HIGH COURT OF AUSTRALIA

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Details of Filing

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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

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The appellant's outline of oral submissions is in a form suitable for publication on the internet.

Part II: the appellant's argument

2. The primary defence case at trial was "accident" but self-defence and excessive self-defence were left. Provocation was not, however the prosecutor acknowledged the objective limb was not "completely unarguable" (AS[11]; AFM621).

3. In sentencing, the trial judge accepted the appellant's account in all material respects up to his response to the deceased's attack. He found the killing was not premeditated (CAB209, 238;AR[5]).

4. The CCA held that although the subjective limb arose on the evidence (CCA[142]) – a finding now challenged by the respondent (RFM96; RS[55]-[66];AR[11]-[15])) - provocation fell on the objective limb (CCA[144], [148]).

Ground 2.2 – failure to leave provocation

5. The duty to leave provocation arises when, on the view of the evidence most favourable to the accused (excluding competing arguments or opposing considerations), it would be open to a jury acting reasonably to find that the prosecution had not negatived provocation beyond reasonable doubt (*Parker* at 616; *Van Den Hoek* at 161-162; *Stingel* at 318, 333-334; *Lindsay* at [15]-[16], [19], [26]; AS[36]-[41]; AR[10]). "Whether it *should* be so concluded is a matter exclusively for the jury regardless of the court's view of the matter" (*Lindsay* at [19]; *Masciantonio* at 70; AS[18], [54]-[55], [60]-[63]; [67]-[71]; [73]-[75]).

6. The version of events most favourable to the appellant was to be discerned from (AS[19]-[35], [44]-[49], [56];AR[5]):

   (a) Aspects of the appellant's evidence (*Moffa* at 617, 618, 622 – must assume the accused's version is to be believed) and other witnesses; the 000 call (RFM36-63) and was largely articulated by the trial judge when sentencing the appellant (CAB208-243;AS[20]-[25], [44]-[52], [56]; AR[5], [8]-[10]).

   (b) The appellant's state of mind – his fear, anxiety and panic (AS[21], [30]-[31], [59];AR[14]).

   (c) The gravity of the provocation from the appellant's perspective (AS[26]-[35], [57]-[72]).

Subjective test

7. The subjective limb of provocation requires that the provocative conduct of the deceased caused the accused to lose self-control and form an intention to kill or cause grievous bodily harm whilst

deprived of self-control (*Lindsay* at [15]; AS[36]-[37]). The relevant loss of self-control is a loss of emotional self-control – perhaps due to panic, fear, anger or resentment (*Van Den Hoek* at 167-169; *R v Chhay* at 8; AS[30]) - causing the accused to emotionally de-regulate and form murderous intent (*Van Den Hoek* at 166; *Pollock* at [33]). The loss of self-control need not be absolute or render the accused an automaton (*Chhay* at 8; AR[12]).

Loss of self-control - a matter of inference

8. That the appellant did not expressly assert a loss of self-control was immaterial to the threshold test (*Van Den Hoek* at 161, 169; AS[39]; AR[8]-[10]), which was to be applied by reference to those parts of the appellant's evidence (and other evidence) that favoured the provocation hypothesis. This reflects the jury's prerogative to accept and reject parts of a witness's account (AR[2]-[10];cf RS[14], [45]-[46]).

9. The CCA was correct to conclude (CCA[142]) that the subjective limb arose on the evidence as a matter of inference notwithstanding it was inconsistent with the defences raised (*Van Den Hoek* at 169):

   (a) The trial judge found (for sentencing purposes) that the killing was not premeditated and was an impulsive reaction to the conduct of the deceased (CAB238; AR[5], [15]).

   (b) Without any apparent cause (see AFM652 – "he's a psycho"), the deceased had engaged in conduct involving goading, taunting, emasculating and "tormenting" the appellant, as well as threats of and actual violence (eg *Pollock* at [25], [34]; CAB219-232; RFM36-53; AS[20]-[24], [44]-[46]).

   (c) The appellant spoke to his fear, anxiety, confusion and panic in response to the deceased's conduct (CCA[101]-[102], [106], [110], [113]-[114]; CAB219-220, 222, 234; AS[21], [30]-[31], [35]; AR[5], [14]).

   (d) The deceased's conduct occurred in the presence of others, in a small regional setting, and continued after the police had been called by Jessica Bridgland (AS[23]; AR[14]).

   (e) Self-defence was left (AS[6], [10]-[11]; AR[15]). The appellant was concerned that the deceased, who kept coming at the appellant (eg AFM654), may have had a knife (CCA[113]; CAB222; AS[34], [47]). It was open to find that the prosecution could not disprove that conduct of the deceased caused a proportionate physical response from the appellant (AS[77]).

10. The observation of the appellant "going crazy" (CCA[142]) was part of a sequence of events that unfolded quickly. The provocative conduct of the deceased, which escalated, was to be viewed cumulatively (*Parker* at 663; *Stingel* at 325; AS[54]-[55]; AR[13]).

11. Whilst the CCA's conclusion was correct, it examined the evidence in a piecemeal fashion, leading to an unduly narrow finding (CCA[142]) built upon antecedent errors in its analysis:

   (a) The CCA found that the sting of the provocation was limited based on counter arguments it identified (CCA[137], [140]) (AS[58]-[63], [67]-[68]).

   (b) The CCA embarked on a fact finding exercise instead of examining the subjective limb having regard to the version of events most favourable to the appellant (CCA[141]; AR[11]-[15]).

Objective limb

12. On the version of events most favourable to the appellant, it was open to a jury acting reasonably to find that the deceased's conduct (its content and extent being assessed from the viewpoint of the appellant – *Stingel* at 326) (AS[26])) could have caused a person in the position of the appellant with ordinary powers of self-control to lose control, form murderous intent (*Masciantonio* at 67-

68; *Lindsay* at [15]) and act in the way the appellant did (*Lindsay* at [16]; AS[38]), having regard to:

(a) The conduct of the deceased, set out at [9] (AS[20]-[24]; [30]-[34]; [44]-[48]).

(b) The gravity of the provocation, properly assessed from the perspective of the appellant and at its highest (*Stingel* at 325-326; *Lindsay* at [28], [81]; *Masciantonio* at 66-67; *Green* at 339-340; AS[30]-[34], [57]-[72]), taking into account:

(i) The appellant's personal characteristics (age, depression, anxiety); relationship with the deceased and Bridgland; the threat that the deceased was going to murder the appellant when released from custody; the appellant's awareness that the deceased might be moving next door to him upon his release; the deceased goading the appellant into fighting him after his release from custody; that the appellant, in response, kept a shovel at his door and a knife on a table in his house; that the deceased's presence and conduct made the appellant more fearful; that the appellant took a knife with him on 1 February to protect himself (AS[12]-[13], [29], [38], [47], [59], [67]-[68]; AR[5]).

(ii) the deceased's provocative conduct occasioned a panicked, anxious, confused and fearful state of mind in the appellant (CAB219-220, 222, 234; AS[21], [30]-[31], [59]; AR[5]) and involved ridicule, taunting and emasculating abuse by the deceased (AS[27]-[34]), culminating in a contemptuous attack on the appellant with a weapon (eg *Moffa* at 606; AS[34]).

13. The CCA's conclusion as to the objective limb was predicated on an erroneous analysis of these matters (CCA[143], [148]; AS[44]-[71]). The jury would have been entitled to view the situation in its entirety (*Moffa* at 606-607; AS[54]-[55]). Moreover, that the appellant did not suffer from a particular sensitivity in fact aligned him more closely to the ordinary person (*Moffa* at 606; AS[72]; cf CCA[138]).

Ground 2.1 – Conflating the threshold test and ultimate issue

14. The CCA conflated the threshold test with the ultimate question for the jury had provocation been left (*Parker* at 616):

(a) At [135] and [143], the CCA framed the provocative conduct of the deceased in anodyne terms (AS[50]-[56]). The descriptive narrative of the scenario confronting the appellant provided by the trial judge during sentencing supplies a useful comparator (CAB210-235, 238, 241-242; AS[44]-[56]).

(b) At [137]-[140], the CCA diluted the sting of the provocation on the basis of "qualifying or opposing considerations" (*Parker* at 616; *Green* at 346; *Stingel* at 336) it identified and then surmised an estimate of the degree of outrage that it considered the appellant might have experienced, when it was for the jury to do so (AS[57]-[71]).

(c) Considering the objective limb did not involve a question of opinion or evaluative fact for the CCA (CCA[143], [148]; AS[64]-[66]). The passage in *Lindsay* to which the CCA referred is concerned with the function of the trier of fact (*Lindsay* at [16], [82]).

(d) Further, the CCA reversed the onus of proof (CCA[144]) (AS[76]).

Dated 9 December 2020

M E Shaw

K G Handshin SC