# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Patel (No 7)* [2013] QSC 65 |
| PARTIES: | **THE QUEEN**<br><br>**v**<br><br>**JAYANT MUKUNDRAY PATEL**<br>**(Defendant)** |
| FILE NO/S: | Indictment No 387 of 2009 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 7 March 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 March 2013 |
| JUDGE: | Fryberg J |
| ORDERS: | **Rule that no instruction in respect of the expression "except in a case of necessity" under s 288 of the *Criminal Code* 1899 will be given to the jury in summing up.** |
| CATCHWORDS: | CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – NECESSITY OR EMERGENCY – NECESSITY – *Criminal Code* 1899 (Qld), s 288 – elements of exception<br><br>CRIMINAL LAW – PROCEDURE – SUMMING UP – Form and content of – Necessity for direction as to exception of necessity under *Criminal Code* 1899 (Qld), s 288<br><br>*Criminal Code* 1899 (Qld), s 288<br><br>*R v Davidson* [1969] VR 667, considered<br>*R v Loughnan* [1981] VR 443, considered<br>*R v Rogers* (1996) 86 A Crim R 542, considered |
| COUNSEL: | P Davis SC with D Meredith for the Crown<br>K Fleming QC with P Smith and K Hillard for the defendant |
| SOLICITORS: | Director of Public Prosecutions (Qld) for the Crown<br>Raniga Lawyers for the defendant |

[1] **FRYBERG J:** The accused has been charged with manslaughter. The Crown case against him is based on s 288 of the *Criminal Code 1899*. It relies so far as is presently relevant upon the conduct of the accused in recommending and performing an operation upon the deceased which, according to the Crown case, was unnecessary and which caused the death of the deceased some two and a half weeks later.

[2] Section 288 relevantly provides:

> **"Duty of persons doing dangerous acts**
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> It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty."

[3] The question which has arisen and which requires a ruling is whether I should direct the jury in relation to the expression "except in a case of necessity". The defence contends that if the evidence is taken at its best for the defence, it is open to the jury to find that the exception applies. The prosecution contends the opposite. For the purposes of the case, the prosecution accepts that it has the onus of negativing the existence of the exception.

[4] The evidence shows that the deceased was admitted to hospital on 20 May 2003 complaining of renewed rectal bleeding. He was, it is common ground, haemostatically stable and was kept in hospital and assessed and subjected to a test over the next few days. On 22 May 2003 the accused decided to operate if the bleeding continued, and the following day he recommended the operation to the deceased. His recommendation was accepted and the operation was performed.

[5] The defence submits that there is evidence that on 23 May 2003 the operation was urgent, that not performing it was potentially life threatening, and that the means adopted to carry out the operation were reasonable and proportionate.

[6] The evidence at its best for the defence on the question of urgency came from Dr Renton-Power. He testified the decision to operate was an excellent decision and that he would have taken the deceased to the theatre on the morning of 23 May 2003 as an urgent procedure. By "urgent procedure" he used a expression of art and he explained that he classified the timing of procedures into elective, urgent, and emergency. Elective procedures, he said, were ones which "don't have to be done today". Urgent procedures were ones where there was a need to do the operation soon; that is, within a matter of hours. Emergency procedures were ones which had to be carried out immediately or now, as the doctor put it.

[7] The operation itself, it is common ground, was carried out properly and the subsequent death was not the result of anything done during the operation.

The Crown case is that the deceased had no condition which warranted the operation, particularly in circumstances where there were a number of co-morbidities threatening to the life of an elderly man if the operation were carried out.

[8] There is no direct authority on the meaning of the word "necessity" in s 288 of the Code. The accused submits that the word should be construed as importing the common law defence of necessity or at least as importing the categories and considerations which that defence involves. He submits that I should direct the jury as follows:

> "The Crown must negative the following: one, the accused did not reasonably believe that the decision to operate and the operation performed by him on 23 May 2003 on Mr Morris was necessary to preserve Mr Morris' life or physical health; and, two, the accused did not reasonably believe that the decision to operate and the operation done by him on 23 May 2003 on Mr Morris was in the circumstances proportionate to the need to preserve Mr Morris from a serious danger to his life or physical health."

That formulation is based on the decision of Justice Menhennitt in *R v Davidson* [1969] VR 667.

[9] In the alternative, the defence refers to the formulation adopted by Sir James Fitzjames Stephen in his draft code of the criminal law of England, a well-known source of the Queensland Criminal Code, and sets out the three requirements for the defence

which were adopted by the Full Court of the Supreme Court of Victoria in *R v Loughnan* [1981] VR 443.

[10] It seems to me that the formulation of Justice Menhennitt cannot survive the formulation by the Full Court of the Supreme Court of Victoria. The latter is a case which postdated *Davidson*. It considered *Davidson* and while it did not overrule it, it reformulated the common law position in relation to the defence of necessity. The directions proposed by the accused do not fall within *Loughnan*.

[11] In any event, it seems to me that *Loughnan* itself would have to be reconsidered in the light of the decision of the New South Wales Court of Criminal Appeal in *R v Rogers* (1996) 86 A Crim R 542. There, a court consisting Chief Justice Gleeson, Justice Clarke and Justice Ireland considered the whole issue and particularly the decision in *Loughnan* in the light of the decision in the High Court relating to self-defence in *Zecevic v Director of Public Prosecutions (DPP)(Vic)* (1987) 162 CLR 645, and held that consistently with the High Court decision it was more appropriate to treat the three requirements identified by the Victorian Full Court as factual considerations relevant and often critically relevant to the issues of an accused person's belief as to the position in which he or she is placed and as to the reasonableness and proportionality of the response, rather than as technical legal conditions for the existence of necessity.

[12] In the end, I do not have to decide whether the word imports the common law into the section. I am presently of the view that it does not. The Code

should be construed as a code unless there is some demonstrated reason for importing common law concepts. The fact that there may be a defence of necessity at common law does not mean that that is what was intended by the word in s 288 of the Code.

[13] Indeed, it is worth noting that neither in Chapter 5 of the Code nor in any of the other exculpatory areas is there a section granting a defence or, more accurately, a removal of criminal responsibility, in cases equivalent to common law necessity. The fact that no such defence is generally imported into the Code would make it surprising if it should be included in the present context by way of exception to a duty.

[14] Nonetheless, even if the word is given its ordinary, every day meaning, it cannot be doubted that in identifying necessity, many of the issues discussed in the cases at common law would logically arise. Certainly the immediacy of the harm which gave rise to the alleged necessity would be a relevant consideration. The necessity must be to preserve the patient's life or health, but the requirement of immediacy is one which is, I think, quite critical.

[15] In the circumstances of the present case, I do not think there is sufficient evidence to support a finding of necessity, because of the absence of any sufficient evidence of immediate risk to the life or health of the deceased. He was in hospital. He was being cared for. If anything should have happened to him, such as the haemorrhage which Dr Renton-Power anticipated, he was in a position where he could be cared for and immediate remedial action could be

taken. It therefore seems to me that even if the jury were to accept that an operation within a matter of hours was required, this is not a situation which would fall within the exception in s 288 of the Code.

[16] I find support for that view in the apparent policy of the section. Why, it may be asked rhetorically, would a doctor in a hospital with all the hospital's facilities be relieved of the duties which the section imposes simply because he was performing or recommending an operation which needed to be performed within a few hours?

[17] There is no other evidence which makes the position of the defence any stronger. It follows, therefore, that in my view the evidence does not permit a finding that the exception in the section applies. Consequently, I shall not give the jury any directions in relation to it.