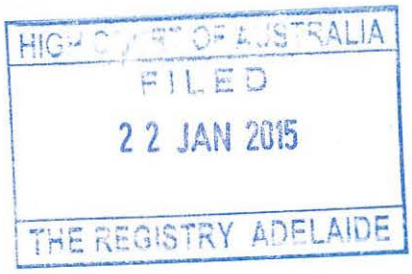
IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A24 of 2014

BETWEEN:



MICHAEL JOSEPH LINDSAY
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

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Part I: PUBLICATION

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

Part II: CONCISE STATEMENT OF ISSUES

2. At his trial for murder the Appellant's defence was that he did not administer any of the stab wounds that caused the deceased's death. The learned trial judge determined that on the evidence the partial defence of provocation arose and so, consistent with his duty, he left provocation to the jury. The jury convicted the Appellant of murder. He appealed unsuccessfully.

3. In South Australia the partial defence of provocation has not been codified. At common law before a jury may return a verdict of manslaughter instead of murder the jury must be satisfied that it is reasonably possible that:

   i the death of the deceased as caused by the accused was the result of a sudden and temporary loss of self-control caused by provocative conduct on the part of the deceased (**the subjective test**), and

   ii. the provocative conduct, measured in gravity by reference to the personal situation of the accused, could have caused an ordinary person to form an intention to kill or do grievous bodily harm and to act on that intention, as the accused did, so as to give effect to it (**the objective test**).[1]

4. In South Australia the common form appeal provision, derived from s4(1) of the *Criminal Appeal Act 1907* (UK), governs criminal appeals to the Full Court.[2] Applying the proviso to the common form appeal provision a majority of the Full Court (Peek J with whom Kourakis CJ agreed), dismissed the Appellant's appeal.[3] It did so after raising the application of the proviso of its own motion and despite the Respondent making no submission in support of the proviso's application. The Chief Justice and Peek J considered that no substantial miscarriage of justice had occurred because "in twenty–first century Australia, the evidence taken at its highest in favour of the Appellant in the present case was such that no reasonable jury could fail to find that an ordinary man could not have so far lost his self-control as to attack the deceased in the manner that the Appellant did. Accordingly, the Judge was incorrect in his decision to leave the partial defence of provocation to the jury in this case."[4]

5. This appeal presents four issues for the consideration of this Court:

   i. first, a question of construction – may the Full Court entertain the application of the proviso where the Crown makes no submission as to its application?[5]

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1 *Masciantonio v The Queen* (1995) 183 CLR 58 at 69 (Brennan, Deane, Dawson and Gaudron JJ).
2 *Criminal Law Consolidation Act, 1935* (SA) s353(1).
3 Justice Gray dismissed the appeal without resorting to the proviso.
4 *R v Lindsay* (2014) 119 SASR 320 at [236] (Peek J), [1] (Kourakis CJ).
5 Notice of Appeal, Ground 2.3. Appellant's written submissions at [45]-[60].

ii. second, a question of procedural fairness – was the Appellant afforded the opportunity to answer the potential for the proviso to be applied by the Full Court?[6]

iii. third, a question of the correctness of the application of the proviso by the Full Court – did the Full Court correctly characterise the "real sting" in the deceased's provocative conduct such that it did properly apply the objective test?[7]

iv. fourth, a question of whether a substantial miscarriage of justice has actually occurred – the Appellant now unequivocally having the opportunity to address the proviso's application for the consideration of this Court, should the partial defence of provocation have been left to the jury?

10 6. In summary the Respondent contends in answer to each of these issues that:

i. properly construed, on an appeal under the common form appeal provision asserting error of law or a miscarriage of justice, the proviso is always in play. Once satisfied that no substantial miscarriage of justice has actually occurred, an appellate court is duty-bound to dismiss the appeal,[8] irrespective of whether the Crown makes submissions invoking the proviso.

ii. the Court's obligation is limited to drawing the attention of the parties to the basis on which the losing party is to lose.[9] The transcript of the hearing in the Full Court makes plain that this was done and that a reasonable opportunity was afforded to the Appellant to address the application of the proviso.

20 iii. when Peek J's reasons are read as a whole, it is apparent that his characterisation of the "real sting" in the provocative conduct does not differ in any material way from the Appellant's characterisation of it. Having characterised the sting in the way for which the Appellant contends, Peek J proceeded to correctly apply the objective test.

iv. the Chief Justice and Peek J were right to apply the proviso: the evidence at trial, taken at its most favourable to the Appellant, did not disclose material upon which a reasonable jury, properly directed, might have a reasonable doubt as to whether the partial defence of provocation was made out. If provocation should not have been left, any misdirection on that issue could not have caused a substantial miscarriage of justice.

Part III: COMPLIANCE WITH s78B OF THE JUDICIARY ACT

30 7. Notices pursuant to s 78B of the *Judiciary Act 1903* (Cth) are not required.

Part IV: CONCISE STATEMENT OF CONTESTED FACTS

8. The Appellant and Luke Hutchings were jointly charged and tried before a jury with the murder of Andrew Roger Negre at Hallett Cove, a southern suburb within metropolitan Adelaide, on 1 April 2011. The Appellant was convicted of the crime of murder. Mr Hutchings was acquitted of murder but found guilty of the alternative charge of assisting an offender. Mr Hutchings has not appealed his conviction.

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6 Notice of Appeal, Ground 2.2. Appellant's written submissions at [58]-[60].

7 Notice of Appeal, Ground 2.1. Appellant's written submissions at [61], [79]-[87].

8 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [25] (French CJ, Gummow, Hayne and Crennan JJ) and at [47] (Heydon J).

9 *Friend v Brooker* (2009) 83 ALJR 724 at [117] (Heydon J).

9. The Appellant and the deceased met by chance at the Hallett Cove Tavern in the early hours of the morning of 1 April 2011. The deceased accompanied the Appellant back to his house at 51 Qualio Avenue, Hallett Cove, where a small group of people had gathered. That group included the co-accused, his partner, Brigette Mildwaters, the Appellant's sisters, Talia Clarke and Ashleigh Lindsay, the Appellant's cousin, also known as Michael Lindsay, and a friend by the name of Nicholas Hayes. The Appellant's partner, Melissa Glover, was also present. Ms Glover was not called to give evidence at trial.

10. It was not in dispute that the fatal attack upon the deceased occurred near a breakfast bar in the kitchen area of the Appellant's home. The evidence at trial of the forensic pathologist, Dr John Gilbert, was that the deceased sustained multiple penetrating stab wounds. One group of wounds was centred in the region of the right upper arm and chest. A second group of wounds was located over the front of the deceased's abdomen. The stab wounds to the abdomen were associated with two significant injuries to the aorta.[10] One of the wounds completely severed the aorta. The second wound caused a half thickness cut to that vessel. The wounds to the aorta would have caused massive blood loss, leading to unconsciousness within 20 to 30 seconds, and death within 2 to 3 minutes.[11] The prosecution case was that these wounds, 25 in number, were inflicted by the Appellant.

11. Doctor Gilbert also observed a 15 centimetre long cut to the front of the deceased's neck.[12] It was alleged that this wound was inflicted by the co-accused. Mr Hutchings gave evidence in his own defence. He described the Appellant inflicting multiple stab wounds to the victim's stomach.[13] Mr Hutchings admitted inflicting the wound to the front of the deceased's throat.[14]

12. As indicated, the Appellant's primary defence was that whilst he struck the deceased he did not stab him at all.[15] The trial judge considered that the partial defence of provocation arose on the evidence and thus, despite provocation not being the Appellant's case, consistent with his duty[16] and after discussion with counsel,[17] his Honour left the partial defence to the jury. The prosecution did not object to that course.

13. The evidence of the uncontentious events prior to the death of the deceased is summarised by Peek J at [89]-[95] of his Honour's judgment.[18] At the time that Ms Ninos left the Hallett Cove

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10 Trial Transcript at 670.
11 Trial Transcript at 670.
12 Trial Transcript at 650, 653.
13 Trial Transcript at 724.
14 Trial Transcript at 725.
15 See, for example, Trial Transcript at 588 (cross-examination of Mr Hayes by counsel for the Appellant).
16 *James v The Queen* [2014] HCA 6 at [31] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), [69] (Gageler J); *Van Den Hoek v The Queen* (1989) 161 CLR 158 at 161-162 (Gibbs CJ, Wilson, Brennan and Deane JJ), 169 (Mason J); *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 (Barwick CJ).
17 Trial Transcript at 795-798, 800, 804-806.
18 *R v Lindsay* (2014) 119 SASR 320.

address the atmosphere in the house was casual, friendly, and there was no sign of aggression.[19] The deceased seemed happy.[20]

14. After the departure of Ms Ninos, whilst the deceased, the Appellant and others were gathered outside underneath the pergola, the deceased approached the Appellant as he sat at a table. The deceased straddled the Appellant's legs and made a thrusting motion with his hips (**the patio incident**). The Appellant responded by saying something like, "Don't go doing that shit because I'm not gay, or I'll hit you".[21] The deceased apologised and said it was only a joke.[22]

15. Justice Peek summarises the evidence of those who witnessed the patio incident in his judgment at [106] (Mildwaters), [104] (Clarke) and [105] (Ms Lindsay). Neither Mr Hayes nor the co-accused, Mr Hutchings, witnessed the patio incident.[23] His Honour's summary of the patio incident accords with the Appellant's summary.[24] To that summary should be added:

- Ms Mildwaters said that the Appellant did nothing in response to the deceased's actions and no-one else responded to Ms Glover's comments.[25] She considered the deceased's conduct sexual and directed at the Appellant, although it was not of long duration.[26]
- Ms Clarke's attention was drawn to the deceased after she heard Ms Glover say "Don't go doing stuff like that", or, "Doing shit like that". She did not consider what she saw to be a sexualised gesture.[27] She described the Appellant's tone of voice as normal, he wasn't angry and didn't show any emotion.[28]
- Despite the conduct of the deceased, Ms Lindsay considered that the people outside "seemed to be getting on good".[29]

16. Sometime later, exactly how long after the patio incident is not known, the group moved inside the house. Whilst inside it was agreed that the deceased would spend the night at the Appellant's house. The Appellant said he could sleep in a spare bedroom. The deceased said he did not wish to sleep in the room by himself and that he wanted the Appellant in there with him. The deceased feared that someone would hurt him.[30] The Appellant said, "No, you'll be alright. You stay in there". Ms Mildwaters said that when the Appellant answered the deceased he "didn't really change his tone of voice or anything".[31] The two men then laid down either side of the fireplace in the living area.[32] They were talking and getting along fine.[33]

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19 Trial Transcript at 129, 156-157, 159.
20 Trial Transcript at 157.
21 Trial Transcript at 424 (Clarke).
22 Trial Transcript at 424.
23 Trial Transcript at 742, 743 (Hutchings), 553 (Hayes).
24 Appellant's written submissions at [15].
25 Trial Transcript at 292, 342, 345, 346.
26 Trial Transcript at 341, 365.
27 Trial Transcript at 386, 417-418, 425-426.
28 Trial Transcript at 386-387, 426-427.
29 Trial Transcript at 466.
30 Trial Transcript at 293 (Mildwaters).
31 Trial Transcript at 293.
32 Trial Transcript at 293 (Mildwaters), 390-391 (Clarke).

17. Later, the Appellant and the deceased were seen standing near the breakfast bar in the kitchen. The deceased was heard to say, "I'll pay you for sex then"[34] (**the second incident**).[35] The Appellant then attacked the deceased. It was during this attack that the fatal stab wounds were inflicted. Ms Mildwaters, Ms Clarke, Ms Lindsay, Mr Hayes and the co-accused were all present in the kitchen area at the time of the attack as was Mr Hutchings and the Appellant's partner, Ms Glover. As indicated, all gave evidence with the exception of Ms Glover.

18. Justice Gray provides a more fulsome and complete summary of the evidence of those who witnessed the second incident in his judgment at [13]-[14] (Mildwaters), [15] (Clarke), [16] (Lindsay), [17] (Hayes) and [20] (Hutchings). To Gray J's summary should be added:

- The comment Ms Mildwaters heard immediately before hearing a thud, emanated from the deceased who said, "I'll pay you for sex then".[36] After the thud Ms Mildwaters heard the deceased say that "he'd give [the Appellant] the money he had in his pockets".[37] The deceased said he would give the Appellant $600.[38] It was then that the Appellant "asked [Hutchings] to come and hold [the deceased] down" "while [the Appellant and Hutchings] went through his pockets".[39] Mr Hutchings held down the deceased's legs and the Appellant said that "there was no wallet there".[40] The knife came from the knife block near the stove in the kitchen.[41] Ms Mildwaters described the expression on the Appellant's face as never changing once.[42]
- Ms Clarke gave evidence that she saw the Appellant hit the deceased twice. It was then she saw the Appellant kick the deceased.[43] She said the deceased was saying something, but she could not say what.[44] It was then that she made her attempt to intervene after which she left the room.[45]
- Neither Ms Clarke nor Ms Lindsay heard the deceased say he would pay for sex.[46]
- Ms Lindsay gave evidence that after beginning his assault on the deceased, she saw the Appellant go into the kitchen area and then walk back towards the deceased.[47] Mr Hutchings' evidence was that a few minutes elapsed between the Appellant punching the deceased and the Appellant stabbing the deceased, during which time Mr Hutchings was in his bedroom listening to his Xbox.[48] On the other hand, Mr Hayes' evidence was that

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33 Trial Transcript at 390-391 (Clarke), 467 (Ashleigh Lindsay).
34 Trial Transcript at 314.
35 At [109] of his Honour's reasons, Peek J appears to wrongly merge the fireplace occasion with the second incident. There was a gap in time between the two, exactly how long is not known, but none of the witnesses suggest the two incidents were in fact one.
36 Trial Transcript at 292, 351.
37 Trial Transcript at 293. Mr Hutchings gave evidence that the deceased offered $200 after his initial request to pay the Appellant for sex; Trial Transcript at 719.
38 Trial Transcript at 293, 316.
39 Trial Transcript at 294, 352.
40 Trial Transcript at 293-294. Ms Lindsay also recalled mention of a wallet; Trial Transcript at 481.
41 Trial Transcript at 298.
42 Trial Transcript at 365.
43 Trial Transcript at 393, 429.
44 Trial Transcript at 393.
45 Trial Transcript at 394.
46 Trial Transcript at 435, 530
47 Trial Transcript at 468.
48 Trial Transcript at 722.

the punching and the stabbing occurred in a continuous sequence.[49]

- Mr Hutchings said that the Appellant reacted after the deceased repeated his offer to pay for sex.[50]

19. It is not correct to say that all witnesses to the second incident "gave evidence consistent with an actual loss of self-control by the Appellant".[51] It is true that Mr Hutchings and Mr Hayes did. That they did so was as a consequence of the Appellant's counsel's cross-examination.[52] Counsel for the Appellant did not explore the topic with Ms Mildwaters, Ms Clarke or Ms Lindsay. In fact, counsel for Mr Hutchings put to Ms Mildwaters that the Appellant was in a rage, to which she responded that "the expression on his face never changed once".[53] Ms Clarke said that the Appellant showed no emotion at the time at which he hit the deceased.[54] Further, on Ms Mildwaters account the Appellant was collected enough to tell his cousin to put away her mobile telephone and to don gloves,[55] whilst on Ms Clarke's evidence he was able to warn everyone not to interfere.[56] Nonetheless, it is accepted, as it was at trial, that there was evidence which, if accepted, was capable of satisfying a jury that it was reasonably possible that the Appellant lost self-control.

Part V: APPLICABLE STATUTORY PROVISIONS

20. *Criminal Law Consolidation Act 1935* (SA) ss 352-353

Part VI: RESPONDENT'S ARGUMENTS

A. May the Full Court entertain the application of the proviso where the Respondent makes no submission as to its application?

21. The Appellant contends that the Full Court may not resort to the proviso in the absence of the Respondent making a positive submission to that effect. In support of that contention the Appellant refers to *dicta* wherein it has been said that the Crown bears the onus of satisfying the Full Court that the case falls within the proviso and the consistency of such approach with the essentially accusatorial and adversarial nature of the criminal justice system. The Respondent contends that this issue has been dealt with by this Court in *Weiss v The Queen*.[57]

22. In *Weiss v The Queen* this Court said of s568(1) of the *Crimes Act 1958* (Vic) (a further example of the common form criminal appeal provision):

> The task of construing this section is not accomplished by simply taking the text of the statute in one hand and a dictionary in the other. Especially is that so when note is taken of some particular

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49 Trial Transcript at 557-558.
50 Trial Transcript at 743.
51 Appellant's written submissions at [19].
52 Trial Transcript at 591, 743.
53 Trial Transcript at 365.
54 Trial Transcript at 394.
55 Trial Transcript at 317, 350.
56 Trial Transcript at 395, 437.
57 (2005) 224 CLR 300.

> features of this provision. What is to be made of the contrast between the provisions in the body of the section that the court "*shall* allow the appeal" if certain conditions are met and the proviso that the Court "*may* … dismiss the appeal" if another condition is met? What is to be made of expressions like "if it [the Court] *thinks* that the verdict of the jury *should* be set aside … "? What is to be made of the reference in the body of the section to "a miscarriage of justice" compared with the reference in the proviso to "no *substantial* miscarriage of justice"? **How is the proviso to operate when it is cast in terms that the Court "*may* … notwithstanding that [the Court] is of opinion that the point … *might* be decided in favour of the Appellant … dismiss the appeal if it *considers* that no substantial miscarriage of justice has *actually* occurred"?** What is the intensity to be given to the words "may", "might", "considers"? What, if anything, turns on referring, in the first kind of ground of appeal specified in the body of the section, to the verdict of the jury but referring, in the second kind of ground, to the judgment of the Court?*(footnotes omitted)*[58]

23. It is an aspect of the question in bold type that arises for consideration. Clearly the question is one of construction.[59] In answering that question the language of the statute is controlling.[60] That leads to the first point; the text of the common form appeal provision does not expressly condition the application of the proviso upon an application being made by the Respondent.

24. In *Weiss*, this Court held that the meaning and operation of the common form criminal appeal provision is informed by the context in which the provision was drafted and enacted.[61] Relevantly, that context revealed that the proviso was intended to do away with the Exchequer rule, a rule that afforded a party a right to a new trial if there had been a departure from applicable rules of evidence or procedure regardless of the nature and importance of that departure.[62] Importantly this Court said:

> [18] The matters of history that are recorded above readily show that the proviso to s 4(1) of the 1907 English Act was intended to do away with the Exchequer rule. But they also cast light upon what appears to be a conundrum presented by reference in the grounds on which the Court of Appeal *shall* allow the appeal to a "miscarriage of justice", and reference in the proviso to dismissing the appeal if the Court "considers that no substantial miscarriage of justice has actually occurred". What the history reveals is that a "miscarriage of justice", under the old Exchequer rule, was *any* departure from trial according to law, regardless of the nature or importance of that departure. By using the words "substantial" and "actually occurred" in the proviso, the legislature evidently intended to require consideration of matters beyond the bare question of whether there had been any departure from applicable rules of evidence or procedure. … *(footnote omitted, emphasis in original)*[63]

25. Accepting this, on an appeal under the common form criminal appeal provision the proviso is always in play, save with respect to that ground that asserts that the verdict is unreasonable or cannot be supported on the evidence.[64] Hence in *Baiada Poultry* in the joint reasons it was said:

> [25] It is to be recalled, as was pointed out in *Weiss*, that the proviso to the common form criminal appeal statute is cast in permissive terms: "the Court of Appeal *may*, notwithstanding ..., dismiss the appeal if it considers ...". That is, the proviso gives the Court of Appeal power to dismiss the appeal

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58 (2005) 224 CLR 300 at [10] (The Court).

59 *Weiss v The Queen* (2005) 224 CLR 300 at [9] (The Court); *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [21] (French CJ, Gummow, Hayne and Crennan JJ).

60 *Weiss v The Queen* (2005) 224 CLR 300 at [31] (The Court); *Fleming v The Queen* (1998) 197 CLR 250 at [12] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [21] (French CJ, Gummow, Hayne and Crennan JJ).

61 *Weiss v The Queen* (2005) 224 CLR 300 at [11] (The Court).

62 *Weiss v The Queen* (2005) 224 CLR 300 at [18] (The Court).

63 *Weiss v The Queen* (2005) 224 CLR 300 at [18] (The Court).

64 *Baini v The Queen* (2012) 246 CLR 469 at [48] (Gageler J).

> *if* the stated condition ("it considers that no substantial miscarriage of justice has actually occurred") is satisfied. No doubt a judgment must be made in deciding whether there has been no *substantial* miscarriage of justice. But if that condition is met, the power must then be exercised. That is, if the Court of Appeal considers that no substantial miscarriage of justice has actually occurred, the appeal *must* be dismissed in exercise of the power the proviso confers on the Court of Appeal. It is not to be supposed that, if an appellate court concluded that there had been no substantial miscarriage of justice, the appellate court could nevertheless allow the appeal and direct that a new trial be had. *(footnotes omitted, emphasis in original)*[65]

26. To construe the common form appeal provision as the Appellant would have this Court do would deny the proviso its proper operation as determined by this Court. It would undermine the important function of easing the burden on trial courts by preventing the "needless retrial of criminal proceedings".[66] Here it must also be remembered that the right to appeal granted by s352 CLCA is an exception to the principle of finality.[67] To construe the common form appeal provision as this Court has in *Weiss* is consistent with that principle.

27. The question of onus in this case is an unnecessary distraction. The fact is that here Kourakis CJ and Peek J were satisfied that no substantial miscarriage of justice had actually occurred. That is, the Chief Justice and Peek J considered that no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the Appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical 29 year old.[68] Once their Honours were so satisfied, they were duty-bound to dismiss the appeal.[69]

28. True it is that the powers contained in the common form appeal provision are exercised by a court within an adversarial and accusatorial system and that the nature of such a system is maintained on appeal.[70] But that cannot be accepted as an absolute proposition[71] and, in any event, acknowledgement of the Full Court's duty to apply the proviso where the Court, unprompted, considers that no substantial miscarriage of justice has actually occurred, does not cause an appeal to lose its adversarial nature. The Appellant would still frame the issues for determination by their selection of the grounds upon which they rely. They would carry the onus of persuading the Court that the points they raise should succeed. That may include, as a

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65 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [25] (French CJ, Gummow, Hayne and Crennan JJ) and at [47] (Heydon J).

66 *Weiss v The Queen* (2005) 224 CLR 300 at [47] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

67 *Burrell v The Queen* (2008) 238 CLR 218 at [15] (Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ); *Achurch v The Queen* (2014) 88 ALJR 490 at [15] (French CJ, Crennan, Kiefel and Bell JJ). That principle forms part of the common law background against which "any statutory provision conferring power upon a court to re-open concluded proceedings is to be considered. It is a principle that may inform the construction of the provision," *Achurch v The Queen* (2014) 88 ALJR 490 at [16] (French CJ, Crennan, Kiefel and Bell JJ).

68 *Stingel v The Queen* (1990) 171 CLR 312 at 336 (The Court).

69 *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [25] (French CJ, Gummow, Hayne and Crennan JJ) and at [47] Heydon J.

70 *Gipp v The Queen* (1998) 194 CLR 106 at [51] (McHugh and Hayne JJ).

71 *Gipp v The Queen* (1998) 194 CLR 106 at [48]-[55] (McHugh and Hayne JJ); *Pantorno v The Queen* (1989) 166 CLR 466 at 473 (Mason CJ and Brennan J).

matter of prudence, accounting for the potential application of the proviso by addressing the question of whether the miscarriage asserted is substantial. The Crown would then respond and the Appellant have an opportunity to reply.

29. For an appellate court to raise the application of the proviso of its own motion does not have the necessary consequence that it becomes an active party in proceedings. Here the proviso was applied on the basis of the application of the objective test. That is, having heard the Appellant's submissions identifying the evidence relevant to assessing the gravity of the provocative conduct from the point of view of the Appellant, the Court applied the objective standard represented by the concept of the fictitious ordinary person to that evidence as identified by the Appellant. The standard is a legal fiction. It is not susceptible to proof by the calling of evidence thereby requiring an appellate court to trawl through trial transcript for evidence in its support. This is not an instance of the Full Court identifying for itself evidence in the transcript justifying an argument in answer to the Appellant's contentions. It did not descend into the arena.

30. If an appellate court reaches the preliminary view on the hearing of an appeal that a substantial miscarriage of justice may not have occurred, procedural fairness demands that it raise the question of the application of the proviso.[72] That the Respondent may not embrace the proviso or make any submission in support of its application does not relieve the appellate court of the duty that the common form appeal provision imposes.

31. Thus here the real issue is not one of onus, but whether the Appellant had a reasonable opportunity to address the application of the proviso, bearing in mind that the Respondent did not raise its application or make a positive submission as to its application.

B. Was the Appellant afforded the opportunity to address the application of the proviso?

32. There are two aspects to this argument; first, there is the question of the Appellant being given sufficient opportunity to address the application of the proviso.[73] Second, there is the question of the Appellant not being privy to "some of the extensive academic literature"[74] referred to by Peek J in his reasons for decision.

33. As to the first aspect: as a general rule procedural fairness is an essential characteristic of judicial proceedings.[75] It may be considered a concomitant of the conferral of judicial power.[76] In *Autodesk Inc v Dyason [No 2]* Brennan J said:

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72 *Friend v Brooker* (2009) 239 CLR 129 at [117]-[118] (Heydon J).

73 Appellant's written submissions at [58]-[60].

74 Appellant's written submissions at [69]-[72]; *R v Lindsay* (2014) 119 SASR 320 at [236].

75 *RCB v The Honourable Justice Forrest* (2012) 247 CLR 304 at [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at [156] (Hayne, Crennan, Kiefel and Bell JJ).

76 By analogy *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [42] (Gummow and Gaudron JJ).

> ... A court should not pronounce a judgment against a person on a ground which that person has not had an opportunity to argue. However, a sufficient opportunity to argue a ground is given when the ground is logically involved in a proposition that has been raised in the course of argument before the court or is to be considered by the court as an unconceded step in determining the validity of a conclusion for which one of the parties contends. Of course, the precise ground which a court or judge assigns for a decision will frequently be formulated in terms different from the terms of a submission by counsel but, provided the ground has arisen in one of the ways mentioned, the court or judge may properly proceed to judgment without requiring the case to be relisted for further argument and without inviting supplementary submissions to be made.[77]

34. In this case the Chief Justice raised specifically with counsel for the Appellant the possibility of the Court applying the proviso on the basis that provocation should never have been left.[78] More than that, the Chief Justice referred to the possible reason for following such a course being the objective test.[79] This occurred after counsel had advanced arguments as to the correct approach, as a matter of law, to the assessment of the provocative conduct for the purposes of both tests, and, the failure on the part of the trial judge to adequately identify for the jury the evidence relevant thereto.[80]

35. It was in the light of counsel for the Appellant identifying for the Full Court the evidence relevant to assessing whether the provocative conduct caused the Appellant to lose self-control, and, the evidence relevant to assessing the gravity of the provocative conduct from the point of view of the Appellant, that the Chief Justice raised the proviso. Counsel having identified the evidence relevant to assessing the gravity of the provocative conduct from the point of view of the Appellant, the necessary first step in applying the objective test, it is understandable that the Chief Justice's mind turned to the second step. That is, whether provocation of that gravity could cause an ordinary person to form an intention to kill or cause grievous bodily harm and act on it as the Appellant did.

36. Counsel responded:

> The second limb of course is what the difficulty was in *Green v The Queen*. If you get over the subjective test it's a matter for the jury, that's why the High Court intervened in *Green v The Queen* because the High Court said that's a matter for the jury, once the evidence supports the subjective test as a reasonable possibility. We haven't referred to that in our outline.[81]

37. This submission suggests that satisfaction of the subjective test has the consequence that the defence must be left even if the objective test cannot reasonably be satisfied. The answer is incorrect, suggesting the question may have been misunderstood. Whilst it is not for a court to tell the parties what the law is, nor how to present their case,[82] acknowledging the possibility of a misunderstanding, the Chief Justice returned to the issue pointing out why this Court's

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77 (1993) 176 CLR 300 at 308.
78 CCA Transcript at 24, line 15.
79 CCA Transcript at 24, line 21.
80 CCA Transcript at 4, line 27 to p9, line 21; p15, line 27 to p24, line 7.
81 CCA Transcript at 24.
82 *Pantorno v The Queen* (1989) 166 CLR 466 at 472 (Mason CJ and Brennan J).

judgment in *Green* was not an answer to the question he had posed.[83] He repeated his question as to whether it was open to the Full Court to determine that provocation should never have been left and, in consequence, to apply the proviso.[84] Counsel for the Appellant's response was appropriate to the question. She referred to the cautious approach to be taken by trial courts in determining whether provocation should be left,[85] she referred to relevant authorities as to the test to be applied in determining whether the partial defence should be left,[86] she did not dispute the Chief Justice's characterisation of the advantage enjoyed by the trial judge on this issue as "pretty small",[87] she alluded to the different versions of what occurred,[88] and concluded by submitting that the trial judge was correct to have left the partial defence.[89]

10 38. In her answer to the Chief Justice's question counsel said nothing specific as to step two of the objective test. This may explain why the Chief Justice specifically took counsel to the question of how one formulates the concept of the ordinary person.[90] The Chief Justice again revealed his thinking; "It seems a very difficult test here".[91] Counsel referred him to relevant authorities.

39. Counsel for the Appellant returned briefly to the application of the proviso in her reply.[92] No adjournment was sought in order that counsel could devote further resources to the question, nor was any request made for permission to provide supplementary written submissions.

40. The question is whether the Appellant had a reasonable opportunity to address the possible application of the proviso.[93] It is true that the Respondent did not reach for the branch extended by the Chief Justice, nor, for that matter, embrace the proviso save in one limited
20 and unrelated respect.[94] But such approach cannot be elevated to the status of an understanding between the parties that in some way bound the Court. There is no onus on the Full Court to warn counsel of the significance of a point or ground if no attempt is made to address the issue or it is inadequately addressed.[95] The Court's obligation is limited to drawing "the attention of the parties, particularly the losing party, to the basis on which the losing party was to lose".[96] The transcript of the debate in the Full Court makes plain that this was done. A reasonable opportunity was afforded the Appellant to address the application of the proviso.

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83 CCA Transcript at 28-29.
84 CCA Transcript at 29.
85 CCA Transcript at 29 line 18.
86 CCA Transcript at 29, line 34; p32 line 2.
87 CCA Transcript at 30, line 11.
88 CCA Transcript at 31, line 32.
89 CCA Transcript at 32.
90 CCA Transcript at 35, line 27.
91 CCA Transcript at 37, line 7.
92 CCA Transcript, at 66-67.
93 *Pantorno v The Queen* (1989) 166 CLR 466 at 472-473 (Mason CJ and Brennan J), 482 (Deane, Toohey and Gaudron JJ).
94 CCA Transcript at 61.
95 *Pantorno v The Queen* (1989) 166 CLR 466 at 473 (Mason CJ and Brennan J).
96 *Friend v Brooker* (2009) 83 ALJR 724 at [117].

41. As to the second aspect; the relevant portion of Peek J's judgment is at [235]-[238]. The Appellant suggests that it is reasonable to infer that the extensive academic literature referred to in this passage was "in the field of social science or human behaviour" and was relied upon by Peek J to obtain evidence about "contemporary attitudes to homosexuality" or "ordinary powers of self-control".[97]

42. The reference to "the extensive academic literature" in [236] follows immediately after the reference to the "careful consideration of the authorities". Read in context, it is reasonable to infer that the two sources related to the same subject matter.[98]

43. Two paragraphs later, Peek J refers to the "more extreme suggestions made in academic debate since the decision ... in *Green v The Queen*". Considered academic debate surrounding the correctness of a legal decision is unlikely to have been in the field of "social science or human behaviour" as the Appellant submits. The factors relied on by the Appellant, namely that the material was not identified, that there was no consideration given to its relevance or admissibility, and that the material was not drawn to the attention of the parties, are far more consistent with Peek J having consulted *legal* academic literature on provocation.

44. This conclusion is rejected by the Appellant on the basis that "[a]cademic commentary on the legal test could really add nothing to the Court's jurisprudence".[99] In assessing the validity of this assertion, one need only have regard to decisions of this Court in which the academic literature on provocation has been commended as of assistance in understanding the principles underlying the authorities. In this regard Peek J's language is little different to that of Barwick CJ in *Johnson v The Queen*, where his Honour stated "[t]here has been a great deal said in reported cases and in academic writing in recent years about provocation. I have taken the occasion to refresh my recollection of a great part of this literature".[100] Similarly, this Court in *Stingel v The Queen* referred to the fact that "the defence of provocation, both at common law and under statutory provision, has attracted a wealth of learned and instructive judicial and academic discussion".[101] Such academic discussion assists in shedding light upon what the Court referred to as the "unity of underlying notions" running through the decided

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97 Appellant's Special Leave Summary of Argument at [30]-[31].

98 This is particularly so having regard to the parallels between the facts in *Green* and this case and the debate that *Green* engendered amongst legal academics as to whether in contemporary Australia the ordinary person could so lose control as to form an intention to kill or cause grievous bodily harm because of a non-violent sexual advance by a person of the same sex. See, for example, A Howe, *Green v The Queen; The Provocation Defence Finally Provoking its own Demise?* (1998) 22 MULR 466; S Oliver, *Provocation and Non-Violent Homosexual Advances* (1999) 63 Journal of Criminal Law 586; R Bradfield, *Provocation and Non-Violent Homosexual Advances: Lessons from Australia* (2001) 65 Journal of Criminal Law 65; S DePasquale, *Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy* (2002) 26 MULR 110; A Gray, *Provocation and the Homosexual Advance Defence in Australia and the United States: Law out of Step with Community Values* (2010) 3 The Crit: A Critical Studies Journal 53.

99 Appellant's written submissions at footnote 22.

100 (1976) 136 CLR 619 at 631. See also at 636.

101 *Stingel v The Queen* (1990) 171 CLR 312 at 320 (The Court).

authorities.[102]

45. In any event, it is inconceivable that any authority or academic writing provided Peek J with an answer in relation to the application of the objective test to the specific circumstances of this case. That could only have occurred if the provocative conduct was capable of being characterised as falling within a class in relation to which the ordinary person would never lose self-control and form an intention to kill whatever the gravity of that conduct as assessed from the accused's viewpoint.[103] Here Peek J made plain that the assessment was case specific.[104] His Honour was not applying some sort of defined intractable policy. The authorities and academic writing simply could not have determined the application of the objective test.

10 ***C. Did the Full Court correctly characterise the "real sting" in the deceased's provocative conduct such that it properly applied the objective test?***

46. This complaint arises in the context of the Full Court determining whether the trial judge was right to leave the partial defence of provocation for the consideration of the jury. The proviso could only be applied if the Full Court was satisfied that the evidence, taken at its most favourable to the Appellant, did not disclose material upon which a reasonable jury, properly directed, might have a reasonable doubt on the question of provocation.[105] It is only by arriving at this conclusion that the Full Court could be satisfied that "the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty".[106]

20 47. The Full Court accepted that the subjective test was satisfied, in that the evidence, taken at its most favourable to the Appellant, disclosed material upon which the jury, properly directed, might conclude that it was reasonably possible that the deceased engaged in conduct that caused the Appellant to lose self-control and, whilst not in control of himself, to form the intent to kill and act as he did.[107]

48. The real issue for the Full Court was whether the evidence, taken at its most favourable to the Appellant, disclosed material in relation to which no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the Appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical 29 year old.[108] Answering that question necessitated that the
30 Court first assess the gravity of the deceased's provocative conduct from the viewpoint of the

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102 *Stingel v The Queen* (1990) 171 CLR 312 at 320 (The Court).
103 See, for example, discussion in *Moffa v The Queen* (1977) 138 CLR 601 at 616 (Gibbs J).
104 *R v Lindsay* (2014) 119 SASR 320 at [237].
105 R v R (1981) 28 SASR 321 at 322 (King CJ).
106 *Weiss v The Queen* (02005) 224 CLR 300 at [44] (The Court).
107 R v *Lindsay* (2014) 119 SASR 320 at [228].
108 *Stingel v The Queen* (1990) 171 CLR 312 at 336-337 (The Court).

Appellant.[109] Three things must be borne in mind here; first, as the ultimate question is one of whether the defence should have been left at all, the assessment of the gravity of the provocative conduct from the viewpoint of the Appellant is to be conducted upon the consideration of the evidence at its most favourable to the Appellant. Second, the Appellant did not give evidence. Third, as the question of what weight is to be given to the evidence forms no part of the exercise,[110] the trial judge did not enjoy any advantage over the Full Court nor, for that matter, this Court.

49. The Appellant has identified the "real sting" of the provocative conduct as "not an imputation by Mr Negre of homosexuality against the Appellant so much as a taunt and challenge to the Appellant's integrity. That is, the real sting was not "you are gay", but "notwithstanding what you have threatened, and what your partner might think, for a bit of money you would have sex with me".[111] That was to be assessed in a context where:

> [82] … [d]espite his lack of education or employment, the Appellant owned a home, where he lived with his partner and child. He had been hospitable to a stranger, inviting Mr Negre into his home. Mr Negre had straddled the Appellant in front of the Appellant's partner and sisters. The Appellant reacted angrily and in effect said that if the conduct was repeated he would hit Mr Negre.
>
> [83] Mr Negre's later conduct was, in context, capable of being seen by the Appellant in effect as an (aggressive) dare to do so.
>
> [84] Importantly, on Hayes' and Hutchings' account, after making a subsequent advance of some sort inside the house, the Appellant responded: "What did you say cunt?" … A severe warning having been given, Mr Negre's subsequent (and, in context, brazen) offer of money for sex might be regarded by a juror as a highly provocative challenge to a person in the position of the Appellant and a grave insult and taunt to be made to a man like the Appellant by a stranger who had been invited into his home.[112]

50. The Appellant's characterisation of the "real sting" of the provocative conduct is not materially different to the conclusion arrived at by Peek J.[113] No doubt that is in part due to the Appellant addressing the issue of gravity in its submissions in the Full Court.[114] A judgment must be read as a whole.[115] When Peek J refers at [235] to the "provocation present here" he is to be taken as referring to his identification of that provocation at [98]-[102]. Justice Peek's reference to former times "when acts of homosexuality constituted serious crime and men were accustomed to resort to weapons and violence to defend their honour", does not lead to the conclusion that he has unwittingly abandoned his earlier conclusions, preferring instead to characterise the real sting of the provocative conduct as simply a homosexual advance. The "real sting" as characterised by the Appellant, and accepted at [98]-

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109 *Stingel v The Queen* (1990) 171 CLR 312 at 325-326 (The Court); *Masciantonio v The Queen* (1995) 183 CLR 58 at 66-67.

110 R *v* R (1981) 28 SASR 321 at 322 (King CJ).

111 Appellant's written submissions at [81].

112 Appellant's written submissions at [82]-[84].

113 R *v Lindsay* (2014) 119 SASR 320 at [98]-[102].

114 Appellant's written outline of submissions for the hearing before the Full Court at [36]-[37].

115 *New South Wales v Ibbett* (2006) 229 CLR 638 at 648 (The Court).

[102] by Peek J, is linked to homosexual sex. The gravity of the insult necessarily incorporates what the deceased would have the Appellant engage in for money at a cost to his integrity and his relationship. The homosexual sex aspect is enough to bring this conduct within a class of conduct that, in Peek J's opinion, in former times would give rise to a verdict of manslaughter. Justice Peek's concern is to highlight the point he makes at [234]. The conclusion in [236] refers specifically to "the evidence taken at its highest in favour of the Appellant in the present case". That can only be a repeat reference to the conclusions at [98]-[102].

51. To construe [235] as Peek J abandoning his earlier conclusions and proceeding to decide this case on the basis that the real sting comprised a homosexual advance and imposing a rule that in contemporary Australian society a homosexual advance can never be relied upon to make out the objective test for the partial defence, which is the effect of the Appellant's construction, is to ignore [237] and his Honour's clear declaration that he was only deciding this case on its particular facts.

52. In any event, for the reasons given below, upon considering the evidence, taken at its most favourable to the Appellant, this Court will conclude that no jury, acting reasonably, could fail to be satisfied beyond reasonable doubt that the Appellant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical 29 year old.

D. Should the partial defence of provocation have been left to the jury?

53. The question for this Court in considering the application of the proviso is, as it was for the Full Court, the same as that confronting the trial judge at the conclusion of the evidence.[116] The task then is no different to that undertaken by this Court in *Stingel v The Queen*[117] and *Green v The Queen*.[118] The question is whether there was evidence which, if believed, might reasonably have led a jury to return a verdict of manslaughter on the ground of provocation.[119] It is a question of law.[120]

54. Here it is not contended that the Full Court was in error in finding that there was ample evidence for the jury's consideration of the subjective test. It being the objective test that falls for consideration, the question for this Court can be stated thus; does the evidence disclose material upon which a reasonable jury, properly directed, might conclude that the provocative conduct of the deceased, with its implications and gravity assessed from the viewpoint of the Appellant, was of such a nature that it could or might cause an ordinary person of the age of

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116 *Masciantonio v The Queen* (1995) 183 CLR 58 at 68 (Brennan, Deane, Dawson and Gaudron JJ).
117 (1990) 171 CLR 312.
118 (1997) 191 CLR 334.
119 *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 162 (Gibbs CJ, Wilson, Brennan and Deane JJ), 169 (Mason J).
120 *Stingel v The Queen* (1990) 171 CLR 312 at 333-334 (The Court).

the Appellant, with powers of self-control within the limits of what is ordinary for a person of that age, to form the intention to kill or do grievous bodily harm and to act as the Appellant did.[121]

55. In answering this question it must be borne in mind:

i. that it is necessary to examine the evidence in the light which is most favourable to the Appellant.[122]

ii. that:

> The central question posed by the objective test - i.e. of such a nature as to be sufficient - obviously cannot be answered without the identification of the content and relevant implications of the wrongful act or insult and an objective assessment of its gravity in the circumstances of the particular case. Conduct which may in some circumstances be quite unprovocative may be intensely so in other circumstances. Particular acts or words which may, if viewed in isolation, be insignificant may be extremely provocative when viewed cumulatively. ... [123]

iii. that the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused as it is only by doing so that the provocative conduct is put in context.[124]

iv. that the function of the ordinary person:

> ... is to provide an objective and uniform standard of the minimum powers of self-control which must be observed before one enters the area in which provocation can reduce what would otherwise be murder to manslaughter. While personal characteristics or attributes of the particular accused may be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act or insult, the ultimate question posed by the threshold objective test ... relates to the possible effect of the wrongful act or insult, so understood and assessed, upon the power of self-control of a truly hypothetical "ordinary person". Subject to a qualification in relation to age (see below), the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused. It will, however, be affected by contemporary conditions and attitudes (see per Gibbs J., Moffa, at pp 616-617).[125] Thus in *Parker* (at p 654), Windeyer J. pointed out that many reported rulings in provocation cases "show how different in weight and character are the things that matter in one age from those which matter in another".[126] (*footnote added*)

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121 *Stingel v The Queen* (1990) 171 CLR 312 at 331, 336-337(The Court); *Masciantonio v The Queen* (1995) 183 CLR 58 at 69 (Brennan, Deane, Dawson and Gaudron JJ); *Green v The Queen* (1997) 191 CLR 334 at 340, 344 (Brennan CJ), 355-356 (Toohey J), 387 (Gummow J), 408, 415 (Kirby J); *Pollock v The Queen* (2010) 242 CLR 233 at [66] (The Court).

122 *Stingel v The Queen* (1990) 171 CLR 312 at 318 (The Court); R *v* R (1981) 28 SASR 321 at 322 (King CJ), 335 (Zelling J).

123 *Stingel v The Queen* (1990) 171 CLR 312 at 325 (The Court).

124 *Stingel v The Queen* (1990) 171 CLR 312 at 326 (The Court); *Masciantonio v The Queen* (1995) 183 CLR 58 at 67 (Brennan, Deane, Dawson and Gaudron JJ).

125 See also, *Parker v The Queen* (1963) 111 CLR 610 at 654 (Windeyer J); *Green v The Queen* (1997) 191 CLR 334 at 375 (Gummow J).

126 *Stingel v The Queen* (1990) 171 CLR 312 at 327 (The Court); *Masciantonio v The Queen* (1995) 183 CLR 58 at 66-67 (Brennan, Deane, Dawson and Gaudron JJ), 73 (McHugh J).

v. that the governing principles underpinning the objective test are "those of equality and individual responsibility such that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard".[127]

vi. that in considering whether an ordinary person could have reacted in the way in which the accused did, "it is the nature and extent - the kind and degree - of the reaction which could be caused in an ordinary person by the provocation which is significant, rather than the duration of the reaction or the precise physical form which that reaction might take. And in considering that matter, the question whether an ordinary person could form an intention to kill or do grievous bodily harm is of greater significance than the question whether an ordinary person could adopt the means adopted by the accused to carry out the intention."[128]

vii. that disproportionality between the provocative conduct and the response is relevant to the assessment as to whether an ordinary person would not have so far lost self-control in like circumstances. As Barwick CJ said, "[t]he notion that a state of loss of self-control is relative is basic to the concept of the objective test. That test properly applied keeps provocation within bounds".[129]

56. Whilst it is undoubtedly appropriate to approach this question on a cautious footing, bearing in mind the respective roles of judge and jury, no manner of urging this Court to caution can overcome satisfaction on this Court's part that the partial defence should not have been left. As was observed by the Privy Council in *Lee Chun-Chuen v The Queen*:

> ... there is a practical difference between the approach of a trial judge and that of an appellate court. A judge is naturally very reluctant to withdraw from a jury any issue that should properly be left to them and he is therefore likely to tilt the balance in favour of the defence. An appellate court must apply the test with as much exactitude as the circumstances permit.[130]

57. That applies irrespective of whether the appellate court is concerned with the subjective or objective test.

58. In this case, the relevant provocative words and conduct of the deceased were the making of suggestive sexual gestures towards the Appellant on the patio, namely "straddling" the Appellant (the patio incident), then, having moved inside, stating that he wanted the Appellant

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127 *R v Hill* [1986] 1 SCR 313 at 342 (Wilson J) quoted with approval in *Stingel v The Queen* (1990) 171 CLR 312 at 327 (The Court); *Masciantonio v The Queen* (1995) 183 CLR 58 at 72 (McHugh J); *Green v The Queen* (1997) 191 CLR 334 at 386 (Gummow J), 401 (Kirby J).

128 *Pollock v The Queen* (2010) 242 CLR 233 at [61] (The Court); *Masciantonio v The Queen* (1995) 183 CLR 58 at 67 (Brennan, Deane, Dawson and Gaudron JJ); *Johnson v The Queen* (1976) 136 CLR 619 at 639 (Barwick CJ).

129 *Johnson v The Queen* (1976) 136 CLR 619 at 635, 636, 639, 640. See also, 655, 656, 657-8 (Gibbs J), 660 (Mason J), 666 (Jacobs J), 671 (Murphy J); *Green v The Queen* (1997) 191 CLR 334 at 378, 382-3 Gummow J) and in *Masciantonio v The Queen* (1995) 183 CLR 58 at 68 (Brennan, Deane, Dawson and Gaudron JJ).

130 [1963] AC 220 at 230, quoted with approval in *Moffa v The Queen* (1977) 138 CLR 601 at 613-614 (Gibbs J) and *Masciantonio v The Queen* (1995) 183 CLR 58 at 68 (Brennan, Deane, Dawson and Gaudron JJ).

to sleep in the spare room with him, and finally offering to pay the Appellant for sex and reiterating the invitation by offering several hundred dollars despite an angry first rejection (the second incident). There was no evidence that the deceased was sexually aggressive towards the Appellant. It might be noted that this case was only marginally distinguishable from a case of "mere words", with conduct amounting to "mere words" having traditionally been regarded as incapable of amounting to provocation, "save in circumstances of a most extreme and exceptional character".[131]

59. Significantly, this is not a case like *Green*,[132] *Romano*[133] or *Dutton*,[134] where the jury had the benefit of hearing from the accused as to the significance of the provocative conduct to him. In those cases, the availability of that evidence facilitated a more personalised assessment and appreciation of the individual circumstances informing the particular gravity of the provocative conduct from the viewpoint of the particular accused. In this case, the jury and Full Court did not (and, indeed, now this Court does not) have the benefit of such evidence.

60. There is scant evidence in this case which genuinely assists in discerning the gravity of the deceased's provocative conduct from the viewpoint of the Appellant. In this regard, the Appellant seeks to rely upon the few personal characteristics of the Appellant apparent on the evidence: his age; his Aboriginal heritage; his lack of education; the fact that he owned his own home; the fact that he had been generous and hospitable to the deceased; the fact that he was in a committed heterosexual relationship and was accommodating of his family and friends. In this there is nothing about the Appellant, his disposition or mental balance which could be called extraordinary. As Gray J noted, "[t]he evidence did not reveal any particular characteristic of Lindsay relevant to the issue of provocation. As earlier observed, Lindsay did not give evidence. Relatively little was known of his personal circumstances".[135]

61. In his written submissions the Appellant refers to his "many difficulties",[136] but these are not identified, nor could they be, for the little we know of him on the evidence does not support an inference that he was confronted by many difficulties, nor does it elucidate any relevant link between such said difficulties and his personal assessment of the provocative conduct.

62. There is also no evidence of a history of sexual abuse that could be used to heighten the gravity of the provocative conduct from his perspective. As Peek J pointed out, the "sexual

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131 *Holmes v Director of Public Prosecutions* [1946] AC 588 at 600 (Viscount Simon); *Moffa v The Queen* (1977) 138 CLR 601 at 605 (Barwick CJ), 617 (Gibbs J), 619 (Stephen J).
132 *Green v The Queen* (1997) 191 CLR 334.
133 *R v Romano* (1984) 36 SASR 283.
134 *R v Dutton* (1979) 21 SASR 356.
135 *Lindsay v The Queen* (2014) 119 SASR 320 at [29] (Gray J).
136 Appellant's Summary of Argument at [27].

abuse factor" that was present in *Green v The Queen* was lacking in this case.[137]

63. Whilst there is some evidence from which it may be concluded that the Appellant held no sexual interest in persons of his sex, there is no evidence to suggest that he possessed homophobic traits or that he harboured, for some reason, an extreme dislike of those prepared to engage in homosexual sex. In this regard, again, this case is very different from *Green*. Justice Peek's view that "the repeated offers to pay the Appellant for sex may have challenged the Appellant's sexuality and integrity" was arguably unduly favourable.[138] There is no real evidence to support an inference that the Appellant's sexuality was challenged.

64. If this is accepted, then the only "sting" left in the deceased's provocative conduct is that of an insult to the Appellant's integrity and commitment to his partner. Importantly, there was no evidence of any kind that the Appellant was particularly sensitive to challenges to his integrity.

65. Also of significance was the fact that there was no pre-existing relationship between the deceased and the Appellant, or between the deceased and any of the witnesses or Ms Glover, which might have heightened the provocation from the Appellant's point of view. There was no perceived or actual breach of trust, or likely feelings of betrayal. The deceased was a man the Appellant had never met before, and would likely never meet again.

66. To overcome the paucity of evidence about the Appellant relevant to assessing the gravity of the deceased's provocative conduct, the Appellant is forced to engage in speculation, alluding to an implicit "taunt" that ignores the full factual context of the deceased's words and conduct. To characterise the deceased's conduct as a "taunt" is artificial and strained. The evidence taken at its highest 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. It cannot be said on the evidence that the offer to pay for sex was "an (aggressive) dare to do so".[139] But even if the deceased's conduct could be characterised as a taunt of sorts, it could only be said to be "aggressive" in the sense that the invitation was repeated.

67. An absence of evidence indicating how grave the insult was to the Appellant cannot be used to enable boundless speculation. The assessment of the gravity of the provocative conduct must have foundation in the evidence. Whilst the fact that the Appellant responded to the deceased's conduct by inflicting 25 stab wounds is some evidence as to how grave the insult was to the Appellant, it does not follow, as a matter of logic, that the Appellant's reaction was proportionate to the gravity of the provocation he perceived. That this is so, significantly curtails the use to which that evidence can be put in attempting to discern the gravity of the

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137 *Lindsay v The Queen* (2014) 119 SASR 320 at [238] (Peek J) referring to *Green v The Queen* (1997) 191 CLR 334, esp at 359-61 (McHugh J) and 339 (Brennan CJ).

138 *Lindsay v The Queen* (2014) 119 SASR 320 at [102] (Peek J).

139 Appellant's Summary of Argument at [83].

provocation from the Appellant's viewpoint.

68. Having regard then, to the inferences available to be drawn from the scarce evidence of the Appellant's personal circumstances 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.

69. The first step of the objective test having been so resolved, the second step is to consider whether the ordinary person, having been provoked to that extent, could have so lost their self-control as to form an intention to kill or do grievous bodily harm and to act upon it by beating and stabbing the deceased. 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. Indeed, the Respondent contends that in these circumstances, no reasonable jury could fail to be satisfied that the Appellant's reaction to the deceased's conduct fell far below the minimum limits of the range of powers of self-control which must be attributed to any hypothetical 29 year old. Once their Honours were so satisfied, they were duty-bound to dismiss the appeal.

Part VII: CONCLUSIONS/ORDERS

70. There can be no question of a substituted acquittal. Provocation is only entertained if the trier of fact is satisfied beyond reasonable doubt that the accused has committed murder.[140] Accordingly, if provocation should have been left, bearing in mind the defects in the summing up identified by the Chief Justice and Peek J, the correct order is that the appeal be allowed and a retrial ordered. If provocation should not have been left, any misdirection on that issue could not have caused a substantial miscarriage of justice[141] and the appeal must be dismissed.

Part VIII: ESTIMATE OF TIME FOR RESPONDENT'S ORAL SUBMISSIONS

71. The respondent estimates its oral submissions will take one hour.

DATED: 22 January 2015

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140 *Johnson v The Queen* (1976) 136 CLR 619 at 633 (Barwick CJ).

141 *Lee Chun-Chuen v The Queen* [1963] AC 220 at 235; *Moffa v The Queen* (1977) 138 CLR 601 at 617 (Gibbs J), 617-8 (Stephen J).