IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A24 of 2014

BETWEEN:

MICHAEL JOSEPH LINDSAY
Appellant

and

THE QUEEN
Respondent

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APPELLANT'S REPLY

PART I

1. This submission is in a form suitable for publication on the Internet.

PART II

2. The respondent's written submissions (RS) advance the following essential propositions:

   2.1. the proviso is "always in play", and where the respondent does not advocate for its application, the Court's only obligation, which it discharged, is one of procedural fairness;

   2.2. Peek J was correct in finding that the evidence did not disclose material upon
20 which a reasonable jury, properly directed, might have a reasonable doubt as to whether the partial defence of provocation could be made out and since provocation should not have been left there can have been no substantial miscarriage in circumstances where it was left but the jury was misdirected.

3. Before answering those submissions, the appellant makes two preliminary responses in relation to whether, having regard to the "objective limb", provocation was correctly left to the jury.

   3.1. *Onus*: First, it is respectfully submitted that the respondent's submissions tend to ignore that the onus on negativing provocation as a reasonable possibility ultimately rests on the prosecution (*Pollock* at [30], [66]). It is not correct, for
30 example, to submit that in order to return a verdict of murder the jury must be satisfied of the so-called subjective and objective tests, as articulated in RS [3]. Moreover, in submitting that:

   (a) there is no real evidence to support an inference that the appellant's sexuality was challenged (RS [63]);

   (b) there was no evidence of any kind that the appellant was particularly sensitive to challenges to his integrity (RS [64]);

   (c) the evidence does not support an inference that the deceased was baiting or goading the appellant, and there was certainly no evidence that the appellant considered he was being taunted (RS [66]);

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the respondent raises a false issue, namely whether the jury could soundly draw particular positive inferences relevant to the gravity of the provocative conduct. The real issue was whether having regard to the evidence that was led, a juror might be left in doubt as to whether the appellant suffered provocation which, assessed in terms of gravity by reference to *his* circumstances, could have resulted in the loss of ordinary powers of self-control to the point of forming an intent to cause grievous bodily harm or death.

3.2. *Disproportionality*: Secondly, the respondent's submission that "the disproportionality of the appellant's attack, whilst not determinative, shows his conduct is hardly likely to be within the range which might properly be regarded as ordinary" (RS [69]) ignores that the objective test does not require a consideration of the duration or precise physical form of the accused's acts; rather the inquiry is whether the provocation, measured in the relevant way, could have caused an ordinary person to form an intention to kill or do grievous bodily harm and to act upon it (*Masciantonio* at 69-70, *Pollock* at [61])). Proportionality is not a separate or distinct aspect of provocation (*Johnson v The Queen* (1976) 136 CLR 619 at 639-640 per Barwick CJ and at 659 per Gibbs J, *Masciantonio* at 67), and has in effect been absorbed into the objective test (*Pollock* at [60]), and it does not assist to pose an intermediate question whether the actual response was proportionate. Here the respondent assumes or asserts the answer to that intermediate question, and then seeks to reason from that answer, in a way which, on analysis, is circular.

Submission that proviso is always "in play"

4. Section 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) provides:

> The Full Court on any such appeal against conviction **shall** allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court **may**, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. [Emphasis added]

5. As the respondent notes (RS [25]), the plurality *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 decided that upon being satisfied that no substantial miscarriage of justice has actually occurred, the word "*may*" does not imply a discretion. However, it is respectfully submitted that the plurality did not decide that it is appropriate or permissible for a CCA to embark on a consideration of whether no substantial miscarriage of justice has actually occurred in the absence of a contention that it should do so (together with the basis for the contention). The authorities relied upon by the appellant in his submissions in chief (AS [47]-[53]) suggest that it is the invocation by the respondent of the proviso which provides the occasion for that review of the evidence. It cannot be right that irrespective of whether the respondent makes an issue of the proviso, a CCA is duty bound in every case to consider the application of the proviso. Even statutory provisions which are expressly mandatory (ie. "*must*" not "*may*") may be subject to the overlay of

procedural and adversarial principles that define whether an issue (about which the Court may have no substantive discretion) is, to use the respondent's phrase, "in play".

6. In the present case, the CCA's application of the proviso entailed asking whether the judge was correct to leave provocation to the jury, which involved the question whether provocation was "open" in the relevant sense. The respondent's non-invocation of the proviso therefore has an additional dimension here, because to make a submission that provocation was not relevantly "open" would have involved the respondent departing from the conduct of the case at trial[1], where no such submission was pressed, and as a consequence of which the trial took on a different dimension. The respondent did not, before the CCA, seek to depart from its conduct of the case at trial, yet the effect of the respondent's submission in this Court is that the CCA was bound to proceed in the way that it did, and that in any event the respondent is permitted to take a different position in this Court. It is respectfully submitted this Court should give the judgment the CCA ought to have given having regard to the respondent's conduct of the appeal, which, consistently with its conduct of the trial, did not involve a contention that provocation was not "open".

Submission that procedural fairness was afforded

7. In relation to procedural fairness, and the exchange between bar and bench during the appellant's submissions (in chief) before the CCA, it is critical to appreciate that:

7.1. while one member of the Court (Kourakis CJ) asked whether it was open to take the view provocation should not have been left by reference to the objective test, Gray J approached the matter in a different way (T28) and ultimately disposed of the appeal on a footing which assumed it was properly left[2], and while Peek J ultimately found that provocation should not have been left, his remarks *arguendo* (T24-26, set out at AS [28]) could not fairly be said to have foreshadowed that approach;

7.2. in the course of the exchange about the proviso the appellant submitted that it was for the prosecution to persuade the Court that the proviso should apply (T28), and the prosecution did not embark on that task of persuasion when it addressed subsequently.

8. In these circumstances it is respectfully that the appellant was not given sufficient notice that the CCA considered that, in the absence of an attempt by the respondent to persuade the Court that the judge erred in leaving provocation (which would have involved articulating the way(s) in which a reasonable juror might assess the issue of gravity for the purposes of the objective test), it might apply the proviso on that basis. The want of procedural fairness is now exemplified by the dispute that has arisen concerning the basis upon which Peek J resolved the issue, and his reliance upon unidentified academic work[3].

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1 Cf. *Coulton v Holcombe* (1986) 162 CLR 1, *Malvaso v The Queen* (1989) 168 CLR 227.

2 He did, however, indicate as part of his analysis of the miscarriage of justice ground, that "the evidence in the trial barely, if at all, raised inferences sufficient to support a defence or provocation" and that "it would have been open to the judge not to have left provocation" (CCA [63]).

3 The respondent's submissions as to the construction to be placed on Peek J's reasons involves an assumption, contrary to the appellant's interests, that a correct reasoning process was adopted, cf. *Fleming v The Queen* (1998) 197 CLR 250 at [30], *AK v Western Australia* (2008) 232 CLR 438 at

Submission that provocation was not "open"

9. Alternatively, and in any event, if this Court differs from the CCA as to whether the judge was correct to leave provocation to the jury, the appeal should be allowed. There having been an unqualified grant of special leave, the function of this Court is to step into the shoes of the CCA and either dismiss the appeal or make the order which the CCA ought to have made: *Green* at 343 per Brennan CJ.

10. The question whether the provocation was not "open" arises in circumstances where:

    10.1. the trial judge evidently considered provocation was relevantly "open" and consequently the appellant's counsel addressed on the matter;

    10.2. at trial and on appeal, counsel for the prosecution made no submission that the trial judge was in error;

    10.3. one member of the CCA, Gray J dealt with the appeal on the basis that the directions were adequate; and

    10.4. at one point in his judgment (CCA [181]), Peek J said that it was not possible to say whether provocation had foundered at the subjective or objective stage.

11. On the application for special leave to appeal, the respondent submitted that a juror might consider that a person with ordinary powers of self-control and with no special sensitivities might be driven to **violence** if subjected to the provocation in question (AS [57]). The submission *now* articulated by the respondent (RS [68]) is that:

> Having regard then, to the inferences available to be drawn from the scarce evidence of the Appellant's personal characteristics as they bear upon his perspective of the gravity of the deceased's conduct, the gravity of the provocative conduct here cannot be said to rise above the mildly or, at very best, **the moderately offensive.**

12. Quite apart from the fact that the differing views reflected in the various positions summarised reinforce that the issue was one for the jury, the approach now adopted of characterising the deceased's conduct in abstract terms ("moderately offensive") is liable to lead to error, because it encourages an objective characterisation of the conduct, when the jury's task is to consider the impact the conduct might have had upon the appellant before turning to consider objective powers of self control.

13. The respondent's approach in effect involves an objective characterisation of the "offensiveness" of the conduct, and then a consideration of whether, on the evidence, the appellant could satisfy the jury that he had particular characteristics which made the conduct more offensive. For reasons articulated above that approach is inappropriate having regard to the operation of the onus, but moreover, in applying that approach, the respondent understates the potential significance, in the analysis of the gravity of the provocative conduct from the appellant's perspective, of the appellant's actual conduct both in response to the first incident on the patio and in the course of the second incident.

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[111]. Further, the fact that legal academic commentary has been referred to in earlier decisions of the High Court, in cases involving a consideration of the elements of provocation casts little light on the identity of the commentary to which Peek J had regard in his *application* of what is now settled law.

He threatened violence if certain conduct was repeated, and the repetition of it resulted in a frenzied attack. A juror would not be unreasonable in considering that that conduct shed light on the gravity of the provocative conduct judged from the perspective of the appellant. Moreover, it was not suggested by the prosecution, nor was there a basis to suggest, that the attack was pre-meditated or that there was any particular motive, and the case was, in that sense, in the heartland of provocation[4], which it must constantly be recalled, is not a true defence or justification but involves an alternative verdict.

14. The task of interpreting the facts with a view to considering the degree of outrage which the appellant might have experienced was essentially a jury question, and the jury were entitled to evaluate the circumstances in a different way to that posited by the respondent or Peek J (*Green* at 345-346 per Brennan CJ). Here, the evidence disclosed that:

    14.1. for whatever reason, the appellant's reaction to the first incident on the patio (the deceased straddling the appellant) was to issue a threat of violence if the conduct were to be repeated;

    14.2. that advance of the deceased was in the presence of the appellant's family and friends and, coming as it did from a stranger who he had invited into his home, could reasonably be interpreted as a serious affront to the appellant;

    14.3. on one sequence of events, the second incident involved an offer to pay the appellant for sex repeated after the appellant asked "*what did you say cunt?*"

15. It is not a question of what positive findings should be made on that evidence about characteristics of the appellant which caused him to feel such outrage, but of whether a juror would be unreasonable in considering that the repetition of money for sex despite the explicit and implicit threats of violence from the appellant were more than "mildly offensive" *to him* and indeed might have been understood by the appellant as a suggestion that he was a degenerate who was so lacking in integrity that he would back down and take a couple of hundred dollars to have sex with another man despite the presence of his family.

16. For the same reasons exemplified by the majority approach in *Green* and *Masciantonio* it cannot be said that no juror could fail to be persuaded that the prosecution had negatived provocation as a reasonable possibility.

Dated: 3 February 2015

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4 As the Court explained in *Pollock* at [48]-[49], the rationale for the development of the doctrine was the recognition that lesser moral responsibility attaches to an intentional killing done in a state of temporary loss of self-control caused by provocation than attaches to a deliberate killing 'in cold blood'.