ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAIALBLE DATABASE UNTIL FINAL DISPOSITION OF RETRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA260/2012
[2013] NZCA 657

BETWEEN	BLAIR ROBERT MCNAUGHTON Appellant
AND	THE QUEEN Respondent

Hearing:	9 and 10 October 2013
Court:	O'Regan P, Hammond and Harrison JJ
Counsel:	R M Lithgow QC and P A Walker for Appellant L C Preston for Respondent
Judgment:	19 December 2013 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The conviction is quashed and a retrial is ordered.

C Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of retrial. Publication in law report or law digest permitted.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] Blair McNaughton was found guilty of one charge of murdering Troy Minto following his retrial in the High Court at Nelson before Miller J and a jury. He was convicted and sentenced to life imprisonment with a minimum sentence of 10 years.[1]

[2] It was undisputed at trial that Mr McNaughton killed Mr Minto by shooting him through the chest with a shotgun at close range. Mr McNaughton's principal defence was that he acted in self-defence. He also denied that he acted with murderous intent.

[3] Mr McNaughton appeals against his conviction on a number of grounds. Two are relevant to our decision: (a) whether the Crown wrongly invited the jury to infer guilt from Mr McNaughton's failure to disclose the defence of self-defence prior to trial;[2] and (b) whether the prosecutor failed to cross-examine Mr McNaughton on a relevant matter, incorporating the related issue of whether the Judge gave an erroneous direction in answer to a jury question.[3] Mr Lithgow QC for Mr McNaughton says that if the appeal is upheld on either ground this Court should substitute a verdict of manslaughter for murder. That is because the common law of New Zealand recognises the partial defence of excessive self-defence.

[4] It is unnecessary for us to address the other grounds advanced by Mr Lithgow except to reject his submission that the trial Judge wrongly admitted in evidence Mr McNaughton's statement to the police.

Facts

[5] In allowing Mr McNaughton's appeal against conviction for murder at his first trial this Court narrated the relevant facts as follows:[4]

> [11] The accounts of witnesses to the events leading up to the shooting were confused and inconsistent. The summary that follows is intended to set the scene for the consideration of the issues on appeal. As there are disputes about a number of factual matters, the summary should be seen as no more

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1 *R v McNaughton* [2012] NZHC 815.
2 Evidence Act 2006, s 32.
3 Evidence Act, s 92.
4 *McNaughton v R* [2011] NZCA 588.

than an indication of the way the incident leading to the shooting transpired, and not as findings of fact on our part.

[12] As mentioned earlier, the charges arose out of a pre-arranged fight between rival groups. The main protagonists were Mr Warren and a Mr Proctor. Mr McNaughton was part of Mr Warren's group, as were the other appellants. We will call this group the "Warren group". Mr Minto was part of the other group. We will call this group the "Proctor group".

[13] Most of the participants were affected by alcohol or drugs and both sides brought weapons to the scene. Members of the Warren group had a crowbar, knuckledusters and a 12 gauge pump action shotgun. Mr Cunnard loaded the gun at the house before they left. Mr Perry drove the other four appellants to the scene. The Crown said that Mr Cunnard placed the gun in the back of the ute in which they travelled to the scene, with the full knowledge of the other appellants. The degree of knowledge the appellants other than Mr Cunnard had about the presence of the gun is a matter in dispute. Members of the Proctor group also had knuckledusters, a wooden baseball bat and a yellow plastic cricket bat.

[14] The Crown case was that a fist-fight developed between Mr Warren and Mr Proctor. The fight quickly escalated. Mr Gillbanks was struck forcefully on the head with the cricket bat by a Mr Clouston, who had armed himself with that bat and a baseball bat. Mr Clouston then used the baseball bat to begin smashing the windows of the vehicle in which the appellants had arrived.

[15] Mr Cunnard produced the shotgun from the rear of the vehicle, cocked it, and began pointing it at members of the Proctor group and in the air. Mr Minto approached Mr Cunnard, pushed the gun away and punched him to the ground. Mr McNaughton then took the gun away from Mr Cunnard, and says he returned it to Mr Perry's ute.

[16] Mr McNaughton became concerned about how the fight was developing and yelled out at least once that the fighting was meant to be "one on one". It seems that Mr Cunnard then retrieved the gun and began pointing it in the direction of those in the Proctor group – perhaps at Mr Minto. Mr McNaughton again took the gun off Mr Cunnard. He began pointing it towards the Proctor group. At that stage, Mr Minto was some distance (perhaps 10–12 metres) away from him. Mr McNaughton said that Mr Minto seemed angry when he saw the gun, called out "You, you cunt", pointed at the gun and advanced. There is a dispute as to whether or not Mr Minto was carrying a baseball bat. Mr McNaughton did not give evidence at trial, but in an affidavit filed in this Court he now says he believed Mr Minto was going to try and gain possession of the shotgun, that he told him to stop but Mr Minto continued to advance. Forensic evidence suggests Mr McNaughton shot the Mr Minto [sic] in the chest from a distance of between 2.4–3.6 metres.

[6] While the detail of these facts may have been modified or varied at Mr McNaughton's retrial, we are satisfied that the summary is adequate and accurate for our purposes.

[7] This Court allowed Mr McNaughton's appeal against conviction at his first trial because of trial counsel error in failing to advise Mr McNaughton to give evidence. In identifying the importance of Mr McNaughton's evidence to his defence the Court noted:

> [57] Depriving the jury of Mr McNaughton's account of his perception of events, particularly his fear of attack by Mr Minto, made self-defence a very difficult proposition to present. *To exclude it, the Crown only needed the jury to accept that they had no way of knowing what Mr McNaughton's perception was because he had not told them.* While it will not be in every case that a credible narrative for self-defence requires the accused to give evidence, it is hard to see how the defence could be properly put forward in this case without that occurring. Nothing that Mr McNaughton told the police or anyone else gave any insight into his perception of events at the relevant time.
>
> [58] That is not to say that there is a strong case of self-defence. It may be that if a jury had heard Mr McNaughton and Mr Brandish cross-examined, the Crown would not have had great difficulty in excluding the defence. *Even if Mr McNaughton's account as put to this Court and Mr Brandish's version of events are accepted, the Crown will no doubt highlight the apparent lack of proportionality of Mr McNaughton's response to the danger he perceived*.
>
> (Emphasis added.)

Self-defence

[8] As noted, Mr McNaughton's defence at trial relied primarily on self-defence or justification. By s 48 of the Crimes Act 1961 a person is justified in using in his defence "... such force as, in the circumstances as he believes them to be, it is reasonable to use". In a jury memorandum delivered in conjunction with his summing up, Miller J placed the three elements of self-defence[5] in factual context in these words:

> [10] You must consider three questions when you assess the evidence. *First*, what did Mr McNaughton believe the circumstances were at the time? You consider that from his point of view. What did he believe was happening at the time? Did he think he faced an attack; if so, what sort of attack; and what sort of harm did he think was he likely to suffer? …
>
> [11] *Second*, bearing in mind what Mr McNaughton believed was happening at the time, was he acting to defend himself from attack by Mr Minto when he fired the gun? Again, that is to be considered from his point of view. Did he honestly believe that Mr Minto was attacking him and that he was using force to defend himself? … Bear in mind that it is implicit

[5] *R v Bridger* [2003] 1 NZLR 203 (CA) at [18]; *R v Hackell* CA131/02, 10 October 2002 at [11].

> in the idea of self defence that the accused acted to meet what he believed to be an existing threat. If you are satisfied that he was acting out of his own aggression or hostility towards the Proctor group, for example, then it is not self defence. If, however, you think that it is at least a reasonable possibility that he believed he was in danger of bodily harm, and that he intended when he fired the gun to act in self-defence against that danger, then you go to the third step.
>
> [12] The *third* step is this: was the force he used reasonable, given what he believed was happening at the time? Was it out of proportion to the threat he faced? Did he believe that Mr Minto merely wanted to ensure that Mr McNaughton did not use the gun against the Proctor group? Were there other options that he knew he might take in the time available to him, such as getting help or fleeing? It is an important question for you to consider just how much time was there available to him.
>
> (Emphasis in original.)

[9] The first question and most of the second question required a subjective threshold inquiry into Mr McNaughton's state of mind at the time he shot Mr McNaughton.[6] The third question is of a truly objective nature, requiring the jury to undertake a fact based assessment of whether shooting Mr Minto at close range was a reasonable use of force in the circumstances as Mr McNaughton believed them to be.

[10] The murder charge fell for consideration in two sequential stages. If the Crown failed to exclude the reasonable possibility that Mr McNaughton was acting in self-defence, the jury would acquit him of all criminal liability. But, as Miller J emphasised, if the jury was satisfied that the Crown had excluded that reasonable possibility, then the killing was culpable and the question was whether Mr McNaughton was guilty of murder or manslaughter.

[11] A central plank of Mr McNaughton's justification defence as it emerged at his retrial was that Mr Minto was holding an object when the two men confronted each other in the seconds before the shooting. Independent evidence from two eyewitnesses was relied upon to develop a defence thesis that Mr Minto was holding a baseball bat. In addressing the jury Mr Lithgow described this feature as "the guts" and "front and centre" of the defence. An associated plank was that Mr Minto

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6 *R v Auckram* [2007] NZCA 570.

presented a threat of taking the gun from Mr McNaughton's possession and using it against him.

[12] As we shall explain, the prosecutor, Mr O'Donoghue, sought to discredit Mr McNaughton's account. The steps he took for that purpose both in cross-examination and closing to the jury are the genesis of the two relevant grounds of appeal.

Appeal

(a) Invitation to infer guilt from failure to disclose self-defence before trial

[13] Mr Lithgow submits that breaches of s 32 of the Evidence Act 2006 occurred because the prosecutor invited the jury to infer Mr McNaughton's guilt from his failure to disclose the defence of self-defence before trial and the Judge omitted to give a contrary direction.

[14] Section 32 of the Evidence Act relevantly provides:

> **32 Fact-finder not to be invited to infer guilt from defendant's silence before trial**
>
> (1) This section applies to a criminal proceeding in which it appears that the defendant failed—
>
> (a) to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or
>
> *(b) to disclose a defence before trial.*
>
> (2) If subsection (1) applies,—
>
> (a) no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and
>
> (b) if the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.
>
> (Emphasis added.)

[15] In *Smith v R* this Court recently subjected s 32 and its common law genesis to scrutiny.[7] Some additional observations are necessary in the context of this appeal. The heading to s 32 confirms that its dominant purpose is to protect a defendant from any adverse comment or prejudice where he or she exercises his or her right to silence. It may thus be thought that the provision only operates where a defendant has exercised that formal right. Mr McNaughton elected to make a statement. The limitation inherent in the heading does not, however, reflect its content – its application appears absolute and we construe the word "silence" as applying not only to an occasion when the defendant makes no statement at all, but also where he or she does say something before the trial but does not disclose the defence advanced at trial. It seems also that that state is of itself, irrespective of a positive inconsistency in an account, sufficient to trigger s 32.

[16] The wording of s 32 reflects a tension recognised by the common law between two conflicting interests. One is the legitimate interest of a prosecutor to challenge the defendant's veracity for failing to raise a defence when an opportunity previously arose. The other is a defendant's interest in protection from an illegitimate invitation by the prosecutor to the fact-finder to go further and draw an inference, usually based on the same omission, that the defendant is guilty. In *E (CA727/09) v R* this Court observed that the distinction would test the skills of a philosopher.[8] As Mr Lithgow noted, it will rarely be that advancing the first interest by challenging the defendant's veracity will not necessarily undermine the second interest. Nevertheless, in *Smith* the Court recognised the validity of the distinction.[9] Thus a prosecutor wishing to pursue the first interest must walk a fine and uncertain line if he or she is not to offend the second.

[17] The prosecutor's breach of s 32 in *Smith* was reasonably clear. His cross-examination of the defendant about his failure after stabbing the victim to raise self-defence when speaking to a number of people including his girlfriend was isolated from, and unrelated to, an attack on credibility. The prosecutor repeated the same theme in closing, observing that "… he didn't say any of those sorts of things,

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7 *Smith v R* [2013] NZCA 362.
8 *E (CA727/09) v R* [2010] NZCA 202 at [60].
9 At [37]–[42].

and the Crown say that is a very, very telling factor in this case".[10] It may be inferred that this was an indirect attack on the defendant's credibility but it was not cast in that way.

[18] This case is different because the prosecutor unarguably linked his frequent references to Mr McNaughton's failure to raise self-defence before trial with a direct attack on the credibility of the same subject matter. The question is whether he went too far.

[19] The important related feature of s 32 is the Judge's obligation to direct the jury that it may not infer guilt from a failure to disclose a defence before trial. This reflects a legislative recognition that an orthodox judicial direction on lies would not be sufficient to answer the underlying risk where the prosecutor attacked credibility in this respect and the settled principle that guilt is not to be necessarily inferred from a defendant's lies. In *E (CA727/09) v R* the prosecutor's breach of s 32 was countered by a strong judicial direction to the jury. By contrast, in *Blair v R* this Court found a clear breach where the trial Judge in summing up told the jury that it might properly wonder why the defendant did not deny the offending when he was being questioned by the police.[11] In *Smith*, similarly, the breach of s 32 was not rescued by a strong judicial warning.

[20] Mr McNaughton's explanation at trial for shooting Mr Minto was that "... it was just a reaction ... [to] ... a threat". The Crown wanted the jury to reject his account as untruthful. As Ms Preston submitted, the prosecutor was seeking to use for that purpose Mr McNaughton's failures when the opportunities first arose to assert to others that Mr Minto was holding an object. She is correct that the Crown was properly entitled to draw to the jury's attention aspects of the evidence which might establish inconsistencies affecting Mr McNaughton's veracity.

[21] The prosecutor cross-examined Mr McNaughton about his failure to refer to these two factual features when speaking with friends and when interviewed by the police immediately after the event. To his friends, Mr McNaughton made brief,

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10 At [44].
11 *Blair v R* [2012] NZCA 62 at [34]–[37].

arguably incriminating, admissions about shooting Mr Minto. He admitted saying nothing about the threat of an object. But he said little about the circumstances of the shooting at all and he was not giving an exculpatory account which might contradict his explanation in Court.

[22] The prosecutor questioned Mr McNaughton about the circumstances of his police statement as follows:

> Q: You were well able to look after yourself during that interview with the detective, weren't you –
>
> A: Mmm –
>
> Q: – you were holding your own?
>
> A: I s'pose you could say that.
>
> Q: *Yes. And he gave you a fair opportunity to say what happened, didn't he?*
>
> A: *Ah, yes he did.*
>
> Q: In fact, he gave you more than one.
>
> …
>
> Q: And he said to you … "All right, well, just to give you a chance to come clean, one final time," so he's sort of hinting to you, not believing it, "Blair, tell us what really happened," isn't it?
>
> A: Um –
>
> Q: "All right, well just to give you a chance to come clean one final time." Now, the detective couldn't be fairer than that, could he? He gave you two opportunities for you to tell him what happened —
>
> A: Um –
>
> Q: – didn't he?
>
> A: Yes I think so.
>
> Q: *And you didn't take that opportunity to say, "Oh, I had to shoot Minto. He was coming at me with an object and I believed – or I believed he might get the gun and use it," did you?*
>
> A: *Um, no.*
>
> Q: *In fact, if this had been true, you could even have told him, "I didn't shoot Minto. One of my unnamed mates did, but Minto was going at him with an object and he looked like he wanted to take the gun off him and use it." You didn't even do that, did you?*

A: Um, no.

…

(Emphasis added.)

[23] In closing the prosecutor built on this line of attack on Mr McNaughton's credibility as follows:

> Mr McNaughton, however, you might think seemed to be the most determined person there to get his hands on the gun. He wanted possession of that shotgun. Oh, you know, has Cunnard not got the bottle or something? He gets it. His whole attitude, and his actions, shows he wanted that gun and to use it, because when he got it, he was pointing at people.
>
> The best predictor of what Minto's intention was, future intention, was what he'd just done, surely. And when did this, "Oh, I thought he might – I believed he might take the gun and use it against me," when did this first materialise? By August of 2010 that's when he told his lawyer, McNaughton … Nine months after he's been arrested. Just keep clear, in your mind, they're separate, coming at him with an object and, "Oh, and I believed he was going to take it off me and use it against me or my mates." Quite separate points. Be careful not to confuse them.
>
> McNaughton had no reasonable grounds to believe that Minto was going to take the gun off him and use it against him or anybody else. It's made up. It's made up. *It's fabricated, long after the event, to give himself a chance of self-defence with the jury.*
>
> (Emphasis added.)

[24] However, while the prosecutor was continuing this theme, he referred repeatedly and specifically to Mr McNaughton's earlier failure to raise self-defence. For example, he said:

> You're entitled to, when someone waives their right to silence and talks to the police, you're entitled to have a look at what they've said, how they said it, when they said it, and what they didn't say, what they omitted to say. These all, sort of, factor in, don't they? *Well, he didn't say anyone to – say anything to anyone who he visited within hours of the shooting who you might have thought he would, relatives and friends, that he shot Minto to defend himself, because Minto was either coming at him with an object, or he believed Minto was going to get the gun off him and use it.*
>
> …
>
> The McNaughton interview. Well, he said yesterday that his plan when he went into that interview was to pretty much admit it, but he freaked out. Well, that's what he claims. Did he look to you on that DVD interview shocked? Did he look panicked? Did he look freaked out? Or did he appear alert and calculating, very quickly able to come up with a lie when the

gunshot residue test is talked about, "Oh, we popped off some rounds earlier in the day." Implying that someone else must have shot Mr Minto, no suggestion that he had to shoot. *He didn't say that the other person who'd done it had had to shoot him in self-defence. You might think it's easier to say, "Oh, someone else did it."*

The detective, you might think, doing his job, doing his duty on the night, investigating a man's killing, doesn't get any more serious than that. Page 14 of 27 of the transcript, "Well, you tell me how the story went. You tell me what happened." *No self-defence. Page 26 of 27, again, comes back to it. "All right, well, just to give you a chance to come clean, one final time." No self-defence.* The defence might invite you to say that these deliberate admitted lies to the police are just a sideshow, put them to one side. Well, hang on a minute, aren't they pretty important when it comes to you assessing the credibility and reliability, can you safely rely on what this man says now? It's a matter for you what you make of his lies during the interview, and we say he told lies yesterday, too.

You want to be pretty cautious, and it would be prudent to be so, for someone who lied for the purposes of trying to avoid the consequences of their actions. Can you believe anything this man told you, at the end of the day?

(Emphasis added.)

[25] To the same effect was this passage:

… Mr McNaughton's evidence was a mixture of self-serving lies and twisted half-truths. He knew about the gun, and he knew that Minto was not coming at him with any object of any description, no table or chair, wooden chair legs, and he knew, in the circumstances as he believed them to be, that Minto was not intending to get the gun and use it. If Minto had wanted to do that, he could have done it. McNaughton gunned down an unarmed man.

Self-defence. What were the circumstances as Blair McNaughton believed them to be? It doesn't mean that you have to accept any old thing that he says about that. "Oh, this is what was in my mind." You can look at all the circumstances and you can work it out. You don't have to accept what he says at face value and in fact, we've already said, be pretty wary about believing what this fellow says. *It's a bit Johnny-come-lately, too, isn't it? It only comes after receiving all the disclosure he claims self-defence.* Wouldn't that be the first thing you said, you know, when the policeman said, "Well, you tell me how the story went. You tell me what happened." The detective couldn't be fairer than that, gave him every opportunity.

…

(Emphasis added.)

[26] In essence, the Crown case was being put on the basis that Mr McNaughton had lied about self-defence to explain away his guilt. The prosecutor could properly have challenged Mr McNaughton's credibility by submitting that he lied in his

evidential interview and had now changed his position at trial. He could have referred in a balanced and fair way in the measured and dispassionate way expected of a Crown prosecutor to the inconsistencies in Mr McNaughton's position. Instead the prosecutor made this point a dominant theme of his address. It became the primary basis for attacking Mr McNaughton's credibility and inexorably undermining his justification defence.

[27] The sheer scale, content and repetition of the prosecutor's emphasis on a constant linkage between silence on self-defence and Mr Minto's possession of an object and threat of disarming Mr McNaughton ran the real risk of leaving the jury with the impression that his failures to raise the defence was evidence of his guilt. This risk was compounded by the prosecutor's references to the formal defence of self-defence.

[28] At the least, the circumstances of the prosecutor's cross-examination and address necessarily triggered the mandatory requirement for a s 32(2)(b) direction from the Judge. A standard lies direction, which was properly given, would not be enough. The Judge omitted to give that s 32(2)(b) direction, referring briefly instead to the Crown's position in these terms in summing up:

> [104] And the Crown says, he did not act in self-defence at all. *Indeed, he never raised that immediately after the killing, as you would expect him to do.* One does not need to be a lawyer to get self-defence the understanding is inherent in all of us. …
>
> (Emphasis added.)

[29] The Judge's omission is regrettable but understandable in the context of a multi-accused trial with numerous and complex issues. It is particularly regrettable that Mr Lithgow did not raise after the prosecutor's cross-examination or the Judge's summing up the argument which he now advances on appeal. A firm direction may have provided an appropriate opportunity to rectify the prosecutor's breach.

[30] This ground of appeal is upheld.

(b) Prosecution failure to put case

[31] Section 92 of the Evidence Act provides:

> **92 Cross-examination duties**
>
> (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
>
> (2) If a party fails to comply with this section, the Judge may—
>
> (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or
>
> (b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
>
> (c) exclude the contradictory evidence; or
>
> (d) make any other order that the Judge considers just.

[32] In summary, counsel is under a duty to cross-examine under s 92 where these four criteria are satisfied: (a) the topic of cross-examination is a significant matter; (b) the matter is both relevant and in issue; (c) the matter contradicts the evidence of the witness; and (d) the witness could reasonably be expected to be in a position to give admissible evidence on it. As this Court has observed, the general purpose of the statutory obligation on counsel is "one of fairness",[12] continuing the common law's longstanding policy that basic fairness requires that if a fact is going to be relied upon in closing it must be put to the relevant witness in cross-examination.[13]

[33] Mr Lithgow's submission of breach is based on the way the Crown closed its case. The prosecutor's submission that self-defence was not available because Mr McNaughton had a number of options at the moment of firing the gun was at the forefront of his closing address. Among the options he specifically identified were firing into the ground or into the air or fleeing. He says the Crown breached s 92 by failing to challenge Mr McNaughton on them. A separate ground of appeal, but one

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12 *R v Soutar* [2009] NZCA 227 at [27]; and *R v Dewar* [2008] NZCA 344.

13 *E (CA727/09) v R*, above n 8, at [54].

which ultimately related to Mr Lithgow's s 92 argument, is whether the Judge misdirected the jury when answering a question.

[34] Strictly speaking, it is unnecessary for us to determine this ground in view of our conclusion that the first ground of appeal succeeds. However, we have resolved to address it given that same issue will likely assume central importance at Mr McNaughton's retrial.

[35] It was, as the Judge noted, "manifest from the outset" that a core component of the Crown case was that, when confronted by Mr Minto, Mr McNaughton had other options available to shooting. By reference to the third element of the self-defence inquiry, Miller J's written memorandum for the jury identified whether there were "other options that he knew he might take in the time available, such as getting help or fleeing". And, significantly, the jury itself, when deliberating, asked a question of the Judge whether "the belief that [Mr] McNaughton had options immediately before fireing [sic] the firearm outweigh 'reasonable response'".

[36] In evidence in chief Mr Lithgow had taken Mr McNaughton, as he said, "step by step" through the relevant circumstances from the time he first saw Mr Minto after picking up the gun. Mr Lithgow led evidence of a verbal exchange. Mr McNaughton described Mr Minto as looking "pretty aggressive" and "in a rage"; he was trying to "defuse the situation" and "his sort of aggressive state" while holding the gun at his side; that he thought Mr Minto was going to "try and come at me and injure me and get the gun"; and he "just assumed it could be pretty dangerous" if Mr Minto got the gun. He gave Mr Minto about three warnings, to which the latter responded "do you really think that's gonna stop me". He pulled the trigger when the two men were about two and a half metres apart.

[37] This exchange followed:

> Q: Why did you pull the trigger?
>
> A: I don't know. I guess it was just a reaction.
>
> Q: What were you reacting to?
>
> A: A threat.

Q: *How many seconds did you have to make up your mind?*

A: *I'd say probably three or four seconds.*

Q: *Did you make up your mind to shoot him?*

A: *Um, no.*

...

Q: You. What were you thinking when the gun went off?

A: I was more surprised, really, surprised, really, that I had, you know, that it had gone off and that I'd just shot someone.

...

Q: Did you know that a shotgun at close range is going to cause serious injury?

A: Um, I – at the time I did not know what type of injuries or damage a shotgun could cause.

(Emphasis added.)

[38] Later, there was this exchange:

Q: Yes. What did you think he was trying to do?

A: He – when he was coming to confront me –

Q: That he was coming to confront you, what did you think he was trying to do?

A: Get the gun.

Q: Get the gun? And what would have happened if he'd got the gun, good or bad?

A: I suppose it can't have been good.

...

Q: If he'd ended up with the gun, what was his mood?

A: Um, he was in a rage of aggression.

...

Q: *But at the time, could you think of anything else you could have done?*

A: *Um, no. There was really no time for it.*

...

Q: *What do you call that?*

A: *Ah, it's normal reaction. It's instinctive.*

(Emphasis added.)

[39] The prosecutor's cross-examination covered about 20 pages of transcript. Some 13 pages were devoted to questions of a scene setting nature, focussing on the background events leading to the two groups meeting.

[40] The prosecutor's substantive challenge began by comparing Mr McNaughton's position with that of Mr Cunnard when the latter was earlier approached by Mr Minto in similar circumstances while pointing the shotgun in his direction. Mr McNaughton responded that Mr Minto was carrying an object when advancing towards him but not when he confronted Mr Cunnard. The prosecutor's riposte was: "... if he truly had, [you] would have told someone long before now". He then focussed on Mr McNaughton's failure to mention to others Mr Minto's possession of an object during the confrontation. Some of the relevant passages have already been recited (at [22] above).

[41] The prosecutor then began to follow another path of questioning Mr McNaughton by reference to a co-accused's statement to the police. The Judge properly intervened in this line of inadmissible questioning. The cross-examination ceased shortly afterwards. In the result, the Crown's only challenge to Mr McNaughton's account was to his assertion that Mr Minto was carrying an object.

[42] In closing, the prosecutor said this:

> The defence, in their opening address yesterday, said that you were justified to use force to defend yourself provided you did not go way over the top, but you know what I'm going to say, don't you? He went way over the top. *What he did, did not and could not, in the circumstances as he believed them to be, constitute a reasonable degree of force.*
>
> Well, an argument might be made, well, what else was he supposed to do? Mr McNaughton's effectively saying, "I had to shoot him," *so you will have to consider what other options were available to him.*
>
> We had the AOS man say, "Oh, you know, step back, run away or something, protect my gun," all these sorts of things are available, but why

not go back to what the original plan, what Mr Cunnard looks like he was shaping to do? Fire it into the air. Fire it into the ground. Poof. That'd arrest his advance, wouldn't it?

Oh you've come here, you're going to listen to evidence for three weeks and lawyers talking, yet this man only had 30 seconds to decide what to do. Well, you need to back up on that one. You look at the whole history of this matter, and the animosities that have built up and at, what actually was happening before that, and it wasn't just 30 seconds, *"I didn't have any other option." McNaughton said, "I told him three times, 'Fuck off Troy or I'll shoot you.'" That's a bit of time, while he's heading towards you.*

And of course, the situation of the AOS member, who's got a, who was, the example was put at him of a bad guy coming to try and take his gun off him, we're not, we're saying that's not what was happening here. And just, while we're on that point, Mr McNaughton is not a dairy owner or a farmer under attack. He's a man, standing in a public park, training a loaded shotgun on an opponent while a group fight is going on around him.

You can dismiss self-defence, the Crown says, and I'm now going to move to murderous intent.

(Emphasis added.)

[43] In directing the jury, Miller J said:

[40] Now the third step is this; was the force he used reasonable, given what he believed was happening at the time? Was it out of proportion to the threat he faced? Did he believe that Mr Minto merely wanted to ensure that Mr McNaughton did not use the gun against the Proctor group? *Were there other options that he knew he might take in the time available to him, such as getting help or fleeing?* It is an important question for you to consider just how much time was there available to him.

[41] Whether Mr McNaughton thought the force he used reasonable is not the point. The question is whether *you* think it was a reasonable response to what *he* believed was happening at the time. We use that test because the law does not give people a blank cheque to defend themselves using as much force as they like. *Of course these things happen in the heat of the moment, you cannot expect him to weigh up his other options or the degree of force he used in a very exact way.* But subject to that, the force used must be a reasonable response to the threat he believed he faced. It is not the case that use of a gun in self-defence is reasonable only when the accused is faced with another gun or other similarly lethal weapon. Sometimes it may be reasonable to use the only weapon at hand. But it is necessary that the accused thought he faced a threat of bodily harm that made use of the gun a reasonable response. It is for you to decide whether it was reasonable to shoot Mr Minto in the circumstances that Mr McNaughton believed he was confronted with at the time.

(Emphasis added.)

[44] Later, the Judge summarised the Crown case against Mr McNaughton as follows:

> [104] … *The Crown says Mr McNaughton knew he had not acted in self-defence. Far from it, he knew he had other options. He did not have to stand there, pointing the gun. It was only because he did that that Mr Minto took an interest in him. He had time to warn Mr Minto, perhaps three times, and that means he had time to do something else, such as put the gun down, or walk away.* He had no reason to suppose that Mr Minto wanted to take the gun and do any harm with it. Indeed, in evidence all he said was that he thought he would be injured and Mr Minto would end up with the gun. The Crown says that at most Mr Minto wanted to ensure it was not used; and Mr McNaughton knew that, because that is what he tried to do when Mr Cunnard first brought it out. *It says that Mr Minto [sic] could have walked away, but he had no intention of doing that.* Instead he used the gun.
>
> [105] Finally, the Crown says, that the force used – that is the shooting – was out of all proportion to any threat that Mr McNaughton faced. Mr Minto was unarmed. Even if Mr McNaughton did think he had some sort of object in his hand, the force used was plainly unreasonable. It is not a question of what an Armed Offenders officer would do in some abstract situation where some unknown person was about to take his weapon. There is no general rule that you can use your weapon to kill if someone tries to take it from you. It all depends on the facts of the particular case. You have to ask what did Mr McNaughton know, what were the circumstances as he understood them to be, and what did he think he was doing.
>
> (Emphasis added.)

[45] We are not satisfied that the prosecutor's cross-examination breached s 92. Four criteria must be established before it applies. The third is that there must be a matter which contradicts the witness' evidence. There was no matter contradicting Mr McNaughton's assertion that he only had three or four seconds to make up his mind; that he did not make up his mind to shoot Mr Minto; and that there was no time to "think of anything else [I] could have done …". So the prosecutor was under no s 92 obligation to question Mr McNaughton on this subject.

[46] However, as a result of the prosecutor's omission, Mr McNaughton's evidence on this critical point of the case was unchallenged. It was directly related to two elements of self-defence – the circumstances as Mr McNaughton believed them to be at the time (the first element) and whether the force used was reasonable (the third element). With some emphasis, the prosecutor based his submission on what he said were the options available to Mr McNaughton. But he had not directly challenged his account – effectively that there were no options – at all.

[47] Given that the Crown carried the burden of effectively negating self-defence, the problem was aggravated by the prosecutor's underlying failure to challenge Mr McNaughton's detailed account of the circumstances and in particular his belief in them at the time of shooting – other than that Mr Minto was holding an object.

[48] Following counsel's addresses and before summing up, Mr Lithgow raised with the Judge the prosecutor's specific failure to challenge Mr McNaughton on the available options. Miller J rejected Mr Lithgow's submission that the prosecutor had not properly put the Crown's case in cross-examination. However, after a lengthy exchange Mr Lithgow was apparently satisfied that the Judge would summarise the Crown case as it was advanced in closing but emphasise the limited time available to Mr McNaughton to consider his options. The Judge directed accordingly.

[49] Mr Lithgow now argues that the trial was unfair because the Crown closed its case on the third element of self-defence of unreasonableness by reference to specific options said to be available which were never put to the witness. We agree that the prosecutor's cross-examination on certain important aspects was inadequate. Nevertheless, we are satisfied that the Judge's summing up substantially mitigated any resulting unfairness by emphasising the limited time available to Mr McNaughton. It might have been preferable if he had also emphasised that it was open to the jury to accept Mr McNaughton's account, unless it could be dismissed as plainly implausible, in the absence of a challenge. But that factor is not ultimately of decisive relevance.

[50] What is relevant, however, is the jury's question which followed the summing up. As noted, it asked whether "the belief that [Mr] McNaughton had other options available outweighs 'reasonable response'". The inquiry must have reflected the importance of the Crown's options argument to the jury's deliberations on whether the shooting was reasonable in the circumstances as Mr McNaughton believed them to be. The premise for the jury's question was that Mr McNaughton did in fact have that affirmative belief.

[51] However, the jury's premise was without a factual foundation. The prosecutor had not attempted to establish it in cross-examination. The only available

inference from the state of the evidence was that Mr McNaughton had not formed a belief at the time.

[52] Miller J consulted with counsel before answering the question as follows:

> The belief that he had other options is a dimension of reasonable response. In other words, you may conclude that the force used was unreasonable if the Crown have proved to beyond reasonable doubt, – and that is a matter for you – that he knew he had other options available to him and those options were reasonably available to him in the time he had to react. That is for you to assess.

[53] This answer followed another lengthy exchange between the Judge and Mr Lithgow. He argued, as he did on appeal, that the Judge's answer should have followed this passage from *R v Howard* that:[14]

> … "such force as … it is reasonable to use" may include force which is not in reasonable balance with the believed threat, if for instance the accused has no real choice of means, other than a means which might be seen in the normal course as way out of balance with the threat.

[54] This submission was beside the point and Miller J was right to reject it. But what is directly to the point, but was apparently lost in argument at the trial, was whether the Crown had provided an evidential foundation for proving "that [Mr McNaughton] knew he had other options available to him". As noted, the prosecutor had not questioned him on the options said to be available – principally, firing the gun into the air or the ground or fleeing. The first or subjective stage of the self-defence inquiry had not been tested by the Crown. The situation required that the Judge direct the jury to consider whether the Crown had proved by an appropriate evidential foundation both that, to use the Judge's words, Mr McNaughton (a) "knew he had other options available to him" and (b) "those options were reasonably available to him in the time he had to react". An explicit direction of this nature was required but was not given.

[55] We have regrettably concluded that the Judge's answer, in the particular context, was insufficient and thus in error and we would have allowed the appeal on this ground also.

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[14] *R v Howard* (2003) 20 CRNZ 319 (CA) at [26].

(c) Partial defence of excessive self-defence

[56] Mr Lithgow submits that if Mr McNaughton's appeal is allowed this Court should recognise the partial defence of excessive self-defence by substituting a verdict of manslaughter for murder where the defendant intended to act in self-defence but in doing so used more force than was reasonable. Alternatively, he submits, we should recognise the partial defence in the event that we order a retrial because it exists at common law which Parliament has preserved and left to be developed by the courts.

[57] Section 20 of the Crimes Act preserves the common law so far as it is consistent with the Act as follows:

> **20 General rule as to justifications**
>
> (1) All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to any charge, shall remain in force and apply in respect of a charge of any offence, whether under this Act or under any other enactment, except so far as they are altered by or are inconsistent with this Act or any other enactment.
>
> (2) The matters provided for in this Part are hereby declared to be justifications or excuses in the case of all charges to which they are applicable.

New Zealand

[58] The authors of Simester and Brookbanks are of the opinion that a partial defence of excessive self-defence is not available in New Zealand:[15]

> In a sense, the law gives conflicting signals concerning the degree of force that is permissible in self-defence. On the one hand it states that the defence must fail if the force used by the accused is excessive. On the other hand, the courts will not "weigh to a nicety" what is reasonable defensive force. However, the underlying principle would seem to be that because a person who repels an unjust attack is upholding the law, and as such is justified, where force used in self-defence is disproportionate to the threat offered, the defender himself or herself acts unlawfully and may forfeit the protection that the law otherwise confers. Such a person is then liable for using an

[15] AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Thomson Reuters, Wellington, 2012) at [15.1.5]. Similar commentary appears in *Garrow and Turkington's Criminal Law in New Zealand* (online looseleaf ed, LexisNexis) at [CRI48.3].

> excess of force beyond that which the law allows. In New Zealand, authority for punishing excess force is provided by s 62 of the Crimes Act 1961, which indicates that wherever the law permits someone to use force, he or she is liable for the consequences of force used beyond that which the law allows. In *R v Godbaz*,[16] the Court of Appeal held that excessive force in repelling an assault was not protected by self-defence and itself constituted an assault. Thus, applying s 62 in a case where excessive force has been used in self-defence resulting in death of the original aggressor, the offender will be liable for murder (unless he or she can avail him or herself of some other defence). Formerly, the defence of provocation might have been available ...

[59] In *Daken v R*, in the context of sentencing and a departure from the presumption of life imprisonment for murder, this Court held:[17]

> [67] They cited a number of authorities not submitted to the sentencing Judge which illustrate how in other jurisdictions excessive self-defence can mitigate criminal responsibility to such an extent as may reduce murder to manslaughter. They are marshalled in the Law Commission's Preliminary Paper *Battered Defendants: Victims of Domestic Violence who Offend* and Report *Some Criminal Defences with Particular Reference to Battered Defendants*. *Palmer v The Queen* on appeal from Jamaica, to the opposite effect was also, properly, cited. The former authorities form no part of New Zealand law.

[60] The Law Commission had proposed a version of excessive self-defence in its preliminary paper on battered defendants.[18] However, its subsequent report resolved not to endorse the defence's introduction in New Zealand, choosing instead to propose a sentencing discretion for murder.[19]

Australia

[61] In *R v McKay* the Victorian Supreme Court had held on the use of excessive force in self-defence that: "If the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon but the person taking action acts beyond the necessity of the occasion and kills the offender the crime is manslaughter – not murder."[20] Shortly after that decision in *R v Howe*,[21] the High

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16 *R v Godbaz* (1909) 28 NZLR 557 (CA).

17 *Daken v R* [2010] NZCA 212 (footnotes omitted).

18 Law Commission *Battered Defendants: Victims of Domestic Violence who Offend* (NZLC PP41, August 2000) at 20.

19 Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) at 25–26.

20 *R v McKay* [1957] VR 560 (VSCFC) at 563 per Lowe J.

21 *R v Howe* (1958) 100 CLR 448.

Court of Australia confirmed the existence of the partial defence. The Privy Council rejected it (on appeal from Jamaica) in *Palmer v R.*[22] But in *Viro v R* the majority of the High Court followed *Howe* in preference to *Palmer*.[23] However, in *Zecevic v R* the High Court reconsidered and rejected the existence of the partial defence.[24]

[62] In the result the partial defence of excessive self-defence is no longer part of the common law of Australia, except to the extent that it lives on through statute in New South Wales, Western Australia and South Australia.[25]

England

[63] Similarly there is no partial defence of self-defence in England and Wales.[26] The Criminal Law Revision Committee of England and Wales and the Law Commission of England and Wales have previously recommended the introduction of versions of a partial defence of excessive self-defence.[27] However, the Law Commission for England and Wales did not recommend a specific partial defence in a later 2004 report, mainly for the reason that its proposed reformulation of the provocation defence would "be the simplest and most effective way of ameliorating the deficiencies of the present law".[28]

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22 *Palmer v R* [1971] AC 814 (PC); a view subsequently endorsed by the English Court of Appeal in *R v McInnes* [1971] 1 WLR 1600 (CA) and the House of Lords in *R v Clegg* [1995] 1 AC 482 (HL).

23 *Viro v R* (1978) 141 CLR 88. A good statement of the rationale for the partial defence can be found in the judgment of Mason J at 139.

24 *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645.

25 Crimes Act 1900 (NSW), s 421 (introduced in 2002); Criminal Code Act Compilation Act 1913 (WA), s 248(3) (introduced in 2008); Criminal Law Consolidation Act 1935 (SA), s 15(2) (introduced in 1991 and revised 1997). There is also an offence of "defensive homicide" in Victoria, where the defendant's belief in the need for the force applied in self-defence was unreasonable they may be convicted of the lesser offence of defensive homicide: Crimes Act 1958 (Vic), s 9AD (introduced in 2005).

26 *R v McInnes*, above n 22; and *R v Clegg*, above n 22.

27 Criminal Law Revision Committee *Offences Against the Person* (14th report, Cmnd 7844, HMSO, 1980) at recommendation 73 and 138; Law Commission of England and Wales *A Criminal Code for England and Wales* (LC177, HMSO, 1989) vol 1 at 68.

28 Law Commission of England and Wales *Partial Defences to Murder* (LC290, HMSO, 2004) at Part 4 and in particular [4.30].

Canada

[64] A partial defence of excessive self-defence is not part of the law of Canada.[29] In *R v Faid* the Supreme Court unanimously held that a partial defence ought not be recognised as lacking in principle, practicality and justice:[30]

> The position of the Alberta Court of Appeal that there is a "half-way" house outside s.34 of the Code is, in my view, inapplicable to the Canadian codified system of criminal law, it lacks any recognizable basis in principle, would require prolix and complicated jury charges and would encourage juries to reach compromise verdicts to the prejudice of either the accused or the Crown. Where a killing has resulted from the excessive use of force in self-defence the accused loses the justification provided under s 34. There is no partial justification open under the section. Once the jury reaches the conclusion that excessive force has been used the defence of self-defence has failed.

United States

[65] Mr Lithgow referred to case law from the United States where a partial defence is recognised in some states. A chapter on justifications in *Substantive Criminal Law* by Wayne LaFave, a respected American academic writer, explains its rationale as follows:[31]

> **(i) "Imperfect" Self-Defense.** We have noted that one who uses force against another with an honest but unreasonable belief that he must use force to defend himself from an imminent attack by his adversary is not, in most jurisdictions, justified in his use of force, for proper self-defense requires that the belief in the necessity for the force he uses be reasonable. Although in many jurisdictions such a person is guilty of murder when he uses deadly force in such circumstances,[32] some courts and legislatures have taken the more humane view that, while he is not innocent of crime, he is nevertheless not guilty of murder; rather, he is guilty of the in-between crime of manslaughter.[33] "Outside of homicide law, the concept [of imperfect

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29 Criminal Code RSC 1985 c C-46, s 34; *Brisson v R* [1982] 2 SCR 227; *R v Gee* [1982] 2 SCR 286; and *R v Faid* [1983] 1 SCR 265.

30 At 271.

31 Wayne LaFave *Substantive Criminal Law* (2nd ed, eBook ed, Thomson Reuters, 2013) at Chapter 10.

32 *Hill v State* 979 So 2d 1134 (Fla Dist Ct App 2008).

33 See for example *People v Flannel* 603 P 2d 1 (Cal 1979); *State v Jones* 261 SE 2d 1 (NC 1980). This means that when the defence of self-defence is properly interposed, it will ordinarily be necessary to instruct the jury on this variety of voluntary manslaughter as well. *People v Lockett* 413 NE 2d 378 (Ill 1980).

> self-defense] doesn't exist. … With respect to all other crimes, the defendant is either guilty or not guilty. … There is no 'in between.'"[34]

[66] While an imperfect or partial defence is offered in certain states – North Carolina is one example[35] – many other states have rejected it.[36]

[67] As Ms Preston notes, the Irish Supreme Court has recognised a common law partial defence of excessive self-defence.[37] Otherwise, apart from some Australian jurisdictions, the defence has little statutory support.

Conclusion

[68] The purpose of s 20 is to preserve a common law defence to a charge provided however it is not "altered by or inconsistent with" the Crimes Act. Mr Lithgow's argument is that this Court should as a matter of policy, provide for the partial defence. He relies on this Court's statement in *R v Hutchinson* that:[38]

> [44] In determining what "rules and principles of the common law" may give rise, if not inconsistent with the Act, to a defence, the principle that the law is always speaking must be borne in mind. That principle was recognised at the time the Act was passed by s 5 of the Acts Interpretation Act 1924. It continues to be recognised by the successor to s 5 of the 1924 statute, s 6 of the Interpretation Act 1999. That principle of interpretation suggests that common law defences which would have been recognised in 1961 by s 20 of the Act should not be regarded as frozen in time. Rather, they may be developed having regard to what has happened in other common law jurisdictions, provided always that, in its final form, the rule or principle is not "inconsistent with the Act" or "any other enactment".

[69] In *Hutchinson* this Court was referring to a common law defence that was in place in 1961 but necessitated adjustment to acknowledge development either here or elsewhere in the common law world. It acknowledged the truism that the

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34 *Bryant v State* 574 A 2d 29 (Md 1990). See for example *State v O'Rear* 270 P 3d 1127 (Kan Ct App 2012) (concept of "imperfect self-defence" not applicable in instant case, involving aggravated battery); *State v Kirkpatrick* 184 P 3d 247 (Kan 2008) (where defendant charged with felony murder, because imperfect self-defence could not be asserted as to the underlying felony, here discharging a firearm into an occupied dwelling, it follows such a claim cannot require an instruction on manslaughter).

35 *State v Blue* 565 SE 2d 133 (NC 2002). The same position has been reached in Massachusetts: *Commonwealth v Carlino* 429 Mass 692 (1999) and *Commonwealth v Johnson* 412 Mass 368 (1992).

36 For example, Michigan and Washington do not recognise the partial defence: *People v Deason* 384 NW 2d 72 (Mich App 1985) and *State v Hatley* 706 P 2d 1083 (Wash App 1985).

37 *People (Attorney-General) v Dwyer* [1972] IR 416 (SC).

38 *R v Hutchinson* [2004] NZAR 303 (CA).

common law does not stand still but is constantly evolving to adapt to changing social, economic and cultural conditions. *Hutchinson* does not stand for the different proposition that in 2013 this Court should recognise a new defence which was not part of our common law in 1961.

[70] In any event, we are satisfied that the limiting words at the end of s 20 are fatal to Mr Lithgow's argument. The Crimes Act "applies to all offences for which the offender may be … tried in New Zealand" (s 5(1)). This proviso is not simply jurisdictional. The Act was plainly intended to amend and repeal the Crimes Act 1908 and codify all relevant principles. Section 48 is a self-contained definition of the defence of justification. To impose a gloss of the nature and effect proposed by Mr Lithgow would be inconsistent with its scope and meaning.

[71] In the High Court in *Wallace v Abbott* Elias CJ observed:[39]

> … The intent required for murder under s 167(1)(b) is an available inference for the jury on the evidence. If self-defence is eliminated by the jury on the ground of excessive force, then the fact that reasonable force might have been justified does not reduce murder to manslaughter (*Palmer v R*; *R v Clegg*). If the jury rejects both self-defence and the specific intent required for murder, then it may properly convict of manslaughter (s 171 Crimes Act).

[72] We would add, in a case such as this, a jury's rejection of a defence of justification, carrying an acceptance that the force used was excessive and thus unreasonable, still leaves for consideration the question of whether the offender acted with murderous intent – if not, as Miller J properly directed, the jury is required to return a verdict of manslaughter. Mr Lithgow is correct that a murder charge based on recklessness limits that possibility. But it does not exclude it in appropriate circumstances.

[73] In conclusion, we are satisfied that the overwhelming weight of authority throughout common law jurisdictions contradicts Mr Lithgow's argument. The leading judgments, such as *Zecevic* in Australia and *Palmer* and *Clegg* in the United Kingdom, are based on a full consideration of domestic and comparative authority.

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[39] *Wallace v Abbott* [2003] NZAR 42 (HC) at [107].

[74] In the New Zealand context, the Law Commission chose not to endorse the introduction of such a defence when reviewing the law on battered defendants. A change in the law or a recognition of the principle advanced by Mr Lithgow would raise issues of fundamental importance relating to criminal jurisprudence, in particular the proportionality to be accorded to specific acts. In *Clegg*[40] the House of Lords took the view that any change of the type proposed by Mr Lithgow is a matter for Parliament, not for the Court. We respectfully agree and accordingly we decline to recognise the partial defence of excessive force at common law in New Zealand.

Result

[75] The appeal is allowed.

[76] The conviction is quashed and a new trial is ordered.

[77] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in the news media or on the internet or in any other publicly available database until final disposition of the retrial. Publication in a law report or law digest is permitted.

Solicitors:
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[40] *R v Clegg*, above n 22, at 500.