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Two Sets of Belief in the Law of Self-Defence: How Reasonable?

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Abstract

In one case, M saw a youth rob a woman in a street. M chased and caught the youth knocking him to the ground. The appellant who had only seen the later stages of the incident, got involved in trying to free the youth. M tried to explain the situation. A struggle followed, and the appellant assaulted M. He was charged with assault occasioning actual bodily harm. He pleaded self-defence and in his argument claimed that he honestly believed that the youth was being unlawfully assaulted by M.

In another, an accused person caused the death of a member of an anti vice team by gunshot. He was spotted to have been committing an illegal activity when he was then checked and cornered. The members of the anti vive team charged towards the accused to arrest him. The accused open fire and caused the death of one of the members of the team. The defence of self defence was later successfully pleaded.

The pertinent issue in both cases above is on the belief of the accused in his defence of self-defence. It is to be noted that there are two aspects of the accused's belief that require thorough investigation: first, the accused's belief concerning the situation entitling him to employ force in self-defence; and second, the accused's belief as to the amount of force necessarily required to combat the threat. In both situation the court will have to decide on which approach of 'reasonableness' that suit best the course of justice; either, a purely subjective test of reasonableness, a purely objective test or a pragmatic mixture of subjective and objective test.

This paper is to investigate on matters surrounding the interpretation of reasonable belief and its impact on the decided cases. It is a comparative study of Malaysian and English cases. An examination is

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to be made on the relevant provisions under the Malaysian Penal Code on the defence of self-defence.

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The Belief of the Accused in Self-Defence

Introduction

In a case of self-defence, two aspects of the accused's belief are scrutinised: first, the accused's belief concerning the situation entitling him to employ force in self-defence; and second, the accused's belief as to the amount of force necessarily required to combat the threat he faces. Mason C.J., in his popular but controversial formulations in *Viro v. The Queen*,[1] takes note of these questions. The first proposition in his directive in that case suggests that the accused must reasonably believe that a situation had come about when he has to use force to defend his life viz., the existence of an unlawful attack which threatens him with death or serious bodily harm. He elaborates further: a reasonable belief of the accused here means a belief which is reasonable based on the circumstances in which the accused found himself.[2]

With respect to the accused's belief as to the amount of force required in his defensive act, the *Viro v. The Queen* [3] formulations suggest that it must be "reasonably proportionate". In other words, it must not be excessive when viewed in the light of the attack threatening his life.[4] The excessiveness or otherwise of his repelling force is to be decided by the jury. In a case where the jury is satisfied beyond reasonable doubt that the use of force is excessive, the outcome of the case can either be one of murder or manslaughter, this depending on the

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1 (1978) 141 C.L.R. 88.

2 Proposition 1(b) of the formulations stated:
"By the expression "reasonably believed" is meant, not what a reasonable man would have believed, but what the accused himself might reasonably believe in all the circumstances in which he found himself." *Viro v. The Queen*, *ibid.*, at p. 146.

3 [1978] HCA 9; 141 CLR 88; 52 ALJR 418; 18 ALR 257

4 Proposition 3 of the formulations stated:
"If the jury is not satisfied beyond reasonable doubt that there was no such reasonable belief by the accused, it must then consider whether the force in fact used by the accused was *reasonably proportionate* to the danger which he believed he faced." *Viro v The Queen*, *ibid.*, at p. 147.

accused's belief in the excessive force which he employs. If he knows that the force used is indeed excessive, he may be convicted of murder. If he believes that his conduct is reasonably proportionate,[5] he will be convicted only of manslaughter. Thus, in this part of the proposition, the central point is the requirement that the accused must have reasonably believed that his defensive force is proportionate.

These formulations have, of course, been revised. The majority decision in the Australian High Court's case of *Fadil Zecevic*[6] has essentially clarified many of the uncertainties of the Australian law of self-defence which pertained at the time when *Viro* was decided. The most significant outcome of *Zecevic* is the demise of the doctrine of excessive force in self-defence. Nevertheless, the High Court retained the traditional approach in dealing with self-defence defence; namely the distinction between the accused's belief concerning the threat and the belief as to the force requiring to be used in the defence. The English courts, on the other hand, also presuppose the importance of this distinction as is shown in the decisions subsequent to *Palmer*. The two sets of belief will now be dealt with in turn.

[5] It is to be borne in mind that this consideration was made at the time when the accused has already been considered by the jury to have been excessive in his self-defence.

[6] [1986-1987] 25 A. Crim. R. 163.

Belief Concerning the Threat[7]: The English Courts and the Belief

In English courts it has been repeatedly pointed out "that an honest but mistaken belief by a self-defender as to the fact or nature of an attack on himself or another will be no answer to a charge unless it is based on reasonable grounds" - a purely objective test was applied. This was the prevailing view until 1983, when the landmark decision of *R. v. Williams*[8] was handed down. Because of its importance, the case needs some elaboration.

In a street M had seen a youth robbing a woman. The youth had been caught by M, but the later managed to break from his grasp. M chased and caught the youth for the second time, knocking him to the ground.

[7] The distinction between the accused's belief in the occasion enabling him to use force in exercising his right to defend himself and his belief in the necessary amount of force required in the course of the defence has often been mixed. For instance, J.C. Smith in his discussion on self-defence appears not to be particularly concerned with this distinction. The cases of *R. v. Williams* [1987] 3 All ER 411 and *R. v. Beckford* [1987] 3 All ER 8, were discussed in his work to ascertain the belief as to the amount of force in self-defence. J.C. Smith "*Using Force in Self -Defence and The Prevention of Crime*." (1994) 47 Current Legal Problems 101. The question concerning the accused's belief in these two cases, in actual fact, is more related to the belief as to the threat in self-defence.

Marianne Giles in her article, "*Self-Defence and Mistake: A Way Forward.*" 53 Modern Law Review, 187, on the other hand makes a clear distinction between the two sets of belief. The cases of *R. v. Williams* and *Beckford v. R.* were therefore cited in the discussion of the first part of the belief.

S.M.H.Yeo in his commentaries on the development of the law of self-defence in Australia makes a distinction between the two parts of the belief. "*Self- Defence: from Viro to Zecevic"* 4 Australian Bar Review, 1988, "*New Development in The Law of Self- Defence in Australia.*" (1987) 7 Oxford Journal of Legal Studies 489, and "*The Element of belief in Self-Defence"*, 12 Sydney Law Review 132.

In my discussion, the belief concerning the threat and the belief as to the necessary force required will be separately elaborated.

[8] [1987] 3 All ER 411.

The trend towards accepting the subjective belief of the accused "as to the circumstances of an alleged offence" was first decided by the House of Lords in *D.P.P. v. Morgan*, [1976] AC 182, a rape case. The decision in *R. v. Williams* is, nevertheless, a landmark decision in the sense that the trend prevailing in *D.P.P. v. Morgan* was for the first time accepted in a self- defence case.

In the meanwhile, appellant who only managed to see the consequent stages of the occurrence, got involved in trying to free the youth. M tried to explain the situation. The only mistake he had made was, in explaining the true situation, he claimed to be a police officer, which was untrue, and he therefore could not produce the warrant card when asked for. A struggle followed, and the appellant assaulted M. Consequently, he was charged under section 47 the Person Act 1861 Which for committing an assault occasioning actual bodily harm of He pleaded self-defence and in his argument claimed that he honestly believed that the youth was being unlawfully assaulted by M.

In the trial court the jury was instructed as to the effect that the appellant's belief in the occasion has to be based on reasonable grounds. The appellant was thereafter convicted on the basis that his honest belief was not objectively reasonable. An appeal has been placed by the appellant alleging that the judge misdirected the jury by stating to them that his mistake had to be reasonable. Lord Lane C.J. in the course of his judgement stated:

"In a case of self defence, ... if the jury came to the conclusion that the defendant believed, or may have believed that he was being attacked. . .. and that force was necessary to protect himself. . ., then the prosecution has not proved their case. If, however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it." R v Williams. [9]

This judgement defends the proposition that the accused who sets up self-defence is to be judged on the facts as he honestly believed them to be, whether or not his belief was reasonable - a clear departure from the objective reasonableness test.[10]

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9 *[2000] QCA 518, ibid.*, at p. 415.

10 The facts of this case show that the accused was indeed reasonable in his belief that the accused unlawfully assaulted the thief. This is based on two reasons:

Lord Lane's judgement in favour of subjective reasonableness was approved and followed by the Privy Council in the case of *Beckford v. R.*,[11] in which it was decided that an honest albeit mistaken belief of the accused was a justification for the use of force in self-defence. The facts of the case were that a police officer was investigating a report that an armed man was terrorising and menacing people in a house. When he arrived at the house, the suspected criminal ran off. There was conflicting evidence as to the subsequent events. The accused claimed that he fired towards the deceased in the belief that he (the deceased) was armed and intended to fight for his escape to the extent of harming his (the accused's) life as well as the life of a police colleague. (The prosecution, on the other hand, argued that the deceased was surrendering at the time when he was shot.) In the trial court he was convicted of murder on the ground that the belief was not reasonable and that the accused failed this purely objective test. In the Court of Appeal of Jamaica, it was held that a belief that the circumstances required self-defence had to be reasonably, and not only honestly held. On appeal to the Privy Council, it was held that when an accused acts under a mistake as to the facts, he is to be judged according to his mistaken belief of the facts regardless of whether, viewed objectively, his mistake is reasonable. The substantial issue is what he actually believes at that moment; if his belief is a genuine and honest one, that would itself justify his reacting in defence of his life, irrespective of

i)The fact the accused only saw the later part of the incidence and therefore was not aware of the true situation,

ii) The fact that M was lying in his claim that he was a police officer. The fact that he failed to produce the identity card necessarily required to prove his claim was good enough to suggest that the accused was not unreasonable in his belief (his belief that M was lying and therefore unlawfully assaulting the thief). Thus, every reasonable man in his position would have the same belief.

Now, what would be the position if M was indeed a police officer and produced his identification. However, because he was not in uniform and acted "violently" in public against someone whom the accused believed to be innocent, the accused still disregarded his (M's) claim and assaulted him in the belief that his act was in defence of others. Would his honest belief under such circumstances fall within the scope of justifiable self-defence? The decision in *Beckford* suggested that it might well be so.

11 [1987] 3 All ER 8.

whether his belief falls within the requirement of the impersonal objective reasonable test.

In the Court of Criminal Appeal decision in *Gaynor Oatridge*,[12] the same issue came before the court. The accused was charged with the murder of her co-habitee. The accused claimed that on the night of the offence the victim was drunk and abusive and had uttered threats to kill her. He had seized her throat and squeezed it. In the belief that he was attempting to kill her, the appellant picked up a kitchen knife and stabbed him. One of the grounds of her defence was that she acted in defence of her life.

The trial judge in his summing up gave the conventional direction on the need for proportionality between the force used and the nature of the attack. No direction was made on the mistaken belief of the accused, and upon this direction, the accused was convicted by a majority of manslaughter. In the Court of Criminal Appeal the main argument against the trial court's decision was the rejection of the accused's mistaken belief. This argument was extensively elaborated by the Appeal Court judges. Mustill L.J. in reading the court's judgement elaborated:

"In many cases of self-defence the following questions must be asked:

(1) Was the defendant under actual or threatened attack by the victim?
(2) If yes, did the defendant act to defend himself against this attack?
(3) If yes, was his response commensurate with the degree of danger created by the attack? In answering this question allowance must of course be made for the fact that the defendant has to act in the heat of the moment and cannot be expected to measure his response exactly to the danger. . . . . There are however occasions where a further question must be asked:

(1a) Even if the defendant was not in fact under actual or threatened attack, did he nevertheless honestly believe that he was? If this question was answered in the affirmative (or, more correctly, the prosecution

[12] (1992) Crim. App R. 367.

does not establish that it should be answered in the negative), then the third question must be modified, so as to read:
(3a) Was the response commensurate with the degree of risk which the defendant believed to be created by the attack under which he believed himself to be?"[13]

It was decided that the honest, albeit mistaken, belief of the accused was not so fanciful as to require exclusion from consideration.

In the light of this decision, a plea of self-defence may be successfully pleaded even where there is no actual threat, so long as the jury is satisfied that the accused honestly believed that his life was in serious danger and that an act of defence was necessary to protect the accused's life. In other words, the accused's honest mistake may not be a bar to his plea of self-defence.

This decision, stressing, as it does, the importance of the accused's genuine and honest belief, is in line with the Privy Council's judgement in *Beckford v The Queen's* [14] case, although their Lordships in *Gaynor Oatridge* made no reference to the Privy Council's decision. One may conclude, then, that the English courts have inclined towards accepting the accused's honest belief and avoiding making decisions predominantly based on the truly objective impersonal reasonable man test.

Belief as to the Force Applied: The Approach of the English Courts

Another issue presenting itself for discussion in self-defence cases is the belief of the accused as to the amount of force necessarily required in his defensive conduct. The question here is: according to what measurement should this belief be decided? The Criminal Law Act 1967 threw some light on this matter. This Act stated that the accused may use, in his defence, "such force as is reasonable in the

13 *Ibid*., at p. 370.

14 *[1988] AC 130 Privy Council*

circumstances".[15] A glance at the case of *Palmer v. R.*[16] also reveals the same approach.[17] Nevertheless, the question arises as to what kind of reasonable belief is required by this test: is it a traditional, but orthodox, conception of reasonableness, or a pragmatic mixture of subjective and objective test of reasonableness?[18] This question merits detailed discussion.

A good starting point is the Privy Council's judgement in *Palmer v. R.*[19] Most commentators commenting on this case seems to have agreed upon one thing - an accused person taking shelter under self-defence has to have believed - on reasonable grounds - that the amount of force used was necessary.

Having said that, however, Lord Morris in delivering the majority judgement in the Privy Council stated: "if there has been an attack so that the defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of

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15 Criminal Law Act (1967) s. 3(1)

16 [1971] 1 All ER 1077.

17 Lord Morris in his judgement explained:
"In their Lordships view the defence of self-defence is one which can be and will be readily understood by any jury. . .. . It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, *what is reasonably necessary.*" (emphasis added). *Palmer v. R, ibid*., at p. 1088.

18 "It is important to note here that the debate as to whether a belief need only be honest or must also be reasonable, is confined to the belief concerning the threat. With regard to the belief as to the necessary force required in the defence, English law requires that the belief be a reasonable one. Nevertheless, the word reasonableness here conveys two different meanings; firstly, whether a reasonable person in the accused's position would have believed the force applied by the accused to be reasonably necessary; secondly, whether the accused believed on reasonable grounds that the force applied by him was reasonably necessary. The former advocates a purely objective reasonableness whereas the latter is a mixture between subjective and objective reasonableness."

19 *Supra*, fn. 15.

his necessary defensive action."[20] This means that, even though the accused's belief is required to be a reasonable one, the trier of facts is required to take into consideration the accused's position in the agony of the moment. The statement also means that, even though it has to be a reasonable belief, the jury should not at the same time look at the case with excessive rigidity and strictness. Allowance must be made for any excitement, affront and distress that the accused might have experienced. Leniency was thus recommended in considering the accused's reasonable act.

Taking this point further, Lord Morris elaborated: "If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken."[21] This statement had clearly appealed to the jury in considering the accused's predicament at that difficult moment. It seems that the court was asking for tolerance in favour of the accused before any conclusion could be reached by the jury. The accused's honest belief, and his spontaneous reaction to the attack are paramount at this point. As already stated, these could serve as the most potent evidence in determining the reasonableness of his defensive conduct.

Now, what would be the effect of these two statements of law on the determination of the authenticity of the accused's defensive act? If "reasonable belief" is still interpreted as a purely objective reasonableness, perhaps Lord Morris's statements would not be necessary. On the other hand, if the statements were to be explained in accordance with the overall judgement in the case, it could lead to the conclusion - the accused's defensive force is now judged by the test of reasonableness, but, in ascertaining the reasonableness of this act, consideration must also be given to his belief at that particular time. This would mean that the law of self-defence envisages a mixed subjective and objective reasonableness in justifying the accused's use of force in the defence.

20 *Ibid*., at p. 1088.

21 *Ibid*.

This new conception of reasonable belief derived from *Palmer's* decision was adopted in the English Court of Appeal case of *R. v. Shannon*.[22] The judges in the Criminal Court of Appeal emphatically stressed the need to have a logical and practical interpretation of Lord Morris's statement of law in *Palmer v. R*.[23] To judge the accused's belief solely on the hypothetical person test was not regarded as truly explaining the law as it had been interpreted by the Privy Council. The court concluded that the logical interpretation of *Palmer* is to accept the need for a mixed objective and subjective belief. Lord Ormrod L.J. in delivering the court's judgement stated that in every case of self-defence a distinction has to be made between an act essentially defensive in character and acts which are essentially offensive, punitive, or retaliatory in character. In considering this distinction, the correct approach would be to consider the fact that the accused could not be expected to weigh to a nicety the measure of his necessary act of defence and that the accused's honest and distinctive belief that his act was necessary is also essential in judging the reasonableness of the defensive conduct.[24] This judgement of the Criminal Appeal Court laid down a solid grounding in the application of the "partly subjective and partly objective reasonableness".

The case of *R. v. O'Grady*,[25] another decision by the Criminal Court of Appeal, reaffirmed this view. In this case, even though the court was willing to accept the honest albeit mistaken belief of the accused, it denied him the defence of self-defence on the ground that the mistaken belief resulted from self-induced intoxication.[26] Thus, the reason for

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22 [1980] 71 Cr. App. R. 192.

23 *Supra*, fn. 15.

24 *Supra*, fn. 21 at p. 196.

25 [1987] 3 All ER 421.

26 Lord Lane C.J. in delivering the judgement stated:
"We have come to the conclusion that, where the jury are satisfied that the defendant was mistaken in his belief that any force or the force which he in fact used was necessary to defend himself and are further satisfied that the mistake was caused by voluntarily induced intoxication, the defence must failed." *R. v. O'Grady*, *ibid*., at p. 423.

the court's rejection of self-defence plea was not because of the application of a purely objective test, but rather because the accused's state of mind denied him the defence.[27]

In the case of *R. v. Whyte*[28] Lord Lane C.J. in his judgement referred to the case of *Palmer v. R.*[29] and *R. v. Shannon,*[30] cases which he regarded as of substantial binding authority. In relation to the issue of the accused's reasonable defensive conduct, the court regarded the two previous decisions as requiring the jury to take into account the honest and instinctive belief of the accused at the very moment of his defensive action. Lord Lane C.J. said:

"In most cases, where the issue is one of self-defence, it is necessary and desirable that the jury should be reminded that the defendant's state of mind, that his view of the danger threatening him at the moment of the incident, is material. *The test of reasonableness is not, to put it at its lowest, a purely objective test*."[31]

This statement explicitly reveals the true interpretation of the reasonable belief requirement in the English courts. As a result of Lord Lane's judgement, the hypothetical person test can be said to have been

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27 It appears that if the accused in this case had not been voluntarily intoxicated, there is a possibility that he could have relied on the defence of self-defence.

28 [1987] 3 All ER 416.

29 *Supra*, fn. 15.

30 *Supra*, fn. 21.

31 *R. v. Whyte*, *supra*, fn. 27 at p. 418. (Emphasis added).
It was commented by S.M.H.Yeo in his article "*The Element of Belief in Self-Defence*" 12 Sydney Law Review 132 at p. 146 that in England the overwhelming preference by the courts is for the purely objective reasonable test. The writer in his commentary referred specifically and solely to the case of *R. v. Williams*. It has to be said that by virtue of Lord Lane's judgement this observation was incorrect. The case referred to in his comment was not essentially the most authoritative in discussing the accused's belief concerning the force applied. As already discussed,(*supra*, at p. 133-135) the case of *R v Williams*, *supra*, fn. 7, is best referred to in the discussion of the belief as to the threat.

replaced by a new test which requires the jury to consider what the accused thought or perceived, and to decide on the basis of how a reasonable man, with the accused's characteristics interpreted the circumstances.

R. v. Scarlett[32] and its Effect on the Question of the Accused's Belief

The decision of the Criminal Court of Appeal in *R. v. Scarlett*[33] however, signifies a departure from the *Palmer* principle. This decision appears to involve an abandonment of the *Palmer* approach, which propagates a partly subjective and partly objective reasonable test. The decision merits closer examination.

The facts in *Scarlett* can be stated briefly. "The defendant, the landlord of a public house, was convicted of unlawful act manslaughter following his use of force to eject the victim, who had entered the public house after closing time the worse for drink. In the trial court, the judge stated that if the jury concluded that the accused had used more force than was necessary in the circumstances in the bar, and if they were satisfied that he had caused the deceased to fall and strike his head, the appellant was guilty of manslaughter; of which offence he was later convicted."

This was held by the Court of Appeal to be a misdirection. The decision was reversed by the Court of Appeal, where Beldam L.J. concluded:

"Further they (the jury) should be directed that the accused is not to be found guilty merely because he intentionally or recklessly used force which they consider to have been excessive. They ought not to convict him unless they are satisfied that the degree of force used plainly more than was called for by the circumstances as he believed them to be and, provided he believed the circumstances called for the degree of force used, he is not to be convicted even if his belief was unreasonable."[34]

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32 [1993] 4 All ER 629.

33 *Ibid*.

34 *Ibid*., at p. 636.

The question now is: has this judgement rejected completely the established principle applied in previous cases? According to *Scarlett*, the defendant could justify the most extravagant actions provided he subjectively believed the circumstances warranted it. This would also mean that the accused's belief, based on the circumstances in which the incident occurred, had been elevated from "potent evidence" as concluded in *Palmer*, to an overreaching new substantive defence. The decision had clearly interpreted the case on a purely subjective term.

The effect of *Scarlett* on the test of accused's belief is that it leads to a departure from the statement of law pronounced in *Palmer* and interpreted and applied in cases following it. The judgement in *Palmer* retained the requirement of necessity as well as proportionality in the accused's act. However, it also gave considerable weight to the accused's belief based on the circumstances of the case as the accused found himself. Therefore, the test is not a purely objective one, although, at the same time, it does not propagate an entirely subjective reasonableness. The decision in *Scarlett* on the other hand, disregarded the need for the jury to decide on the reasonableness of the accused's act, suggesting instead a purely subjective reasonableness. This notion of supporting the subjectivist position on criminal liability would appear to contradict the approach adopted in *Palmer*, and, for that matter, the well established rule already applied in courts in other cases.

Some two years after *Scarlett* was decided, it was heavily criticised in the case of *R. v. Owino*.[35] The appellant in "this case was convicted on two counts of assaulting his wife occasioning her actual bodily harm (injuries to her head and her thumb). The appellant's argument regarding these counts was that any injuries his wife had sustained through his actions were caused by reasonable force used to restrain her and to stop her from assaulting him. The members of the jury received no direction on self-defence until, about an hour-and-a-half after retiring, they sent a note in effect asking for such a direction. The judge then directed them on the issue to the effect that the prosecution must prove that the defendant did not believe that he was using reasonable force. On appeal it was argued that the judge inadequately directed the jury on self-defence, by reason of (a) his failure to state that the test of

[35] [1995] Crim. L. R. 743.

what force was reasonable was subjective, and (b) the delay of an hour-and-a-half before the direction was given."

The appellant's appeal was rejected, the Court of Appeal justifying its decision by explaining the true nature of *Scarlett's* case. The court asserted that the judgement of Beldam L.J. in *Scarlett*, when read in context and properly understood, was not meant to say that a person was entitled to use any degree of force he believed to be reasonable, however ill-founded the belief.[36] This diplomatic treatment of Beldam L.J.'s judgement was understandable. The fact of the matter was that, the Court of Appeal in *Owino* did not want to allow the accused's subjective belief to be determinant in considering the reasonableness of his repelling force. The Appeal Court concluded that the law was as set out by Lord Lane L.J. in *R. v. Williams*[37]: a person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be. This test was the one applied in *Palmer v. R*[38]..

The question to be addressed now is this: what significance does *Scarlett* have in the development of the law of self-defence, or more specifically, what significance does it have for the issue of the accused's belief in his plea of self-defence? It would also appear that, in the light of *Owino*, *Scarlett* had contributed nothing to the law of self-defence at all.[39] Alternatively, if *Scarlett's* principle were to be strictly followed, the consequence of it would be to allow the accused's mistaken belief, no matter how erroneous it was, as long as it was honestly and genuinely held, to be a sole determinant factor in his self-defence claim. Hence the accused's chance of getting away from any criminal liability would be greater than ever. On top of that, the long standing rule requiring a reasonable man test would be completely abolished.

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36 *Ibid*., at p. 744.

37 [1987] 3 All ER 411.

38 [1971] 1 All ER 1077.

39 It was thus commented: "It seems that we must now take it that Scarlett added nothing to the law as stated in *Gladstone Williams* and is best not referred to in future, as far as this aspect of the decision is concerned." *R. v. Owino*, *ibid*,at p. 744.

The Defence of Self-Defence in *Martin v R*[40]

This is a case whereby a farmer from Norfolk, England was convicted of a murder of Fred Barras, a 16 year old burglar. The conviction was then reduced on appeal to manslaughter on grounds of diminished responsibility. The main issue in the case is whether the manner in which the employment of defensive force was within the term 'reasonable force' as permitted by the English law of self-defence.

It was the prosecution case that Martin, having been disturbed by burglars, had lain in wait for them and fired in short range with the intention of killing or causing serious injury to the intruders. Martin, on the other hand, argued that his past experience made him to believe that his house is vulnerable to burglary.

On the night in question, the deceased and his fellow burglar were fleeing when they were shot. The deceased was hit in his back and suffered his death consequently, the other was in the leg, escaped but later apprehended.

The defence of self defence and defence of property was raised. There were two points for the jury to satisfy; first, whether Martin genuinely acted in self-defence. Second, whether Martin had only used reasonable force in his defence. It was decided that the manner in which the whole incident occurred raised doubt on the validity of the claim of genuine self-defence. It was claimed that Martin was in fact preparing himself with the deadly weapon and thus the force used was wholly unjustifiable.

On the point of reasonableness of the defensive force, though it was accepted that anyone in such an extreme difficulty would be allowed to use force in protecting his life, property or the life of others – Martin's repelling force, however, was beyond the accepted purview of the defence.

40 [2002] 1 Cr. App.R 27

The case was rather a straight forward one. On the issue of the belief as to the threat, it was plainly clear that there was an intrusion into one's own house and thus it would be just natural if one spontaneously reacted in self-defence. On the issue of the belief as to the amount of force necessarily required for the defence - as it appeared, the dangerous weapon used in the circumstances was beyond acceptance. It is exactly this part of the test that failed him in his defence. It is evident that the reasonable belief of the accused is evaluated not on the purely subjective approach but rather a mixture of subjective and objective belief as traditionally been the test suggested in Palmer.

The Test of Reasonable Self-Defence in the Penal Code of Malaysia

What constitute reasonable self-defence in Malaysian Penal Code could probably be explained by these references.

Section 99 (3) of the code requires the grievance party to opt for the support and help of the public authorities in cases where the help is possible and within reach.[41] If one decided to stay put awaiting an attack while confrontation could well be avoided, the possibility is that the test of reasonable self-defence would fail; in clearer terms, the belief of the accused as to the existence of the threat would not be a good reasonable belief.

The reverse understanding of the provision will suggest that, the accused belief that his life is threatened will only be accepted as reasonable when there is no time for him to recourse to public authority for help or an attempt has been made to reach help but without success. Thus, the danger toward life will only be a reasonable danger that permits the use of repelling force when there is no reasonable opportunity, under that special circumstances, to seek help.

While this part of section 99 relates closely on the discussion of the accused's belief as to the existence of threat in self-defence, section 99

[41] Section 99 (3) states:
"There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities."

(4) of the code describes the acceptable manner in which the force is to be exercised in the defence.[42]

The force combating the attack must not in anyway be more than what would be necessary in the defence. In other words, the force used must be proportionate to the attacking power. In a situation where the court decided that the defence was in excess of what would otherwise be necessary, the case will then falls under Exception 2 of section 300 - a middle-path provision - not a recognisable option in English court.[43]

The provision is by no means introducing anything new in the whole concept of the defence. The law is plain and clear, when the employment of strength and force become necessary, it must not be in any aspect more than necessary. The law expects the defender to stop using force when the threat to his life, property or life of others ceased. The excessive force used would render the act of self-defence itself unreasonable and fail him in the test of reasonable belief as to the amount of force in the defence.

Section 102 of the code stipulates:

"The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of the body continues."

42

Section 99 (4) states:
"The right of private-defence is in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence."

43

Section 300, Exception 2 states:
"Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the [power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence."

Section 102 of the code is important in that it explains as to when the accused person is expected to start initiating his defensive action by force in the defence and the continuation of the perceived right of defence. The provision stipulates that the right for one to defend arises as soon as a reasonable apprehension of danger to the body arises and it continues so long as that apprehension of danger continues.

This provision focuses predominantly on the state of mind of the person who exercises his right of defence. The phrase used is 'apprehension of danger'. To investigate on one's apprehension of danger essentially involved the analysis of one's belief as to the danger. Despite the wording chosen the effect is, in essence, the same.

This provision seems to be favourable to the attacked person's case. As it appears from the text, one could be exercising his defensive action upon reasonable apprehension of danger. The danger, interestingly, could arise merely from an attempt or threat to commit an offence against the other. That it continues as long as the defender state of mind tells him of the persistent of the danger, seems to a large extend, benefit the defender. This provision also presupposes two separate issues; one, on the aspect of the commencement of the right of self-defence - it relates the discussion on the belief of the defender as to the existence of a threat. Two, on the aspect of the continuation of the right of defence - it will require the trier of fact to indulge on the reasonableness of the accused's belief as to the amount of force required in the defence.

The Case of *Public Prosecutor v Halim Bin Din*.[44]

The respondent was initially charged for an offence of murder in the High Court of Alor Setar on which he successfully pleaded private-defence. In the Court of Appeal, the High Court's decision overturned and the verdict of culpable homicide not amounting to murder[45] was substituted.

[44] [1999] 3 MLJ 433.

[45] Section 304 (second limb) of the Malaysian Penal Code.

The respondent was caught presence in the house of a lady where, when raided, run to avoid detection and capture. The attempt at escaping proved to be a terrible experience for the then police officer like himself. He climbed onto the roof of the house and jumped down at its rear in the backyard of another. He climbed the fence and got into the area of the next house. It was there when the tragic incident occurred. According to his account of the story, two men approached him and pushed him to the fence. He was assaulted by few others and that some of the blows landed on the fence. It was that moment of time when he believed that his life was seriously threatened. He tried to alert the attacker as to his identity (as a police officer) but without success. He then pulled his service pistol from his waist with a view of firing warning shots. The fatal shot was then made though he protested not directing it at any particular person.

The defence of private-defence failed, but it is the reason for the rejection of the defence which is a matter of substance. From the report, it was stated that the manner in which the defence was exercised cannot be accepted as reasonable. ". . . and even if it is self-defence (which we say is not), we feel that he has exceeded his right of self defence since one of those men was only armed with a piece of wood, and being separated by a fence, could not be a danger to his life," *P.P. v Halim Bin Din*. [46]

It would be interesting to look at the case from the perspective of the two sets of belief as discussed earlier. Is it the belief of the accused as to the threat, or his belief as to the conduct and amount of repelling force used which material? The judgement seems to suggest that it was decided on the second part of the test. This would tantamount to saying that there was indeed in the very beginning, a reasonable threat to the respondent's life and well being. That the respondent was right in making his escape, and that the way the escape was made was also acceptable. This is despite the fact that he has the knowledge that the people outside the house knocking were members of the anti-vice team. That - some uniform personnel like himself, with the trainings he

46 [1999] 3 MLJ 433 at p. 437.

received purportedly to safeguard the integrity and safety of the public- is expected to deal with the matter maturely and with full responsibility.

I would suggest that the unreasonableness of his defensive action was not at all material fact in the case. This is a straightforward non self-defence case by any standard of measurement and definition of the defence. From the very beginning, there is no reason whatsoever for the respondent to believe that there is a threat to his life. If this approach is taken, the High Court would not have been confused with the evaluation of the defence.

The situation would be different if the self defender was a complete innocent and the people knocking the door were real gangsters. It would then be reasonable for one who defends himself to make his escape and, when pressed to the limit, used deadly force to save his life. In this situation the issue would be on the reasonableness of the accused belief as to the amount of force used. In so far as his belief as to the threat, that would be a valid claim and the fact that he ran to avoid direct confrontation is a good evidence fulfilling the 'try to disengage first' rule.

However, as mentioned above, the respondent knew exactly that by being in the house of a lady at one o'clock in the morning will only irritate the sensitivities of the community and, when investigation conducted by the anti vice team, he should have surrendered. To claim of being subject to gangsters attack at that moment is therefore, absolutely unacceptable.

In the case of *Public Prosecutor v Dato' Balwant Singh* [47]

The accused was having an argument with the deceased, a despatch rider. The deceased pulled the accused out of his car and attacked him with a stick which according the judge, lethal enough to cause a person's skull or bones to crack if hit with it. The accused fired a warning shot with the hope that the deceased would retreat. The deceased instead, behave more violent which made the accused to fire

[47] (no2) [2003] 3 MLJ 395.

a second shot that caused the death of the deceased. The defence of private defence was raised and it was for the court to decide on the reasonableness of the accused defensive action. [48]

The court focussed on the issue of the authenticity of the claim of self-defence. First, whether the accused defensive act fit the requirement under section 102 of the Penal Code, i.e., on the commencement and continuance of the defence. On this point, the accused was said to have the reasonable apprehension of danger to his body and life as soon as the deceased charged against him aggressively and behaving violently.

The requirement of recourse to public authority as stated in the law (section 99 (3)) was not so much of an issue. It was just plain that under such an agony, and taking into consideration the place on which the incidence took place, it was impossible to expect anyone to turn and look for assistance. The court has taken the view that the accused person does not have to wait until he was hit by the assailant before taking his step of defence. (pg 40 of the case)

It is clear that the emphasise is more on the first part on the requirement of the defence of private defence, i.e., whether the accused's was really under serious threat, and whether it was reasonable for the accused to repel the attack in the manner he did in the case. The issue of proportionality of the defence was not central in the decision.

In short, the court has convincingly decided that the accused has reasonable ground to believe that his life was really in danger as soon as the deceased started to behave violently. The used of a gun was also reasonable in such an agonising situation, though the deceased was only with a stick. The court's approach is such that, the apprehension of the accused belief was an objective one, and the reality of the extreme circumstances the accused was under was also heavily considered. Thus, it could be concluded that this is a good example of a case in Malaysian court where the objective and subjective belief of the

[48] "Court acquits lawyer of murdering despatch rider | The Star", <https://www.thestar.com.my/news/nation/2003/07/24/court-acquits-lawyer-of-murdering-despatch-rider> (accessed 22 July, 2020).

accused was taken in the test of the reasonableness of the accused belief in the law of self-defence.

Conclusion

The English court's approach to the case of self-defence could be explained in these terms: with regard to the accused's belief relating to the occasion allowing him to exercise some force in retaliation to an attack or what he believed as an attack threatening seriously his life and bodily integrity, the law regards his honest and genuine belief to be the deciding factor. Even in the event where it is objectively unreasonable, if it is honestly thought to be necessary, this will entitle him of the defence of self-defence.

In relation to the accused's defensive conduct (the amount of force he employed in his defence) the judgement of Lord Morris in *Palmer* suggests a mixture of "half subjective" and "half objective reasonableness". This interpretation was affirmatively applied in the cases of *R. v. Shannon*[49], *R. v. O'Grady*[50], and *R. v. Whyte*[51]. The test is, what would a person in the accused's position be doing in the circumstances. This is not a purely objective reasonableness.

In the Penal Code of Malaysia, although there is no specific section explaining the distinction on the two parts of the belief and the approach towards the understanding of the belief, it would not be too abstruse an effort to identify the distinction. The problem is, in some cases the court has overlooked the importance of making such distinction. This resulted in the complication of what would otherwise be a straightforward endeavour as evident in Halim's case.

On the issue of the quality of the accused's reasonable belief, it is taken lightly without emphasis. However, there is clear evidence that neither a purely subjective test nor a complete objective test of reasonableness that applies. With reference to the case of *Dato' Balwant Singh*, the

[49] [1980] 71 Cr. App. R. 192.
[50] [1987] 3 All ER 421.
[51] [1987] 3 All ER 416.

trend is safely to investigate the state of mind of the grievance party while at the same time comparing it with that of those who have the same background as he is in that particular critical circumstances.

Finally, it should be pointed out that the distinction between the objective and subjective test, when applied to the question of reasonable force in self-defence, although semantically clear, is rather blurred in practice. The fact of the matter is that the issue of one's belief is intrinsically too subjective and that it is highly unlikely that one would be able to determine that belief with absolute certainty. It has to be said that in any case where the question of the accused's belief is at issue, whatever formulations and theories are applied, the conclusion derived still framed in terms of probabilities. Nevertheless, the approach presently finding favour in the courts has certainly proved more sensible. The tendency of accepting the accused's belief on what he actually perceived in the agonising circumstances - especially in considering the accused's belief as to his defensive action and comparing the belief with the one who shares the same character as he is - is arguably the best available way of achieving a satisfactory conclusion in cases of self-defence.

Bibliography