in danger. What we say is, what she did because of that was entirely proportionate, necessary, to avoid that terminal danger that she found herself in.

--- you can't really divorce yourself in a case like this totally from emotion because the defence case here is one of fear, and fear is an emotion. So you have to grapple with that, by necessity.

You will hear evidence also from the defence which very much takes you away from emotion and passion, and sympathy, and drama, because the defence is calling a scientist to give evidence, an eminent forensic psychiatrist [Dr Lawrence] of 30 years standing.

And that forensic psychiatrist has examined [the accused] and she gives a diagnosis of [her], by virtue of spending time with her and learning about her life and, in particular, her relationship [with the deceased]. And that forensic psychiatrist, more specifically, is going to give evidence in this court --- on what is known as the EBattered wife syndrome.

Now you've probably heard of the EBattered wife syndrome. It's one of those things that's reared its head in recent years. It's almost a cultural indicia of our modern times. It sits alongside similar things like AIDS, youth suicide, the increasing levels of violence which modern mankind has found itself in; and EBattered wife syndrome is one of those things. It stems from domestic violence --- which our society seems to be almost riddled with.

And she will give evidence of what that is and, more importantly, --- how it affects [the accused]. She will describe the syndrome. --- it's a mental, psychological, psychiatric effect experienced by women who have experienced what the experts say is a ECycle of violence, at the hands of their husbands, wife bashers.

They're continually battered, and what happens is, the ECycle is that the husband bashes the wife and there's a sort of scheme to the thing whereby tension builds in the relationship, physical assaults occur. It's often followed by impassioned pleas for forgiveness and reconciliation, and the wife accepts such pleas, takes the husband back in. Tension builds, and he does it again.

That's a very general description of it. It has its nuances and its differences,

but generally speaking, that's the cycle and it gets [sic, goes] on and on.

--- this is a forensic psychiatrist going to give expert evidence about this syndrome, which is a concept that exists ☐ if you are a woman in that situation, it affects you. It affects the way you perceive things; it affects [the way] you apprehend things; it affects the way you judge things. In a sense, you're basically beaten into a different perspective.

Now most of the effects it has on women in situations like this, needless to say, are negative, but you'll also hear that it can actually enhance women's apprehensions and judgments and perceptions. It can actually increase the efficiency of their radar, their

Battered wife syndrome = no self esteem
antenna, as far as what their husband's going to do next.

They have, by necessity, through however long it's been going on, developed an acute sensitive antenna which tells them, more accurately than anyone, needless to say, what their husband's going to do next, and to what extent. And so for instance, remarks about to be severely beaten or killed.

- - - You might be thinking, 'Well, why didn't she just leave him? Why didn't she just cut and run?'

Well, on the facts in this case, the defence will be saying, you don't need an expert, really, in that regard to see why this woman didn't, couldn't get out. It'd [been] done ☐ (E've been there, done that, just made the thing worse'. The phone's cut, she can't drive; all those physical aspects aside.

But the expert will also say, as another stick on that pile, that women in a situation like that develop ☐ a concept which is known as ☐ (E'learned helplessness'. By virtue of the continual beatings, their self-esteem is demolished. They've got little [self-esteem] or none ☐ negative perhaps, in some instances ☐ and by virtue of that, they're just incapable, unable to have the appropriate volition, gumption ☐ call it what you may ☐ to make that move.

Now the defence will be saying to you probably ultimately, that's only one aspect. Look at the physical situation here, look at the history anyway. Where was [the accused] going to go, with 6 kids; phone cut; can't drive? Been to the police station, along with the other women. Where was she going to go? She told you in her record of interview, - - - that if she went to the women's shelter, he was going to climb in and kill her - - - Doctor Lawrence is brought to this court by the defence as an expert witness. She will give her evidence objectively from her experience and learning, and you will find her qualifications are - - - nothing short of eminent. She's been in the field for 30 years; she's an expert in domestic violence and, in particular, homicides in domestic violence. She will tell us a lot which is relevant; more background, more factual aspects which you need to know.

She will then particularise by giving evidence about [the accused] - - - her patient, having examined her, and the relationship which [the accused] (E'employed', to use a ridiculously inappropriate term, and how that affected her; and, most importantly, how it affected her on the morning of Sunday 20 November of last year.

These are - - - apprehensions at the time when [the deceased] said those words; vis-a-vis what she did to face it, as [to] its necessity or its proportionality.

So that will be the defence case to this charge, ladies and gentlemen. It's a matter of filling in the gaps, we say, putting the full picture to you factually, historically, and allowing you then to judge in the appropriate geography this all-important question.²

It may fairly be said that there was evidence which, if accepted by the jury, could warrant it finding that the relationship between the accused and the deceased was as suggested by Mr Lawrence at pp6 ☐ 12. It is desirable, however, to refer to some of the major parts of that evidence; to that I now turn.

Some aspects of the evidence

The Crown case, in essence, was as follows. The accused and the deceased had lived in a de facto relationship for some 10 and a half years. They had 6 children. About 11 am on Sunday 20 November 1994 she loaded his rifle, entered their bedroom where he was then asleep, pointed the rifle at his back from a distance of some 70 centimetres, and shot him dead.

Different people testified that shortly afterwards she made differing statements to them, viz: 'I'm sorry, I didn't mean to do it', 'I'm sorry I shot him but him and Jacqui did me wrong', 'I loved him, I didn't mean to shoot him', 'I did it, I shot him, he forced me to do it'. The accused had no memory for what she may have said, apart from denying that she said she shot him because 'him and Jacqui done me wrong'. (As to that 'Ewong', she had found out when obtaining the restraining order at the court on 21 October, that it was the deceased who had made her 15 year old half-sister Jacqui pregnant).

(a) The accused's account to the Police on 21 November 1994

When interviewed by the Sgt. Smith next day, Monday 21 November 1994, after she had spent some time with her lawyers, the accused gave the following account. She said that she had 'shot him'; they 'had an argument when we got back from Yarralin [at about 9 □ 10 o'clock on the morning of Sunday 20 November]; they had left Kulaluk for Yarralin about 12, 12.30 on Saturday 19 November, arriving at Yarralin at about 9.30 or 10 o'clock that night. She had 'never been out there before'. When the deceased drove back from Yarralin with Jacqui and herself, he had 'started picking on me'; he did so 'for nothing at all'. She said that he 'hit me across the face twice'; he swore repeatedly at her and 'even tried to kill us [her half sister Jacqui and herself]'. This appeared to be by his manner of driving. She was 'scared' by his behaviour and his erratic driving on the way home to Kulaluk from Yarralin, and 'shaking'. She said to him on the way back that he had 'brought me out here to kill me'. She tried to jump out of the vehicle twice, but he 'pulled me back in'. He threatened that if, after they arrived home at Kulaluk, she called 'the cops, I'll smash your skull in before they get here'. She had seen the rifle in the back of the utility when they refuelled at Katherine, at 5 am on Sunday 20 November on the way back to Kulaluk. She said that on the way from Katherine to Kulaluk 'he tried to kill us a few times', by 'going off the road'. When they arrived home at Kulaluk 'probably about 9, 10 o'clock [on the morning of Sunday 20 November]' the accused was angry and swore at her because he believed his car jack was missing. He told the accused that her half sister Tina, aged 9, had to leave their house, and stay with another of her half sisters, Lynette Shields; he said 'I don't want no little T! cunt in my house, she's gonna be the slut like the rest of youse . . .'; when the accused protested at this he said 'shut your fuckin' mouth up'.

He swore at her when they were in their bedroom □ 'those fucking [Thursday Islanders], and I was a slut like my mother and sister' □ and when she answered him back he 'punched me in the mouth and then he grabbed me by the throat and he threw me on the mattress □ started to try and suffocate me'. He let her go and she went to arrange to get milk and 'EKimbies'. He ordered her to 'bring my fucking tapes'. After she did this, and put on the tape, he asked her 'where you fucking going now, you slut'. She also said that he called her names □ 'Eslut', like 'Edirty black cunt', everything he called me'. She told him she was going 'to check on the babies'. He told her □

³Hurry up and get in here I want you to scratch my own □ tickle my fucking back □ when I wake up it's gonna start □ I haven't finished with you yet.²

She then walked out 'to check on the babies', and when she came back to the bedroom 'he had his eyes closed'. She then walked out of the bedroom into the hallway, 'grabbed the bullet, went downstairs walked to the ute, grabbed the gun'. She described this terminal phase to Sgt. Smith as follows: □

SMITH: Who was there?

SECRETARY: Jacquie and Darren [Junior], - - - was sitting all on the lounge in the lounge chair and my daughters. Like I just wasn't myself like I just walked straight to the door and went downstairs to the ute, just grabbed the gun ☐ I loaded it and walked up the stairs, went through the lounge door. Jacquie and Darren [Junior] they seen me ☐ they probably thought Eoh she's just taking it back in the room'. Like Darren [the deceased] always gets everyone to put the gun in his room. Just walked in, see him sleeping on the bed.

SMITH: How was he sleeping?

SECRETARY: Sleeping sideways (inaudible). I just ☐ just got the gun like this and I just (inaudible) I don't know how ☐ I don't know how you like aim a gun or whatever. Just got the gun, I just closed my eyes and I just turned my head and just (inaudible) and when I heard the bang I just like it awoke me. Because what I was feeling then you know when I went to get the bullet I was thinking, I'm scared, I'm feared of my life, he's going to wake up, he's going to kill me like he said (inaudible). I can't let him kill me. I've got my kids ☐ I'm thinking of my kids. Why should he kill me when I haven't done nothing wrong? I always obey his rules, I've always got bashed, I never done anything about it, (inaudible) me. He wanted things, I'd have to (inaudible). He'd say one thing, I'd have to jump for it, if I didn't jump I'd cop it. (inaudible) call me names, hit my kids. When he hit my kids, I tell him not to do it. He'd tell me to shut up. I was, I'm bringing them up like a slut like I was, that's what he'd say, he'd always say my daughters are going to turn out to be a slut like you living in this Aboriginal community with these coons'. Your family. What's (inaudible) you know. (inaudible) scared for my life, feared for my life. Bashing me, insulting me, hitting my kids. When he came home from the bush that day he came to pick up some stuff, I was in the bathroom, he came in there and he assaulted me in there sexually.² [The last sentence was a reference to an earlier incident after the restraining order had issued on 21 October, and before the deceased came back to live in no. 10 about 10 November].

She described the terminal phase in another part in the interview, saying that she walked past the children to the bedroom where ☐

³He must have gone to sleep ☐ aimed the gun ☐ closed my eye, turned my head away and then all I remember is hearing a bang and I opened my eye ☐ I was feared for my life.²

Sgt. Smith asked her when she had decided to shoot the deceased; she replied: ☐

³Just when he, when he said to me that he was going to (inaudible) when he wakes up he was going to, he hasn't stopped, when he wakes up Ethere's going to be trouble' and Ethe's going to start'. E'I'm not finished with you yet, you know ☐ calling me names, Eslut' like Edirty black cunt', everything he called me. That's when I put the tape and I walked out ☐ that's when I grabbed the bullet. Went downstairs, walked to the ute, grabbed the gun.²

She also told Sgt. Smith, after relating how she shot the deceased: ☐

³I had to put up with him belting me and abusing me (inaudible) he was gonna wake up and he was gonna kill me you know because he said he was gonna do it ☐ I was scared (inaudible) feared for my life. And the next thing I just put the gun in corner, I was just screaming for help. Like he said to me E'I was his property, always be his property'. He

can do whatever he wants to me. He'd flog my kids ☐ supposed to be our kids ☐ he'd flog them, I couldn't do anything. (inaudible) he put our twins in a room and let them scream, I wasn't allowed to go next to them, I'd get hit.²

She told Sgt. Smith that a couple of weeks² before the shooting on 20 November she (Just walked out² after he³ whacked me right on the jaw.² This appears to be a reference to her exodus to the women's shelter on 18 October. This attack on her had occurred after the deceased compelled her to write down³ all the names of all the men that you've slept with, how many times you've fucked them²; when she wrote down some names under compulsion (her evidence was that she never in fact slept with any man other than the deceased) he had punched her, whipped her with a stick, and strapped her³ hard² with his belt saying:

³I'll show you who's in charge of this house. I don't muck around with sluts.²

He compelled her to say to her children³ I hate you²; she obeyed because³ if I didn't, he'd hit me². She related how she did everything that he ordered her to do, but for her pains³ he punched me off the chair, he grabbed me by the throat and started choking me.²

She had eventually walked out on 18 October 1994 when she fled to a women's shelter ☐ ³I was fearing for my life² ☐ until she obtained a court order on Friday 21 October restraining the accused, from coming into Kulaluk.

She referred to an earlier incident not long before her exodus on 18 October, when some of her female relatives, fearing for her safety, went to the Police; this resulted in Police coming to her house and seizing two unregistered firearms of the deceased. The deceased had blamed her at the time for telling the Police ☐ ³he pulled by the hair and knocked me on the floor, started kicking and punching me².

She referred to his hitting the children: ³he split my sister [Tina, aged 9] ear²; the young boy Darren³ had cuts all over him² from a beating with an electric cord. She said that she could not stop the deceased from ³flogging² the children; he would ☐ say: ☐

³You're my wife for life, you're my property, you'll never get rid of me; wherever you go I'll find you

She related how he came at her in the kitchen with a knife on the morning of Saturday 19 November 1994, before they left for Yarralin; he eventually stabbed it into the bench top. He then cut the phone in the kitchen saying: ☐

³You don't get the cops here otherwise whenever the cops can come you'll be dead, I'll beat your head in.²

When Sgt. Smith asked her³ why didn't you just leave him², she explained that she was scared², and that the deceased had said he had seen the women's shelter and ☐

³ - - - you can't hide from me, no matter where you go I'll always find you. You go to the women's shelter and it's easy for me to get in, I'll jump the fence if I want to, come in there and kill you. I'll kill you in front of whoever's there.²

She explained that she had taken the deceased back on 10 November, despite the restraining order, because ☐

³ I was scared for my sister Lynette's life because he was threatening her - - - he threatened to assault Lynette.²

She said he had been back for some 35 days², before the killing on 20 November. In fact, it appears to have been about 10 November when he returned to live with her.

She said that the reason other residents of Kulaluk were³ not game enough to come up and help² her, was that³ they know [the deceased] had guns all the time.²

She rejected Sgt Smith's suggestion that she had said to Darren Junior³ I'm sorry I shot him, but him and Jacquie done the wrong thing by me², or that the fact that the deceased had made Jacquie pregnant was a reason she shot him. Rather, she said³ I was fearing for my life². She told Sgt. Smith: □

³ I didn't mean to shoot him but I feared for my life, I was scared. I'm not an aggressive person, I don't.²

She said that the accused had once said to her: ³you either shoot me first, or I shoot you.²

She explained that: □

³ - - - that's why I was scared. I feared [on 20 November] that he was going to kill me when he woke up and I just couldn't put up with the way he treated me all these years and I never done anything wrong. You know he like before he went to sleep he said to me um ³I'm (inaudible) and find Out the truth who you been fucking,² that's what he said. I said³ that's not true²; yes it is, it's the truth². I used to go to the toilet in the shower, he said a piece of paper with a pen ³FI want to know who you've fucked, how many times you've fucked them, how many times you've come¹ things like that, (You're nothing but a moll¹. Even when I took him back he was saying things like that to me you know. I was fearing for my life because I didn't want him to treat me and my kids like that. I mean my nine year old she is an epileptic, she hasn't had a fit for three years, he'd still whack her in the head (inaudible) head but my kids like they were grown up people but they were little kids □ twins he I said he split my half □ sister's ears, he split me in the eye, he come back from camping one day, my young sister Anna had a tape of one of those punk tapes and it was Negro singer or something, singing □ he called me to go in the room □ I went in I sat on the chair and then he kneed me in the head, (inaudible) blood coming out of my head. He said to me that um (You like listening to Negro music because you like fucking TIs¹ and that he should get my daughters to fuck TIs. And he said (When you go up to the clinic you better not tell them what happened, you better tell them that you fell down, which I did.¹ I had to go back to that house because of my kids.²

This passage was a recounting of incidents which had occurred at various times. She said that she had received 11 stitches from the cut near her eye from the deceased's knee to the head,³ a few months back²; this was clearly the attack arising from the (FNegro music¹ incident..

She told Sgt. Smith of the beatings which the deceased had given her: ³Fat lip²; ³black eye²; ³lumps in my head²; ³boot me like a dog, kicked my head in like a dog²; ³he used to flog my kids, my babies²; ³he used to boot me (inaudible) on the floor, bang, smashing my head². She said³ I used to put up with it for years

She explained that she had not reported many of the deceased's assaults to the Police³ because I couldn't get out of the house². She said that the deceased always kept some of her children home if she went out somewhere² so he knew I had to go back for them kids.²

She described the deceased as³ a very twisted and violent man², though he had been ³OK² when for 4 years or so³ he gave up drinking, gave up drugs.²

She related how the deceased would inject 'speed' into his arm, and how on three occasions ☐ once apparently in September 1994 ☐ he had forcibly injected it into her arm.

Again apparently referring to the killing on 20 November she said to Sgt. Smith: ☐

³¹ I feared for my life and what I did I know I shouldn't have done it. One way or another I had to get him out of my life and then my kids', because he was going to kill me. My life and my kids' safety. Because if he wasn't going to kill me he was going to end up killing one of my kids which (inaudible) one of my kids he would kill one of my sister's ☐ that's how he was. I had to do it. I didn't want to do it. I'm their mother. He'd want to kill me. Like he said, I was his property for the rest of his life. I was no one else's. He treat me the way he wanted to treat me and my kids. He was in control of my life. (inaudible)

(b) The accused's testimony in court

In her testimony the accused gave an account similar to that in her record of interview of 21 November 1994.

As a child she had been bashed by one of her stepfathers. She had been with the deceased since she was 15 and he was 17 years of age. She had left him only once; that was on 18 October 1994. The deceased had commenced assaulting her, in 1986. After beating her, he 'always said that he was sorry, that he wouldn't do it again.' He 'blamed everything on me and yet I never did anything wrong.' She said that 'the only time he was good to me was when he was stoned' on marijuana. He was 'really jealous'; for example, when they were staying for 6 months with Lynette Shields in 1988 in house no. 6 at Kulaluk, if he was going out drinking he would lock the accused in their room until he returned ☐ then he'd come back and accuse me and flog me up. She described other instances of his jealous nature, which resulted in her being beaten by him. She related the incident where he had required her to write down the names of men she had slept with; in fear she had simply written down friend's names, but he then flogged her with his belt. She gave instances of the deceased's racist behaviour; 'sometimes I'd argue back with him, and I'd end up getting a flogging.' She described a flogging² as:

³ - - - he was punching me in the mouth, said that I got big mouth. He used to boot me. Sometimes he just, you know, chuck me on the ground and jump on my head. It was as if I was a basketball, my head was a basketball. Until I learned to shut up and not answer him back.²

She described how she had to wait on the deceased, hand and foot; 'if he wanted his drugs, I had to go and get his drugs' - - - ³.

She said that when she was President of the Kulaluk Community from August 1991 to August 1995 she was away from home 'most of the day'. However, the deceased would 'come to the office and advise me about things', and if she disagreed with him 'when I went home I used to get a flogging.'²

She had lived in house no. 10 in Kulaluk for about 8 months before 20 November 1994. In that period the beatings got worse ☐ 'he'd punch me, he'd swear at me, he'd boot me, in front of the kids sometimes.' She described some of these beatings, including the one referred to at p21 which had occurred in their bedroom after her half-sister Anna had played a tape of Erap's music by a black singer: ☐

³ - - - he said to me that, (EOh, you like listening to ☐ to black prick's music', and then he kneed me in the head and all I felt was this ☐ I could see stars and just felt this cold thing dripping on me. I looked at it. It was blood and I started screaming. (EWhy did

you do that for? He started screaming, he said, 'I'm sorry, I'm sorry, I didn't mean to do that'. He said, 'I'll get sister in law to take you up to the hospital'. He said, 'But tell them that you fell down, please, baby? Tell them that you fell down. - - - the doctors asked me what happened. I told them that I fell down. I had to have 7 stitches in [the] - - top of my eyebrows.'²

She described how the deceased would beat the children ☐ 'he used to flog the hell out of [her 9 year old half sister] Tina.'² She said: ☐

³He always said he was the man of the house, he can do whatever he wanted. We were his property, and if anybody tried to interfere when he flogged me or the kids they better watch out, that he'd kill them.²

She described how she found out that he was injecting himself with 'Speed' in house no. 10, and how this drug had made his behaviour worse. She told of incidents where he had forced her to receive injections of speed: ☐

- - - the second time he gave me [the injection], he called out to me, I thought I was dead. I had this sharp pain in my chest and I dropped back on the chair and he started panicking, wondering what happened and I'm trying to speak, but I couldn't. For some reason, I had my puffer with me, because I'm an asthmatic as well and I started puffing on the spray and the pain eased up. So I started swearing at him for what he was doing, I thought he was going to kill me and then I just walked out of the room, out of the bathroom.²

She described the incident when the Police had come and seized the deceased's guns; this had followed a visit to the Police by her half sisters, who feared for her safety, after hearing her screaming when the deceased had flogged her with his belt.

She explained why she had never left the deceased before 18 October 1994, viz: ☐

'Because Kulaluk is my home. I grew up there since I was little. I had nowhere else to go. It was always my home and my kids. And I was too scared to leave him because he always said to me that if I left him, he'd kill me, and then I'd say to him, 'If you kill me, what's going to happen to the kids?' and he'd say to me that he'd spend the rest of his life in gaol and no one would have the kids, and that's why I didn't leave him.'²

She described the incidents of physical and mental violence by the deceased which led to her fleeing to the women's shelter on 18 October 1994 with most of her children, and seeking the restraining order eventually made on Friday 21 October,³ the same day that I went home.² The deceased had meanwhile taken 3 of the children to a camp at Gunn Point ☐ but sent them home apparently on 21 October with a letter apologising and promising to reform.

The accused described how the deceased came back to house no. 10 several times after 21 October, despite the restraining order, and that on one such occasion he had forced her to have sex with him. She then related the events of the night of 10 November, involving the deceased's drunken assault on Lynette and her son David, and the Police attending at no. 10 on Lynette's telephone complaint. This in fact led to the deceased moving back into no. 10 with her, without her apparent objection at the time. She related how this had occurred: ☐

³[The accused] said to me: 'I don't open the door. If they [the Police] look for me, tell them that I'm asleep, because if they lock me up I'm going to come straight back for you'. So I did what he said. I opened the door and one of the constables said to me: 'EIs

everything all right? We hear there's been a disturbance'. And I said: 'EOH, he's gone to sleep'. And there was about four of them, and they said that they wanted to see where he was. So I showed them where our bedroom was and they had a torch and they torched the bed that he was supposed to be sleeping on, and he wasn't there. So we headed back down the hallway and they heard a noise in the toilet, and they torched it. He was standing on the toilet seat and then he jumped off. And one of the constables asked him what he was doing there: 'Apparently there's been a complaint'. And he said to the coppers: 'There's no complaint. It's between me and my wife'. He said: 'EI just want to go to sleep now'. And then the police left.²

She answered my question on this topic as follows: ☐

³Did you realise you could have asked the police [on 10 November] to take [the deceased] away, because he was in breach of the restraining order? - - - He said to me, before the police got there, that [when the police come you tell the police that I'm asleep, because if I come out I'm coming straight back for you'; and I always abided by Darren's rules, and what he said I had to do, and that's what I did. I told the police that he was asleep because he told me to say it, because if he would have come out, he would have come straight back for me.²

She also said: ³If I didn't say for him to stay there, he would hurt my sister [Lynette]².

She referred to further episodes of violence by the deceased in the last 10 days of his life, the fact that he was still on ³speed², and her fear during that time, when he wanted her to go on a trip out bush with him, because of his remarks about having dug a grave out there.

During this period she said: ☐

³There was still threats that he was going to kill me if he seen cops coming. He never mentioned anything about the gun.²

She referred to the incident involving the knife in the kitchen at house no. 10 on the morning of Saturday 19 November, as follows: ☐

³I was giving breakfast to the kids and - - - I started to wash up and clean up and [the deceased] walked into the kitchen and then he started accusing me of sleeping with some Island blokes and I said to him, [That's not true, why are you starting, why are you accusing me when you know I never leave the house, I don't do anything wrong?]. Then he picked up a steak knife and aimed it towards my heart and started going like he was going to jab me with the knife and I kept saying, [Don't, Darren, don't. Then he turned around and started stabbing the bench until the knife bent. Then he picked up another knife and he cut the cord of the telephone and said to me that [You won't be ringing the cops because you're a cop fucker] ☐ that's what he always called me ☐ [EBY the time they get here I'll have your head caved in and you'd be dead. This was before we left for the trip [to Yarralin].

He cut the [telephone] cord? - - - He cut the cord.²

She said she did not want to go on the trip to Yarralin; she was ³scared² to do so, because she thought she was going to kill me². She described the journey to Yarralin, and the incidents which occurred on the way back ☐ the deceased's swearing at her; his punching her; his screaming at the bush; his frightening her with a snake; his injecting himself with [Speed²]; and his driving too fast and erratically, while saying: ☐

³I'm going to have an accident. I'm going to kill us. I'm going to kill us.²

She said that after he hit a pole he³ started punching himself until he made himself bleed². She explained how she felt on the return trip ☐

³Scared; I was frightened. I feared that he took me in there to kill me. I thought that's what he was going to do to me. If I had no kids with me and he was taking me to a place that I'd never been, far away. Because with him trying to stab me that morning, I thought that this time he was going to take me out there and do what he said he was going to do to me.²

When they had returned to Kulaluk she referred to the deceased's anger about the missing jack, and his swinging the jack handle around. She said she³ just tried to ignore him², and cleaned up in the kitchen. Her evidence was: ☐

³What kind of mood was he in? - - - In a very very frightening ☐ to me, frighten me. He wasn't down. He was in a very cranky, angry mood.²

She then related how the deceased swore at 9 year old Tina, and required that Lynette remove Tina from the house. This made the accused cry.

She then related the final incidents before the killing: ☐

³EI went in [to the bedroom] and he wanted a glass of water and I said 'Eokay' and come out and got his water. And I took it back into him. And then I walked back out to the kitchen. And then he came out and he had a drink of it. He had a drink of the water and then he threw the rest of it at the ceiling in the kitchen, and then he put the glass down. He rammed it on to the bench. I didn't say anything to him. Then he walked back - - - and then he came back out and started accusing me again of things, sleeping with bokes, and calling me names that³ I'm just a slut like my mother and sister was¹ and I tried to argue back with him and that made him angry, because I don't argue back with Darren. He pulled his belt out and I looked at him and said: 'ENO, Darren, not that again .

The accused indicated that the deceased then made snapping noises with the belt between his hands. She continued: ☐

³I kept saying 'ENO, Darren, not that again'. And then he turned around and he said to Jacqui that: 'ESee Jacqui, if a wife doesn't listen to her husband that's what she gets'. And I said, 'ENO more Darren, not that again'. And then he called out to me to go into the [bed] room and I walked into the room and I went to the far side of the door near the balcony. And he started accusing me again, saying I was sleeping with a TI bloke, calling me names and running my mum and sister down. ☐ ☐ ☐ at that time he said that 'EThat's why I don't want little Tina in this house, she's just a little TI and that will bring TI's back into this community and I don't want my daughters mixing with TI people'. And because I turned around and said to him: 'EThat's not nice, to say things about people', he punched me in the mouth and grabbed me by the throat and threw me on the bed and started choking and suffocating me. And I tried struggling because I couldn't breathe properly. And then he stopped as if nothing happened. I asked him, 'ECan I go and ask little Darren to go and get some Kimbie's and milk?' and he said 'Hurry up'.²

She said she then sent Darren Junior off to the shop. Her account continued: ☐

3 - - - then he called me to go back into the [bed] room, which I did. He wanted his ☐ bed made up, which I did. I did the bed up and I started sweeping. Then someone turned a tape on outside. I don't know who it was, but it was his music that he liked listening to. And he said to me, 'Go and get the cassette player with my Cat Stevens cassette', so I went and got it. Didn't answer him back. I just done what he said, connected it up. And then he said to me, 'Where are you going, now?' And I said to him I wanted to see how them kids ☐ and if little Darren came back. And then he got off the bed (inaudible) and he leaned up, I thought he was going to get up, and he looked at me and he said to me that: 'EHurry up, because I want you to come back and tickle my back because I'm going to have a little sleep and, when I wake up, I'm fucking (inaudible) haven't fucking started'.²

She described the look on his face at that time as 'a threatening look'. She continued with her account: ☐

And when he said that to me, I was like a little girl ☐ ☐ ☐ it was like I was this little girl that feared for my life, and when he wakes up he's going to kill me. I walked out of the room and I grabbed a bullet from the cabinet and I walked down to the ute and got the gun, loaded it the way I used to see him do it. I walked up the stairs and into the living room, passed Darren and Jacqui and then I walked straight down the hall into our bedroom. He was asleep. I stood behind him and just pointed the gun. I closed my eyes and all I remember is this 'Ebang'. With the 'Ebang' it like woke me, and I seen Darren laying there and I

ran round and put the gun against the wall, and I seen the blood, and started screaming for help.²

She described how she felt at this time: ☐

³ I felt like I was a little infant, I'm going to get a hiding again. And then he just told me he's going to kill me when he wakes up.

- - - how did you feel from the time he said that, to the time you went down the stairs, got the bullet, loaded the gun, came back up the stairs and walked down into the room? - - - I feared for my life, and then when he wake up he just going to kill me.²

In cross ☐ examination, the accused told Mr Wild that when she got the rifle from the utility and loaded it, she was thinking 'he's going to kill me when he wakes up'. This time she said 'when I left the room, he was awake'; this appears to have been a reference to the penultimate time she left the bedroom³ to check on the babies². Then came the following passage: ☐

³ Yes, why did you load [the rifle]? - - - In fear for my life then, when he wakes up. He was going to kill me like he always said he was going to do.

Yes, but the question is, why did you load it? - - - I don't ☐ I don't know.

What were you going to do with it? - - - Defend myself. That when he wakes up, he was going to - - -

Were you going to wait till he woke up - - - ?---No, I - - -

- - - to defend yourself?---No, I didn't know he was asleep.

Were you going to defend yourself by taking the rifle upstairs, were you?

- - - Yes. For the fear of my life.

While you were downstairs under the house, you feared for your life?

---Yes.²

Shortly afterwards there was the following passage: ☐

³You knew that all you had to do once you loaded [the rifle], was pull the trigger?---Yes.

And that is what you were going to do, was it?---Yes.

So your intention as you walked up the hall was to shoot Darren?---Yes.

When you went in the room your intention was to shoot Darren?---Yes.

You aimed to shoot him in the back?---No, I didn't aim. I just pointed the gun and, like I said - - -

Where did you point the gun?---I just pointed behind his back.

Pointed it as his back?---I just pointed it, like ☐ like this.

HIS HONOUR: How is that, witness?---I just pointed it like that. Holding out her arm.

THE WITNESS: I've never used a gun before.

MR WILD: Well, you knew that if you pointed a gun in the direction of somebody and pulled the trigger, a bullet would go in the direction you were pointing in?---I just pointed the gun and I closed my eyes. All I remember is the bang.

Yes?---And then I - - -

Just a moment. When you pointed the gun were you pointing it at Darren?---Yes.

And you intended to shoot Darren?---Yes, for the fear of my life.

And you intended to kill Darren?---Yes.

He was then asleep?---Yes.

When did you decide you were going to shoot Darren?---I didn't decide. It happened. When he said to me that when he wakes up he was going ☐ he hasn't fucking started yet, but when he wakes up he's going to. That's when. I was like this little girl who was going to get a hiding, and that he was going to kill me when he wakes up.

How long was he asleep, do you think, before you shot him?---He was awake when I left the room (inaudible). I don't know.

Did he appear very tired to you when you left the room?---When he looked at me he wasn't tired, he was just frightening me, and that scared me.

The accused had no memory of anything she may have said to other people, shortly after the

shooting. Later, in answer to a question from me, she said that she³ intended to shoot him, but I didn't intend to kill him², reiterating that³ I feared for myself that when he wakes up he's going to kill me.² She had earlier agreed with Mr Wild that she had intended to kill the deceased (see above) and after my question he took her to that again, viz: ☐

³Now I asked you that question about 5 minutes ago. I said: (EDid you intend to kill him?¹ and the answer you gave was (Eyes?¹---Like I said, I don't remember everything. It was like in a trance.

Oh you were in a trance, sorry. So what part of what happened do you remember?¹---I just remember pointing ☐ getting the bullet after he said that to me. I went downstairs and loaded it. I went upstairs. He was laying on the bed and I pointed the gun and I closed my eyes and then all I remember is that bang.

How far away was the rifle from Darren when you pulled the trigger?¹---I can't remember.²

She said that she thought that the deceased was going to use the rifle on her. Mr Wild took up the point of why she did not leave the house, if she feared that the deceased would kill her when he woke up, viz: ☐

MR WILD: He couldn't have killed you if you hadn't been there, could he?¹---I beg your pardon?

If you hadn't been at the house when he woke up, he couldn't have killed you?¹---Yes. Well, where am I supposed ☐ a woman with six kids. I don't know how to drive, and it was my home. Why should I leave my home?

Why should you leave your home?¹---Yes.

Is that what you thought?¹---No, I didn't think of that when he said to me that when he wakes up, he hasn't started. All I thought in me was: (EIm just a little girl. I'm going to get a hiding, and this time he's going to kill me like he always said he's going to kill me.¹

So you decided you've have to get in first?¹---It just happened, it happened, it just happened. Like I said, I don't remember, until the bang, what I did. It was like in a trance. When I heard this bang and looked, and then I realised what I did, and then I started crying for help.²

Finally, she was asked by Mr Wild: ☐

³Were you angry with Darren that morning [of 20 November]?¹---That morning?

Yes, the way he was treating you?¹---The way he treated me, I was scared of Darren, not angry. I was scared. It wasn't Darren. I was scared of Darren.²

(c) The evidence of the psychiatrist

The other defence witness was a consultant psychiatrist, Dr Lawrence, an expert who had become³ particularly involved in criminal work and homicide, particularly in women, - - - [from] the late 1970's², stemming from her interest in domestic violence. Since 1978 she had³ regularly² given evidence about the³ battered wife syndrome². Dr Lawrence described that syndrome as follows: ☐

--- a situation in a relationship where --- the husband batters or is physically abusive --- as well as emotionally, sexually abusive and verbally abusive to his partner over a long period of time. --- there's often a 'cycle of violence' in this relationship, which is ongoing --- that sort of cyclical effect --- helps --- to ensnare the women in staying in the relationship.

--- there is a very significant risk, as the abuse is prolonged and increases, that the women, usually, will be killed. In a small number of cases, of course, the reverse sometimes happens.²

Dr Lawrence went on to give³ a number of explanations to try to explain² why women stayed in such a relationship. She said: ☐

³There are the obvious, if you like, external reasons why people will stay in a relationship: their own ideas of commitment; their love for the person; and their desire to make a marriage work. There are many social pressures of course on women to stay in relationships which are unsatisfactory; and of course as children come into the marriage, concerns for the welfare of the children will often keep them in unsatisfactory relationships. There are sometimes ☐ the absence of alternatives if you like, or socially acceptable or socially available alternatives, which I think have kept women in relationships in the past. I think our efforts in society to address some of those are being of assistance. Legal things such as the restraining orders that are now more readily available, and the provision of alternative accommodation at least in emergency such as women's shelters, have certainly perhaps given women more opportunities to escape or to leave than there were previously, but they are also still obviously very inadequate, and they're not readily available, and they don't always work, as is apparent.

--- what is often more relevant are the perhaps internal aspects that are arising in the women, and we think often that is the result of the battering itself, the experience of being constantly traumatised, abused physically and verbally, and emotionally over time. Perhaps there may be things which a woman has brought to the relationship to start with from her own earlier childhood experience which of course is very relevant for everybody, it is an influence on the sort of person we are and how we will react to certain situations. But as I say, the interest tends to centre on the effect of that constant chronic trauma in a relationship with a person who you have great affection for, at least initially; what effect that has on the individual. There are various explanations as to --- how that operates. ---

One theory that's been espoused is a condition called 'learned helplessness'. This is an idea that has been derived from our knowledge of animals that have been subjected to a whole series of traumas, physical trauma such as electric shocks and our observations of behaviour and how we learn. To explain it it's fairly simple really, if you know that if you do a certain action or behave in a certain way you're going to get some sort of adverse reaction from that, then you learn fairly quickly to avoid that particular behaviour. If you learn that if you do other things and that will also help you to avoid some sort of unpleasant consequence, then you learn to do that. But if you subject a person to a totally unpredictable and very constant barrage of traumas, and they are totally unpredictable, that is, (b) doesn't always follow (a), it may do but it may not do, and anything at all leads to the battering, the person becomes almost frozen or paralysed in their actions. They somehow can no longer take effective action to stop these negative consequences to stop the punishment or stop the trauma that they're experiencing. They can't take satisfactory evasive or escape action. So that's sometimes called a state of 'learned helplessness' ---

--- there are several other aspects to it. I think many women in fact develop an illness of depression and --- you are severely depressed then not only your perception of what is happening to you is very negatively based but it also affects your ability to act, to make decisions and may significantly affect your judgment. Now, I think that happens in a lot of cases of battered Women. ---

--- there's a third element or third possibility, and this is --- arising out of the most recent sort of work that's being done; and --- there is a condition called Gpost traumatic stress disorder' ---

--- Post-traumatic stress disorder' is a recognised disorder Which follows acute stress, and it's --- a series of reactions that a person experiences --- in which their minds continually revert back to the stress that they've been exposed [to], and memories of that, flashbacks; and also [they] are in a state of what we call Ghyper-vigilance' or Ghypercensivity' to any cues which might --- recall the stress that they've been under. Now the sort of prolonged and repeated exposure to battering is obviously a stress, but it's a different sort of stress --- than the one that usually causes P.T.S.D., so that doesn't explain again all of the phenomena that we observe with battered women. And there's a condition now which is being explored which is sometimes called Gcomplex P.T.S.D.' I won't go into it, but --- I'm just trying to explain the efforts that are going on to try and understand this particular condition and why --- women react in the way that they often do, as if they're totally controlled, helpless and powerless to take what, from the outside, often seems to be necessary or obvious action to escape from the trauma that they're undergoing. And in particular, the P.T.S.D. helps us to understand how sensitive and alert they are to the slightest nuance that might come from the attacker that a new threat is about to be imposed on them.

That is, they develop a heightened sensitivity ---?---Yes.

--- to prospective assaults?--- Yes. Because they've --- been through it all before, they know what's happened and they're hyper --- their whole bodily system, their nervous system is in a state of heightened reactivity to the slightest thing which might be associated with the traumas that they've experienced.

Dr Lawrence considered that the model of the hostage/terrorist situation was 'really quite apt' for the battered wife/battering husband situation, and explained why she considered this was so.

She had interviewed the accused on 16 November 1995, to make a psychiatric assessment of her. She noted that the accused had been physically abused as a child, and observed that 'a very high proportion of [battered] women have been --- victims of childhood abuse.' She explained the accused's motivation, stemming from her life with her mother (an alcohol abuser), that □

'She wanted to stay with her man for always, for that to be a single commitment, to have children only by the one man and that she would never part with her children ---'

Dr Lawrence considered that the Kulaluk community, 'the family', provided 'a sense of security for [the accused] in the face of what was then to become escalating violence'. The accused's election as President of the Kulaluk community in August 1991 was very important for her, 'an affirmation of her worth', which helped her 'through the dark times' in her relationship with the deceased.

Dr Lawrence referred to the abuse of the accused by the deceased, and his 'morbidity'. She considered that the 'cycle of violence' increased, escalating 'very rapidly' in the last 'couple of months before the ultimate death'.

Dr Lawrence considered that the accused was ³controlled², a state which she said: ☐

³ - - - is important. The person does feel controlled. Very often the batterer sees the other person, his partner, as really just an extension of himself, and something that he controls, has to be there to do whatever he wants, and isn't seen as a separate being or person in their own right. And she has said that he said that she was, and the children were, his property that he could do with as he wished, and I think that she, in her efforts to placate him, to please him, to stop the battering, went along with doing whatever he said, except that that didn't please him because if he said, 'EDo this' and she did it, he would still tell her it was wrong and bash her. - - - So that this is the sort of pattern that - - - affects these people, so that they do ultimately feel almost totally controlled in that relationship, and they do everything they can to - - - please or to avoid it, but they almost lose the ability to think and make decisions for themselves.²

She considered that the deceased became ³out of control² in the last few months of his life, the drugs he was taking probably affecting his behaviour. She explained the effect of taking amphetamines such as ³speed² as follows: ☐

- - - the amphetamines have the effect of increasing violence or unleashing violence and aggression within a person, even if they've been fairly placid beforehand. High doses of amphetamines or intravenous use may make that person extremely aggressive. If the person is already aggressive and violent, that will only accentuate even more, and the other factor is that they become very paranoid. They feel that everybody is against them or persecuting them - - - and anything - - - else of that nature which is there, such as the morbid jealousy that we've spoken about, this irrational jealousy, would also become accentuated.²

Dr Lawrence explained that the effect of abuse became ³more damaging² as it became more ³irregular and erratic².

She considered that the accused's obtaining a restraining order caused an escalation in the violence towards her. She gave her opinion as to the effect of these matters on the accused, viz: ☐

³The restraining orders failed; where recourse to the law has failed, how does that impact on Helen Secretary? - - - I think it just increases the sense of being trapped, there's no escape. She's in absolute terror for her life. The threats are escalating, the amount of violence that she's exposed to is increasing in frequency and severity, the abuse is increasing, and the efforts that she's used to deal with the situation have come to nowhere. She can't leave the community and that family situation, and she can't get [the deceased] to leave either, - - - and his violence is becoming increasingly unpredictable with these threats to kill her. I mean, they're constantly telling her he's going to kill her or that there's a grave dug for her somewhere, and that he will, or if anybody tries to stop him doing anything, he'll kill them. So that she, I think over a period of some weeks, if not months, had believed that she was going ☐ she was very likely to die, her life was very much at risk.²

As to the return journey from Yarralin, Dr Lawrence said of the accused: ☐

³Now I'm quite sure she believed that she was going to die, if not at his hands, by accident in some of the things that he was doing, and she was - - - absolutely terrorized, I believe, and it went on for some 24, 36 hours.²

She expressed her opinion as to how matters stood on the return to Kulaluk from Yarralin: ☐

--- and I think that she was in a state of even heightened, more heightened terror, if that was possible.

And that was the state she was in when she returned to house 10 on the Sunday morning just before killing him? - - - That's correct and even the return to - - - the safety of the community and the home was not sufficient to ☐ it certainly didn't stop the violence and the threats. They continued on for another hour so after he returned.

So you don't see that level of terror, fear or whatever, decreasing at all from the time they were in the house? - - - No. There was no real respite from it at all, and no escape at all, so it just heightened even further.²

Dr Lawrence then expressed her opinion of the effect on the accused of the last words uttered by the deceased, viz: ☐

³Can you give an opinion as to how she would have felt at that point in time when those words were uttered to her by the deceased? - - - The words that are reported are of the order of that he said: 'I'm going to have a bit of sleep but when I wake up' ☐ no sorry: 'But I haven't finished yet. In fact it hasn't even started yet'. And I think that to her, in her state of fear and terror that she'd been in for quite some time, and exhaustion, and knowing him as she did in this heightened state of hyper-vigilance as a result of all of this exposure to trauma - - - it meant that this was really the ultimate threat. He really was going to kill her and her life was going to end very shortly, and I think that that was the trigger for an alteration, if you like, in her state of mind at that point. - - - it's only a transient thing and I'm not suggesting that she was mentally ill at this point, but I think she sort of switched and in that state of sort of terror, and numb ☐ which became almost numb and what we could call 'depersonalised', so that she went downstairs ☐ or got the bullet and the gun and was able to load it and come up and fire the rifle, not with any intent, I don't believe, to kill but merely as the last ☐ as a way of trying to escape or get some relief from the situation.

Was she in that state of mind from the moment those words were uttered to the moment that she fired the gun, in your opinion? - - - I think it's likely that she was. I think she said in evidence that she suddenly felt as though she was the little girl that was overwhelmed when she was about to be physically abused by a stepfather, and I think she said other words. To me she said: 'It was ☐ it was as if it was not me' or 'I was in a trance'. She was aware of what she was doing and she had full recall of what she was doing but I think she was behaving in a very automatic sort of fashion, not with careful forethought. It was an automatic response to the overwhelming stimulus that she'd been exposed to in that state of terror and the belief that she was going to die.

Bearing in mind her state of mind, what is your opinion as to the fact that she took recourse to a weapon and used it lethally? - - - Well, I think that if you can see it from her perspective, she was a woman who had been repeatedly victimised and battered and she had no physical power herself to resist or deal with those threats. She had, to that point, been totally unsuccessful in using the external controls if you like - - - that is the legal recourse ☐ and I think that in her heightened state of terror and trauma that she certainly wasn't thinking in a logical clear frame of mind, so that a gun would be ☐ she'd recently become aware that a gun was still there, sort of heightened the threat. I think that that would be seen as something which might even equalise this gross power imbalance between them, if you like. It was something almost with which to defend herself, but certainly it would not have appeared to be excessive to her in that state.

Does Helen possess all the hallmarks of this condition and syndrome?---Oh, yes.

In cross-examination, Dr Lawrence said that the accused³ was aware of her actions and could recall them afterwards², and³ understood [her] actions² at the time of doing them. She said that the [Battered women syndrome¹ was not a disease or an illness or an abnormality of mind, but³ a collection of behaviours² in a characteristic recurring pattern. Dr Lawrence³ couldn't say that [the accused] was suffering from acute or even chronic post traumatic stress disorder at that time². Finally there was the following evidence: ☐²

³Doctor, this morning in cross-examination, Helen Secretary said at one stage, that she did intend to shoot her husband, and she intended to kill him. Does that surprise you?--- Not really. I mean I would accept that she could have ☐ she said. Clearly, if you load a gun and pull the trigger - - - you're shooting somebody and there is a risk, an obvious risk¹ that somebody could be harmed or killed in that. But - - - I wasn't convinced that there was anything to suggest that this was carefully thought¹ out, planned or intended, ahead of time. It was an immediate response to that final overwhelming threat, innocuous though it might seem in its words.²

The submissions on whether self defence should be left to the jury

It was common ground that the relevant provisions of the Criminal Code were ss28(f) and 187(b). Section 28(f) provides, as far as relevant: ☐

³In the circumstances following, the application of force that will or is likely to kill or cause grievous harm is justified provided it is not unnecessary force:

(f) in the case of any person when acting in self-defence - - - where the nature of the assault being defended is such as to cause the person using the force reasonable apprehension that death or grievous harm will result.² (emphasis mine)

The term³ unnecessary force² is defined in s1 of the Code, viz: ☐

³unnecessary force² means force that the user of such force knows is unnecessary for and disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion;²

Section 187 provides, as far as relevant: ☐

☐ In this Code³ assault² means ☐

(a) the direct - - - application of force to a person without his consent if the consent is obtained by force or by means of menaces of any kind or by fear of bodily harm - - - ; or
(b) the - - - threatened application of such force where the person - - - threatening it has an actual or apparent ability to effect his purpose and the purpose is evidenced by bodily movement or threatening words.²

Mr Wild submitted that under the Code provisions self-defence in relation to the killing of a sleeping person could not be made out except perhaps in most extraordinary circumstances, which did not obtain here.

He submitted that it was doubtful whether at common law self-defence was open on a charge of killing a sleeping person. In support, he referred to five authorities. It is useful to note the discussion therein, though the ultimate task is to construe the language of the Code.

The Queen v R (1981) 28 SASR 321 involved the killing of a sleeping husband by his wife; the trial judge had refused to leave the issue of provocation to the jury. Self-defence was not relied on. King CJ dealt with the respective functions of the trial judge and jury at p322: □

³The respective functions of judge and jury, when a defence of provocation is raised are defined in the speech of Viscount Simon in *Holmes v Director of Public Prosecutions* [1964] A.C. 588, at p597:

³In dealing with provocation as justifying the view that the crime may be manslaughter and not murder, a distinction must be made between what the judge lays down as matter of law, and what the jury decides as matter of fact. If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict.²

It is not the function of this Court of Criminal Appeal to consider whether the evidence should lead to a verdict of manslaughter by reason of provocation. The function of this Court is to consider whether the evidence discloses material upon which a reasonable jury, properly directed as to the law, might reach that verdict. If there is such material, it is for the jury to evaluate it and the issue of provocation should be left for its decision. If there is no such material the proper course for the trial judge is to withdraw the issue from the jury.² (emphasis mine)

I observe that, mutatis mutandis, the same considerations apply when the question is whether the issue of self-defence should be left to the jury. See also *R v Kerr* [1976] 1 NZLR 335 at p340; the accused must be able to point to material in the evidence which could induce a reasonable doubt as to self-defence. If so, there is a chance fairly open to her of being acquitted of murder, and the issue of self-defence must be left with the jury.

In discussing what constitutes provocation in law in *The Queen v R* (supra) at p325 □ 6 King CJ explained why self-defence was not there in issue: □

³The loss of self-control which is essential [to provocation], is not to be confused with the emotions of hatred, resentment, fear or revenge. If the appellant, when in control of her mind and will, decided to kill the appellant because those emotions or any of them had been produced in her by the enormity of the deceased's past behaviour and threatened future behaviour or because she considered that that was the only way in which she or her children could be protected from the deceased's molestations in the future, the crime would nevertheless be murder. The law of a well-ordered and civilized society cannot countenance deliberate killing, even to the extent of treating it as extenuated, as a response to the conduct of another however abhorrent that conduct might be. Nor can society countenance killing as a means of averting some apprehended harm in the future. The law, of course, permits the use by a person of force, even to the extent of inflicting death, if that is necessary to defend that person against immediately threatened harm. But the law has always and must always set its face against killing by way of prevention of harm which is merely feared for the future. Other measures which

are peaceful and lawful must be resorted to in order to deal with threats of future harm. Self defence is therefore not in question in this case.² (emphasis mine)

Van Den Hoek v The Queen (1986) 161 CLR 158 also involved the question whether the trial judge should have left provocation to the jury. If there was evidence of provocation fit to be left to the jury, it was his duty to do so. In that case the accused wife said that her husband, while armed with a knife, threatened to kill her. She said that he slipped and fell when attacking her and she then stabbed him once with his own knife; he chased her again, holding the knife, and she hit him on the head with a piece of brick. He later died from one of two stab wounds to his body. There was some material conflict between the wife's account and that of an independent witness. At pp167 and 169 Mason J discussed provocation and self-defence, viz: □

167³ In Anglo-Australian criminal law provocation and self-defence are distinct and separate defences. Provocation is more limited in its area of operation and in its consequences. And there is a difference in the elements of the two defences. Loss of self-control is essential to the first, but not to the second. It has been said that a loss of self-control caused by fear, panic or mental instability cannot be brought within the defence of provocation: Ashworth, ³The Doctrine of Provocation, [1976] Cambridge Law Journal, 292 at p297. But the better view is that expressed by Professor Glanville Williams in his Textbook of Criminal Law, 2nd ed. (1983), p524: ³Anger is the domain of the law of provocation; fear that of the law of private defence □ though fear is also capable of amounting to provocation.

No doubt it is true to say that primarily anger is a feature of provocation and fear a feature of self-defence. But it is too much to say that fear caused by an act of provocation cannot give rise to a defence of provocation.²

169³ The failure of an accused person to testify to loss of self-control is not fatal to a defence of provocation or a case in which self-defence is raised. Because the admission of loss of self-control is bound to weaken, if not destroy, self-defence, the law does not place the accused in a dilemma: Lee Chun-Chuen [1963] A.C., at pp232-233. The jury's capacity to infer loss of self-control from appropriate facts is underscored by the comment of Lord Devlin, speaking for the Judicial Committee, in Lee Chun-Chuen [1963] A.C., at p233 that a jury would be entitled to infer loss of self-control from facts suggesting a possible loss of self-control, even if the accused expressly denied loss of temper, especially when the nature of the main defence would account for the falsehood. Of course, an admission of fear is not as antagonistic to self-defence as an admission of anger. None the less the point remains that the absence of direct evidence of loss of self-control is explicable when self-defence is an issue with the result that the jury is entitled to infer it in the absence of direct evidence.²

R v Runjanjic, R v Kontinnen (1991) 56 SASR 114 raised for consideration whether evidence of the ³battered women syndrome² was relevant to a defence of acting under duress. The trial judge ruled it inadmissible. The Supreme Court (in Banco) held that the syndrome was properly the subject of expert testimony, subject to satisfactory proof that it was regarded by experts competent in the field as an accepted field of scientific knowledge. The Court also held that such evidence was relevant to the issue of duress. King CJ discussed the features of ³battered women syndrome² at p18. His Honour there noted that ³it now appears to be a recognised facet of clinical psychology in the United States and Canada², while observing at p19 that he was ³not aware of any case on the subject [of the admission of expert evidence of battered women syndrome] in Australia or any other common law country.² His Honour considered that the evidence in question was relevant, and admissible. He noted at p120: □

³Even if the [expert] evidence had no bearing on the objective aspect [of the defence of

[duress], it would be relevant to the question whether the wills of these appellants were in fact overborne. But [the basis relied on for exclusion] also misapprehends, in my opinion, an important thrust of the proffered evidence. It may be that the expert is in a position to express an opinion as to the evidence of mind of these appellants, but the primary thrust of the evidence is to establish a pattern of responses commonly exhibited by battered women. The proffered evidence is concerned not so much with the particular responses to these appellants as with what would be expected of women generally, that is to say, women of reasonable firmness, who should find themselves in a domestic situation such as that in which the appellants were. It is designed to assist the court in assessing whether women of reasonable firmness would succumb to the pressure to participate in the offences. It also serves to explain why even a woman of reasonable firmness would not escape the situation rather than participate in criminal activity. As such it is relevant.² (emphasis mine)

His Honour observed that the fact that³ the ordinary juror would have no experience of the situation of a battered woman was not sufficient³ to justify the admission of expert evidence of the battered women syndrome². However, on certain matters expert evidence was admissible, though³ the Courts must move with great caution² because (p 121) □

³The admission of expert evidence of patterns of behaviour of normal human beings, even in abnormal situations or relations, is fraught with danger for the integrity of the trial process. The risk that, by degrees, trials, especially criminal trials, will become battle grounds for experts and that the capacity of juries and courts to discharge their fact-finding functions will be thereby impaired, is to be taken seriously. I have considered anxiously whether the situation of the habitually battered woman is so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries called upon to judge behaviour in such situations. In the end, I have been impressed by what I have read of the insights which have been gained by special study of the subject, insights which I am sure would not be shared or shared fully by ordinary jurors. It seems to me that a just judgment of the actions of women in those situations requires that the court or jury have the benefit of the insights which have been gained.

I am fortified in the conclusion to which I have come not only by the trend of authority in the United States of America but by the decision of the Supreme Court of Canada in Lavallee (1990) 55 C.C.C. (3d) 97.

His Honour observed at p122: □

³Lavallee (supra) was a case of self-defence to a charge of murder. All the American cases which I have seen in which evidence of the battered woman syndrome has been admitted have been cases in which the issue was self-defence or provocation on a charge of murder. It would appear, however, that, on the trial of Patti Hearst for armed robbery, expert evidence was admitted, as relevant to a defence of duress, of the psychological effect of a period of prolonged captivity and coercion on a normal person; and this was approved by the United States Court of Appeals, Ninth Circuit: see United States v Hearst 563 Fed 2d 133 (1977) at 1351. I can see no distinction in principle between the admission of expert evidence of the battered woman syndrome on the issues of self-defence and provocation and on the issue of duress.

I consider therefore that the ruling excluding the evidence on the ground upon which it was made was in error. The evidence was admissible, in my opinion, subject to satisfactory proof that its subject matter is regarded by experts competent in the field as an accepted field of scientific knowledge and subject, of course, to the proposed expert

witness or witnesses being qualified as expert in this particular field.²

In *R v Taylor* (unreported, Supreme Court of South Australia (Olsson J), 3 February 1994) there was a plea of guilty to manslaughter which was accepted by the Crown in full discharge of an indictment in which the accused wife was charged with the murder of her husband. She had killed him by loading and firing his rifle at him. He does not appear to have been asleep at the time. He was a chronic alcoholic who had constantly and violently assaulted the accused and their children over many years. Olsson J described 'dreadful conditions' of life, and a 'nightmare' like environment² which eventually led to an incident of 'mindless drunken cruelty' by the husband which proved to be the 'last straw' for the accused. His Honour referred to what King CJ had said in *R v Runjanic* (supra) and at p11 described the 'battered woman syndrome' as 'really a type of post-traumatic stress condition caused by enduring long term high stress environments'. At pp12-13 his Honour said: □

³The literature suggests that the syndrome has a significant impact on a woman's perception of the immediacy and degree of danger and can often give rise to the commission of a homicide when the person killed is in fact even asleep and certainly not, at the time of retaliation, objectively about to inflict further acts of brutality. It is also pertinent to note that, as here, it is common for a sufferer, after the homicide, to retain only a fairly hazy recollection of the precise details related to the circumstances causing death.

In relation to self defence it bears, in an important fashion, on both the perception of immediacy and nature of further danger and what response is necessary to meet it, however much that perception, in objective terms, is difficult for the ordinary person to appreciate. In short, such a condition has a fundamental effect on the normal reasoning processes of the sufferer. The discussion of some of these aspects in the judgment of Wilson J in the Canadian case *Lavallee v The Queen* (1990) 55 CCC (3d) 97 is instructive.²

His Honour said to the prisoner at p13: □

³Your plea implies an acceptance that a crime has been committed by you but that what would otherwise be murder has been reduced to manslaughter by reason of provocation or because you acted in perceived self defence, but your response was, in the circumstances, excessive.

In *Muy Ky Chhay* (172 A Crim R 1 the issue was whether the trial judge should have left provocation to the jury. The accused was convicted of murder. The Crown contended that she had killed her husband as he slept. She contended that she acted in self-defence, on the basis that her husband was attacking her with a knife when she killed him. There was a long history of violence by the deceased. The jury clearly rejected her account of events, and accepted the Crown version. The trial judge had left the issue of provocation to the jury only if they considered that it was possible that her version of the facts was true. The appeal was allowed; it was held that his Honour should have left provocation to the jury on a wider basis, since, although there must be a sudden and temporary loss of self control caused by the provocation, it is not necessary that the killing immediately follow the deceased's provocative act or conduct. There need not be a specific triggering incident. The jury could have concluded that her actions resulted from a loss of self control. In discussing the development of the law of provocation and the criticism that it was so framed as to be a concession to male frailty² Gleeson CJ observed at p11: □

³The Orientation of the law towards relief of the plight of males, rather than females, was also noted in the area of self-defence. It was discussed, for example, in the judgment of the Supreme Court of Canada in *Lavallee* (1990) 76 CR (3d) 329. The

leading judgment in that case was written by Wilson J. She observed that the law catered much better for the position of a person against whom another person's hand was raised in sudden threat or anger, than for a person who, over a lengthy period, has become sensitised to danger from her batterer and who ought not to be required to wait until a knife is uplifted, a gun is pointed, or a fist is clenched, before her apprehension of danger is deemed reasonable (at 352).²

It is unnecessary to express an opinion as to the position at common law in relation to the defence of self-defence to a charge of killing a sleeping victim.

Mr Wild submitted that in any event since the Criminal Code codified the criminal law, the question in issue is to be determined by the construction of s28(f) in the light of s187 of the Code. I accept that general proposition.

Mr Wild submitted first that the word 'assault' in s28(f) referred in its context only to an 'actual' assault; that is to an actual application of force, in terms of s187(a). If 'assault' in s28(f) were so construed, clearly no defence of self-defence is open in the circumstances of this case. However, I do not think that it should be construed in that restricted way.

Mr Wild submitted, second, that 'assault' in s28(f) does not extend to an assault constituted by a threat in terms of s187(b), unless both requirements of s187(b) are met, viz: ☐

1. The person threatening to use force, here the deceased, must have had an actual or apparent present ability to effect his purpose; and

2. He evidenced his purpose by bodily movement or by his threatening words.

Mr Lawrence submitted that the Crown's submission was that self-defence was not open, because the deceased was asleep at the time he was shot, and so could not at that time have been threatening the accused, the assault by way of threat having ceased when the deceased fell asleep. Such an approach presupposed that s28(f) imported a temporal requirement, though none was there specified. Mr Lawrence submitted that s28(f) should not be construed as if it had a temporal requirement. No 'imminence' of the force earlier threatened, was required. Here the deceased had made a threat while he was awake; that threat remained in the mind of the accused when she left the room and until she returned, having loaded the rifle. Mr Lawrence submitted: ☐

³Once the threat was issued, she apprehended her own death. She returned with the gun, saw him there, and still apprehended her own death.²

Mr Lawrence submitted that the deceased, though asleep, still had 'an actual or apparent present ability to effect his purpose'; I should say that I find difficulty with that contention and in the absence of any supporting authority to that effect, I reject it.

Mr Lawrence relied strongly on *Lavallee v The Queen* (supra). In that case the accused had been living with the deceased for a number of years. She shot him in the back of the head as he was leaving the room after allegedly assaulting her and threatening her. A psychiatrist testified as to the 'Battered wife syndrome'. The accused was acquitted of murder, on the basis of self-defence. The Court of Appeal ordered a new trial on the basis that the jury had not been properly instructed as to the evidence of the psychiatrist. The Supreme Court of Canada allowed an appeal, and ordered that the verdict of acquittal be restored. The relevant self-defence provision in the Canadian Criminal Code was: ☐

34....

(2) Everyone one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.²

Mr Lawrence submitted that this provision was similar in effect to the self-defence provisions in the Northern Territory Criminal Code; see p39. In Lavalley the Supreme Court noted at p 115 that □

3 - - - the assault precipitating the appellant's alleged defensive act was [the deceased's] threat to kill her when everyone else had gone.²

The court considered that an accused need not apprehend imminent danger when he or she acted in self-defence. The case law to the contrary had proceeded on a basis of certain assumptions, as to which Wilson J observed at p116: □

³The implication of [that] reasoning is that it is inherently unreasonable to apprehend death or grievous bodily harm unless and until the physical assault is actually in progress, at which point the victim can presumably gauge the requisite amount of force needed to repel the attack and act accordingly. In my view, expert testimony can cast doubt on these assumptions as they are applied in the context of a battered wife's efforts to repel an assault.²

Mr Lawrence stressed that the expert evidence relating to 'Battered wife syndrome' went to the state of mind of the accused "when [she] did what [she] did".

Mr Lawrence also referred me to Hickey (unreported, Supreme Court of New South Wales (Slattery AJ), 14 April 1992) which is noted at (1992)16 Crim LJ 271. In that case the accused was being head butted and strangled by the deceased, who then stopped his attack and sat with his back to her; she grabbed a knife and stabbed him in the chest. He died shortly afterwards. The accused relied on self-defence, giving a history of escalating violence which founded her contention that she reasonably believed that the deceased's latest attack was life-threatening. Expert evidence was admitted, without objection, to show that the accused suffered from 'Battered woman syndrome'. The jury apparently accepted the plea of self-defence; the accused was acquitted of murder. The expert evidence was tendered to explain why the accused's belief was that the latest attack was life-threatening.

Conclusions

Despite the various cases in which expert evidence of 'Battered woman syndrome' has been admitted, it is not clear to me that this novel scientific evidence can properly be said to be a recognised area of expertise for forensic purposes, as opposed to its use for therapeutic purposes. Those purposes are not the same. The need for caution in the admission of such evidence, referred to by King CJ in *R v Runjanjic* (supra) □ see p44 □ is very real. I note in passing that the criterion for admitting 'novel scientific evidence' in *Frye v United States* (1923) 293 F 1013 at 1014, adopted in Australia to allow in evidence of this syndrome, no longer obtains in the United States; see now the different 'reliability' criterion in *Daubert v Merrell Dow Pharmaceuticals* (1993)113 S.Ct. 2786, and generally *Freckleton & Selby* 'Expert Evidence' (looseleaf), pars9, 180□9.330. However, since the Crown took no exception to the expert evidence being introduced in this case I deal no further

with general aspects, and treat the expert evidence as being properly before the jury..

I consider that the general observations of King CJ in *The Queen v R* (supra) emphasized at p41 should be borne in mind, when the Code provisions on self-defence are being construed.

It is clear that the jury could have been satisfied that the accused was frightened that the deceased would use force on her after he woke up from his sleep; and that at the time he made that threat he had an actual then-present ability to carry it out, his purpose being evidenced by his words. The nature of the assault being defended was the threat that the deceased would later use force. However, it appears to me that s28(f) contemplates matters being assessed at the time the accused was acting in self-defence; that is, at the time in which she engaged in the series of actions culminating in her shooting the then sleeping deceased. Section 28(f) speaks of the nature of the assault being defended; the language carries distinct overtones of the need for imminent danger. At the time the accused shot the deceased, since he was asleep, he had no ability of any type to implement his earlier threat. That is to say, he was not then assaulting the accused, in any meaningful way, in terms of s187(b). As can be seen from the foregoing, I uphold Mr Wild's submission as to the proper approach to the construction of s28(f).

Further, I consider that it would be impossible for a reasonable jury to hold on the view of the evidence most favourable to the accused that at the time she shot the sleeping man, thereby applying force likely to kill him or cause him grievous harm, she could reasonably have apprehended that she would suffer death or grievous harm when he awoke. The term 'reasonable apprehension' in s28(f) sets an objective standard against which the accused's apprehension that she would be killed (which may be accepted as genuine), must be measured, regardless of its genuineness and of the fact that she exhibits many of the characteristics described in the 'Battered woman syndrome'. The objective standard of reasonableness in this case, which must be met, is the application in law of a policy that persons are to be discouraged from engaging in violent self help, despite an appalling domestic or other situation. The requirement of reasonableness in s28(f) keeps the Code provision for self-defence in general accord with self-defence at common law, as expressed in *Zecevic v Director of Public Prosecutions* (1987)162 CLR 645.

Further, in the circumstances taken at their most favourable to the accused, I consider that the jury could not have found that her shooting of the deceased was other than the use of unnecessary force, applying the second or 'ordinary person' leg of the test in the definition of 'unnecessary force'. Taking the approach to the provisions of the Code which I have indicated, I considered that self-defence was not open for consideration by the jury on the view of the evidence most favourable to the accused, and I so ruled on 1 December.

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DIRECTOR OF PUBLIC PROSECUTIONS

Parties

V

SECRETARY, HELEN PATRICIA

TITLE OF COURT: SUPREME COURT (NT)

SUPREME COURT (NT) exercising

JURISDICTION:

Territory jurisdiction

FILE NOS: No.111 of 1995

DELIVERED: Darwin 12 December 1995

HEARING DATES: 27□30 November 1995, 1 December 1995.
JUDGMENT OF: Kearney J

JUDGMENT OF: Kearney J

CATCHWORDS:

Criminal Law and Procedure Murder Defence¹ of self Defence Question of self-Defence to be left to jury if there is evidence suggesting it unless trial judge considers jury could not entertain a reasonable doubt.

Criminal Code (NT), s28(f)

The Queen v R (1981) 28 SASR 321, followed.

R v Kerr [1976] 1 NZLR 335, followed.

Van Den Hoek v The Queen (1986) 161 CLR 158, applied.

Criminal Law and Procedure ☐ Evidence ☐ ³battered woman syndrome? ☐ ² quare, whether a proper subject for expert evidence.

R v Kunjanjic, R v Kontinnen (1991) 56 SASR 114, considered.

R v Taylor (unreported, Supreme Court (SA), Olsson J, 3 February 1994), considered. Muy Ky Chhay (1994) 72 A Crim R 1, considered.

Hickey (unreported, Supreme Court (NSW), Slattery AJ, 14 April 1992), considered. *Frye v United States* (1923) 293 F 1013, referred to.

Daubert v Merrell Dow Pharmaceuticals Inc. (1993) 113 S.Ct. 2786, referred to *Lavallee v The Queen* (1990) 55 C. C. C. (3d) 97, considered.

Statutes ☐ Interpretation ☐ Criminal Code ☐ Defence of self/defence ☐ Approach to construction.

The Queen v R (1981)28 SASR 321, followed.

Words and phrases ☐ Criminal Code ☐ nature of the assault being defended? ☐ Need for imminent danger, for Defence of self ☐ Defence.

Criminal Code (NT), ss28(f) and 187(b)

Words and phrases ☐ Criminal Code ☐ ³reasonable apprehension² ☐ Objective standard against which accused's actual apprehension must be measured ☐ Purpose of objective standard..

Criminal Code (NT), s28(f).

Zeccevic v Director of Public Prosecutions (1987)162 CLR 645, referred to.

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Solicitors:

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