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 LAURENCE MILLER
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification

1. The appellant's Reply is in a form suitable for publication on the internet.

Part II: Reply – version most favourable to the accused (RS[14],[40]-[41],[45]-[48],[65])

2. The premise of the respondent's argument is that there is a qualifier, *sub silentio*, to the proposition that the threshold test is to be applied to the version of events most favourable to an accused. The qualification is that identifying that version does not require the appellate court to disregard aspects of the evidence which undermine or contraindicate provocation – in this case, the appellant's claim of accident.

3. The obligation of an appellate court considering the threshold question to identify the version of events most favourable to the accused requires just that. The task of the court is, quintessentially, to piece together a mosaic of those aspects of the evidence which raise the issue of provocation in its most favourable light. Contrary to the respondent's submission, that task *does* require parts of the evidence to be extricated and looked at in relative isolation from the totality of the evidence (RS[14],[45]-[46]). Having defined the parameters of the version of events most favourable to the accused, the question to be addressed by the appellate court is whether that version raised provocation. There is no room for the appellate court, when defining the provocation matrix or answering the threshold question, to discard features of the provocation scenario that the appellate court may consider unpersuasive.

4. The respondent attempts to defend the CCA's approach, which the appellant contends did, on proper analysis, involve a selective fact finding exercise (AS[44]-[72]), on two bases: first, that the CCA considered the whole of the relevant scenario (RS[26],[36]); second, the CCA could not divorce the provocation matrix from the appellant's evidence of accident (RS[14],[46]). These submissions should be rejected.

5. That the CCA did not properly address the whole of the relevant scenario most favourable to the appellant becomes apparent from contrasting the factual scenario set out by the trial judge when sentencing the appellant and that defined by the CCA at [135], [141] and [143]. Amongst other things, the trial judge observed during sentencing that the killing was not planned or pre-meditated but, rather, occurred in the context of a sudden quarrel or emotional disturbance and was an impulsive reaction to the conduct of the deceased (AB238), set against a background of threats and fear over a lengthy period (AB210-219). The trial judge found that the appellant had not gone out to confront the deceased and that his conduct was informed by fear, anxiety, panic, intoxication and erratic thought processes (AB219-220,234).The trial judge remarked that when the deceased re-emerged from the house having gone inside momentarily, he "reignited the situation" (AB224) and ran at the appellant, swinging the metal pole at him (AB222, 230-231) and playing "a highly aggressive part" in the subsequent events (AB224).

6. This economical summary of *some* of the relevant observations made by the trial judge demonstrates two matters. First, contrary to the respondent's submission (RS[45]-[46]), it is possible, practicable and indeed consistent with principle, to disentangle aspects of the appellant's evidence that support provocation from his account of "accident" (and self-defence). Second, the narrative set out by Stanley J (CCA[135],[140],[141],[143]) was *a version* of events stripped of the colour and movement of the interaction, and incidental references – whether factual or thematic - in the course of a summary of the evidence cannot remediate any deficiency in these critical passages (RS[36]).

7. Problematically, the analysis in CCA[135],[140],[141],[143] is concerned with minimising the significance of various features of the provocation matrix. Both Stanley J, and the respondent (RS[43],[45],[47],[48]), offer counter-arguments to weaken the provocation matrix. This is symptomatic of an erroneous approach. The observations made by Stanley J – and those advanced by the respondent - may have been relevant to the jury's final analysis of the issue; but they are counter-arguments that have no work to do when defining the provocation matrix for the purpose of the threshold test.

8. At RS[46] the respondent argues that defining the scenario most favourable to an accused "does not permit artificial dissection and reassembling of evidence…to achieve a factual paradigm for provocation which is not reasonably open on the evidence". The submission suggests that where an accused gives evidence inconsistent with provocation, the provocation scenario must be reconcilable to a greater or lesser extent with the accused's primary defence. That is not the approach that has been taken by this Court to

the threshold question in the past. In *Van Den Hoek v The Queen* (1986) 161 CLR 158, the accused's case on her trial for murder was self defence and a lack of murderous intent. She gave evidence of being fearful but did not assert a loss of self-control. Of this construct, the plurality said at 162:

> The jury were entitled to accept the evidence of the applicant, in its material respects, notwithstanding that on some points there was a conflict between her evidence and other evidence…[and]…form the view that the conduct of Mr. Van Den Hoek was provocative and that by reason of that provocation the applicant was driven to lose her self-control… They might further not unreasonably have concluded that a reasonable (or ordinary) woman might, in consequence of the provocation, be so rendered liable to loss of control as to do what the applicant did and that the applicant's actions were not disproportionate to the provocation. These were all questions for the jury and it is trite to say that in a case of provocation all that the defence need do is to point to material which might induce a reasonable doubt.

9. Most strikingly, in *Lindsay v The Queen* (2015) 255 CLR 272, the accused's case was that he was not present at the time of the fatal assault on the deceased. Although the accused did not give evidence, it is hard to contemplate a starker illustration of a conflict between the primary defence case and provocation than one in which the accused, by the conduct of his defence, denies even being present at the time of the fatal act.

10. References in the threshold test to a jury "acting reasonably" must be understood on the basis that provocation only operates in circumstances where murder has otherwise been proved. The provocation matrix therefore often requires consideration in the context of the rejection of an accused's primary defence. The reasons of this Court in *The Queen v Baden-Clay* (2016) 258 CLR 308 (RS[45]-[46]) do not purport to narrow the limits of the *Pemble* (1971) 124 CLR 107 doctrine in the way contemplated by the respondent. The giving of evidence inconsistent with provocation (or not at all), is not a disentitling consideration. Thus, a denial of a loss of self control is not just "not determinative" (RS[46]); it is irrelevant to the threshold question because it does not form part of the version of events most favourable to the accused. This is not to "artificially dissect" the evidence. It merely recognises that it is open to a jury to accept parts of the evidence (including that of an accused) and to arrive at a view of the relevant events that may not precisely represent either party's case.[1]

Notice of Contention - loss of self control (RS[55]-[66])

11. The respondent's submissions in support of its notice of contention proceed on the flawed premise that the CCA, when considering whether there was evidence going to the subjective limb, had to discount the appellant's evidence (RS[63]). With respect, the

[1] *Lee Chun Chien v The Queen* [1963] AC 220, 233; *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161; *Stevens v The Queen* (2005) 227 CLR 319, 330; *R v Teichman* [2014] QCA 50, [43]-[44].

CCA's assessment of the subjective limb had to be informed by the most favourable version of events that could be extracted from all of the evidence before the jury, including aspects of the appellant's evidence that supported a loss of self-control.

12. The anchor of the respondent's submission is a mere matter of timing that places undue emphasis on the fact that Lillian Bridgland's observations that the appellant was "going crazy" (RS[62]) were made 11 minutes before the fatal act.[2] It is here, again, that the respondent's assessment of the evidence is shaped by an incorrect approach to the threshold question. Arguments about the effluxion of time and the strength of the nexus between this evidence and the appellant's state of mind at the time of the stabbing may have been material had provocation been left, but they are not matters that informed the threshold test.[3] It must also be remembered that a loss of self-control is not synonymous with acting in a state of automatism.[4]

13. The relevant provocation matrix most favourable to the appellant had to acknowledge that during the 11 minutes relied upon by the respondent, the emotionally charged state of the appellant did not abate but, rather, was heightened or exacerbated by the deceased's conduct, particularly after the deceased re-emerged from the house, ran at the appellant with a weapon and struck him multiple times. The fact that there was a mere 11 minutes between Lillian Bridgland's observations of the appellant "going crazy" and the infliction of the fatal wound hardly tells against the threshold question being answered in favour of the appellant. An accused's response to the provocation need not be immediate and explosive.[5] As Windeyer J said in *Parker v The Queen* (1963) 111 CLR 610 at 663, the availability of provocation does not turn on a "precise counting of…time".

14. In any event, Stanley J's treatment of the subjective limb compartmentalised the evidence of Lillian Bridgland from other features of the provocation matrix relevant to the subjective limb and offered a critical analysis (CCA[141]), instead of identifying the version of events most favourable to the appellant. The observations of Lillian Bridgland had to be assimilated with other features of the episode including the appellant's self-report of anxiety, fear and panic.[6] The fact that the appellant took a knife with him when

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[2] The timeline included in the respondent's further book of materials (RBFM 64-69) and referred to in footnote 11 of the respondent's response was not provided to the jury (T783-785; 792-797).
[3] This Court's role following the grant of special leave is to step into the shoes of the CCA and decide whether there was evidence raising provocation: *Green v The Queen* (1997) 191 CLR 334, 343-344 (Brennan CJ); *Parker v The Queen* (1963) 111 CLR 610, 647 (Windeyer J).
[4] *R v Chhay* (1994) 72 A Crim R 1, 8 (Gleeson CJ).
[5] See, eg, *Parker v The Queen* (1963) 111 CLR 610, 663 (Windeyer J); *Masciantonio v The Queen* (1995) 183 CLR 58, 71 (McHugh J); *R v R* (1981) 28 SASR 321, 328 (King CJ); *R v Chhay* (1994) 72 A Crim R 1, 10 (Gleeson CJ).
[6] See *Van Den Hoek v The Queen* (1986) 161 CLR 158, 169.

leaving his house; that he engaged in highly erratic behaviour (demonstrated by his loud, and reciprocated, verbal abuse of the deceased from the middle of a road in a small regional community); that he was taunted (in language not dissimilar to that used in *Pollock v The Queen* (2010) 242 CLR 233 at [24]) and emasculated by the deceased in the presence of others; that he was denigrated as a coward for hiding behind a weapon which could not deter the deceased from goading him in any event; and that the events reached a crescendo in the moments before the stabbing, was all evidence from which a loss of self-control *might have* been inferred by a reasonable jury, particularly in circumstances where, as observed by the trial judge, the killing was not premeditated.[7]

15. It was accepted at trial that there was evidence from which the jury could infer that the appellant responded defensively and proportionately to the deceased's attack – hence self-defence was left. If the jury rejected self-defence, it was open to infer from the same circumstances, including the appellant's fear, panic and anxiety and the speed with which the events transpired, that the appellant suddenly, and without premeditation, lost his self-control and stabbed the deceased. That there was only one stab wound did not gainsay a loss of self-control (RS[66]) borne out of emotions of fear, panic and anxiety. Moreover, no particular form, or timing, of response should be seen, *ipso facto*, as more or less compatible with a loss of self-control. It may be said, in any event, that to stab the deceased in the presence of others[8] after the police had been called, and on the back of 15 minutes of angry posturing and spiteful verbal abuse, threats of and actual violence by the deceased, was consistent with the appellant having become increasingly anxious, fearful and panicked by the provocative acts of the deceased before ultimately acting in the grip of a loss of self-control. At the very least, it was for the jury to make that assessment, irrespective of any counter-arguments perceived by the CCA or the respondent.[9]

DATED the 20th dav of November 2020

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[7] *Zecevic v director of Public Prosecutions* (1987) 162 CLR 645, 685 (Gaudron J); *Lindsay v The Queen* (2015) 255 CLR 272, [15].
[8] See, eg, *Masciantonio v The Queen* (1995) 183 CLR 58, 68.
[9] See, eg, *Lindsay v The Queen* (2015) 255 CLR 272, [38]-[39]; *Green v The Queen* (1997) 191 CLR 334, 345; *Van Den Hoek v The Queen* (1986) 161 CLR 158, 162; *R v Teichman* [2014] QCA 50, [43]; *Maher v WA* [2010] WASCA 56, [173].