

## ***R v Secretary* [1996] NTCCA 18 (2 April 1996) – Northern Territory Court of Criminal Appeal**

\*Note this case was decided under now superseded legislation (s 28(f) *Criminal Code Act 1986 (NT)*) however the case contains relevant statements of principle.

‘Emotional abuse’ – ‘History of abuse’ – ‘Manslaughter’ – ‘Murder’ – ‘Physical violence and harm’ – ‘Self-defence’ – ‘Substance abuse’

Charge: Murder

Appeal type: Question of law under s 408(1) *Criminal Code (NT)*

Facts: The accused was charged and pleaded not guilty to murdering her husband (the deceased). For eight years leading up to this incident, the deceased had verbally, mentally and physically abused the accused and their children. The violence and abuse increased substantially in the months prior to the killing. During this time, the deceased threatened to kill the accused, beat her with his hands and a belt and sexually assaulted her. The deceased was a chronic drug abuser. On a road trip the accused noticed a rifle in the back of the car. Upon returning home, the deceased threatened to beat the accused with a belt, punched her in the head, throttled her, and made further threats of abuse. Fearing for her life, the accused retrieved the gun and shot the deceased while he was asleep. At trial, the judge ruled that the issue of self-defence should not be left to the jury. Following this, the accused’s counsel made an application that the subject of the ruling be reserved for the consideration of the Court of Criminal Appeal. Subsequently, the accused pleaded not guilty to the charge of murder, but pleaded guilty to the charge of manslaughter by reason of provocation. The indictment was amended accordingly and the jury found the accused guilty of manslaughter. No conviction was recorded; the trial judge postponed judgment until the Court of Appeal returned an answer on the reserved question of law.

Issue: Whether the trial judge was correct in ruling that self-defence was not open for consideration by the jury in the circumstances of the case.

Decision and Reasoning: In a 2:1 majority, the question was answered in the negative. The conviction was quashed and a retrial was ordered.

The defence counsel contended that as the deceased was asleep at the time he was shot, the accused could not have been acting in self-defence. The trial judge had accepted this reasoning: that because the deceased was asleep he had no ability to implement earlier threats. Mildren J of the Northern Territory Court of Criminal Appeal found that self-defence as provided under s 28(f) of the *Criminal Code* (NT) does not require a temporal connection between the assault and the force used to defend the assault: 'The lack of any specific requirement for an apprehension of immediate personal violence, so far as the Code definition of assault is concerned, reinforces the view that an assault is a continuing one so long as the threat remains and the factors relevant to the apparent ability to carry out the threat in the sense explained have not changed' ([16]-[17]). Accordingly, it was open to the jury to find the deceased's threat was an assault that continued while he was asleep. Having regard to the history of the domestic violence, it could also be inferred that, upon waking, the deceased intended to kill or cause grievous harm to the accused, and he had the ability to do so. It was also open for the jury to consider that the force used was not unnecessary in the circumstances. Mildren J regarded the jury's verdict as a conviction despite no conviction being formally recorded by the trial judge. Having found the trial judge was incorrect in ruling self-defence was not open, Mildren J quashed the conviction and ordered a re-trial.

Angel J, agreeing with Mildren J, held that self-defence extends to taking action to defend oneself from threatened assault even if this action is 'a pre-emptive strike'. It was open to the jury to find the threat of the deceased constituted an assault and this assault continued to exist at the time of the shooting. Therefore, self-defence should have been left to the jury.

In his dissenting judgement, Martin CJ found the trial judge was correct in his ruling. He considered the word 'being' in s 28(f) of the *Criminal Code* (NT) to require a contemporaneous connection between the assault and the act of self-defence. As the accused was asleep at the time of the shooting, no such connection could exist.