



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: A19/2020
File Title: Miller v. The Queen
Registry: Adelaide
Document filed: Form 27F - Outline of oral argument
Filing party: Respondent
Date filed: 09 Dec 2020

Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A19 of 2020

BETWEEN:

MICHAEL JOHN MILLER

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The Respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: Outline of the propositions to be advanced in oral argument.

2. When should provocation be left to a jury ?
 - *Lindsay v The Queen* (2015) 255 CLR 272 at [15], [16], [19], [26]-[27], [28] : JBA at 97, 98, 101-2.
 - *Masciantonio v The Queen* (1995) 183 CLR 58 at 67-68: JBA at 131-132.
 - *Stingel v The Queen* (1990) 171 CLR 312 at 333-334: JBA at 406-407.
3. The trial judge's task is to be undertaken on the version of the evidence most favourable to the accused in relation to both limbs.
4. As to the subjective limb, the task for a trial judge requires the identification of the direct and indirect evidence relevant to whether (written submissions (WS) [22]-[23], [38]-[43]):

- the accused lost self-control;
- as a consequence of the provocative conduct and/or words of the victim, and,
- whilst labouring under that loss of self-control, formed an intent to kill or to cause grievous bodily harm and acted on that intent,

and,

the determination of whether the evidence so identified has the capacity to cause the jury not to be satisfied beyond reasonable doubt of any of the contrary.

5. The objective limb requires that a trial judge:

- identify the direct and indirect evidence relevant to an assessment of the gravity of the provocative conduct (such conduct being identified in the course of considering the evidence relevant to the subjective limb) from the point of view of the accused, and
- in the light thereof, conduct an assessment, from the point of view of the accused, of the gravity of the provocative conduct that is most favourable to the accused and which a reasonable jury might form, and
- determine whether the provocative conduct having the gravity as assessed, could result in a reasonable jury not being satisfied beyond reasonable doubt that such conduct was not capable of causing the ordinary person to lose self-control and act as the accused did.

6. A determination that the evidence does not have the capacity to support provocation, involves no conflation of the role of judge and jury.

7. The CCA's approach accords with the above and thus with settled principle (**WS [24]-[33]**).

- Stanley J was correct in the observations made as to the nature of the task to be undertaken in determining whether provocation should have been left to the jury; Core Appeal Book (**CAB**) at 278-279, [130]-[131].
- At CAB 279, [133] Stanley J commences his analysis of the capacity of the evidence to satisfy the two limbs of the common law doctrine of provocation.
- At CAB 280, [135] the provocative conduct is accurately summarised.
- At CAB 280-281, [136]-[140] factors relevant to the assessment of the gravity of the provocative conduct are identified.
- At CAB 282, [141]-[142] Stanley J assesses the capacity of the evidence to cause the jury to be satisfied beyond reasonable doubt that the appellant did not lose self-control as a consequence of the provocative conduct and/or words of the

victim, and, whilst labouring under that loss of self-control, formed an intent to kill or to cause grievous bodily harm and acted on that intent.

- At CAB 292-4, [143]-[148] Stanley J assesses the capacity of the evidence to satisfy the objective limb, concluding that *no jury* properly instructed and acting reasonably, could fail to be satisfied beyond reasonable doubt that the appellant's response to the deceased's conduct fell far below the minimum limits of the range of powers of self-control to be attributed to the ordinary 36 year old.
8. The judgment must be read as a whole. Succinctness does not amount to minimisation nor mean a failure to appreciate significance and gravity (WS [35]-[37]).
- compare *Stingel v The Queen* (1990) 171 CLR 312 at 335 (JBA 408); *Mascantonio v The Queen* (1995) 183 CLR 58 at 68: JBA 132.
 - (CAB 280-281, [135]-[140]) to be understood in the light of the summary at CAB 256-275, [5]-[114].
9. None of the findings made by the trial judge for the purposes of sentencing are fatal to the CCA's assessment (Reply submissions at [5]).

The Notice of Contention

10. The finding at CAB 282, [142] was not open (WS [55]-[66]).
11. The evidence to which the appellant refers (Reply submissions at [14]) does not have the capacity to support a finding by a jury, acting reasonably, that the appellant might have lost self-control.

Dated: 9 December 2020



M G Hinton QC