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

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RESPONDENT'S SUBMISSIONS

Part I: Internet Publication

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

Part II: Statement of issues

20 2. The essential question for this Court is - as it was for the Court of Criminal Appeal ('**CCA**')[1] - whether the trial judge should have left provocation to the jury, in circumstances where: (a) it was not in dispute that the fatal incident was the culmination of an aggressive 'to and fro' confrontation lasting approximately 15 minutes during which insults and threats were made by both the appellant and deceased but both exercised physical restraint until the deceased took the first swing and was stabbed; (b) the appellant had given a version of events at the scene almost immediately after the fatal incident where he admitted stabbing the deceased and said he did so in self-defence; (c) the appellant gave evidence at trial claiming that the stabbing was accidental and that he misspoke at the scene; and (d) where, if both

30 accident and self-defence were rejected by the jury beyond reasonable doubt, there was very limited evidence consistent with provocation.

3. The trial judge directed the jury on the primary defence of accident and the alternative defence of self-defence (open if the jury rejected accident as a reasonable

[1] *R v Miller* [2019] SASCFC 91; Amended Application Book ('AB') 254-292.

possibility). The trial judge also directed the jury on the alternative of manslaughter by excessive self-defence and the further alternative of manslaughter by unlawful and dangerous act (in the event that murderous intent was not proven).[2]

4. The appellant complains that the trial judge should have left as a further alternative, manslaughter by reason of provocation, contending that the evidence was sufficient to meet the 'threshold test', notwithstanding the trial judge considered that provocation did not arise on the evidence, and neither trial counsel disagreed. [3] The appellant therefore complains that the CCA erred in answering the essential question in the negative.

10 5. In *Lindsay v The Queen ('**Lindsay**')*[4] this Court observed that at common law, provocation operates to reduce murder to manslaughter if two conditions are met: [5]

> ...first, the provocation must be such that it is capable of causing an ordinary person to lose self-control and act in the way the accused did (the objective limb); and second, the provocation must actually cause the accused to lose self-control and the killing must take place while the accused is deprived of his or her self-control (the subjective limb)."

6. Before leaving provocation to a jury, the 'threshold test' or 'threshold question of law' for the Judge is:

> whether there is material in the evidence which sufficiently raises the issue to leave
> 20 the partial defence for the jury's consideration. The determination of the threshold question requires the trial judge (and the appellate court) to consider the sufficiency of the evidence to allow that an ordinary person provoked to the degree the accused was provoked might form the intention to kill or to do grievous bodily harm and act upon that intention, as the accused did, so as to give effect to it.

7. Where provocation is raised by the evidence, whether the prosecution has negatived it (by negating either or both limbs) is ultimately a question of fact for the jury.

8. The appellant contends that the CCA erred in its approach to the threshold question (Ground 2.1 Questions 1 and 2); conflated the ultimate question of fact (for the jury) with the threshold question of law (for the Judge) (Ground 2.1 Question 3); and in
30 any event erred in holding that the trial judge was correct in deciding not to direct on provocation (Ground 2.2).

9. The appellant fails to appreciate that the threshold question requires an examination of what the jury might infer, at the extreme, but *acting reasonably*.[6]

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[2] Memorandum on the law provided to the jury, Appellant's Book of Further Materials ('AFM') 669-679; Summing Up at AB5-203.
[3] Transcript ('T') 510-512; T590-591; T600; AFM617-623.
[4] *Lindsay v The Queen* (2015) 255 CLR 272 (French CJ, Kiefel, Bell and Keane JJ).
[5] *Lindsay v The Queen* (2015) 255 CLR 272 at [15] (French CJ, Kiefel, Bell and Keane JJ).

10. The respondent contends that the CCA, proceeding in accordance with principles settled by this Court, was correct to approach the threshold question as it did, and having done so, was correct to conclude that provocation did not need to be left to the jury due to the lack of evidence capable of going to the objective limb. The respondent further contends by Notice of Contention that, contrary to the conclusion arrived at by the CCA, which was favourable to the appellant, there was insufficient evidence going to the subjective limb such that the threshold test was not satisfied on either limb.

11. This was an uncommon case in which self-defence arose for the jury's consideration, but provocation did not. The reasons why that is so can only be understood by a consideration of the evidence.

Part III: Notice in compliance with s 78B *Judiciary Act 1903*

12. No notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Statement of contested material facts

13. The respondent does not understand there to be any issue taken with the accuracy of the summary of evidence set out in Stanley J's judgment.[7] A more expansive summary of the evidence was provided to the CCA by the respondent.[8]

14. The respondent does not dispute the accuracy of the appellant's chronology, however:

    1) the importance of the timing of the relevant events in the approximately 15 minutes preceding the fatal stabbing are not adequately captured in the appellant's chronology; and

    2) while the threshold test requires a consideration of the version of events most favourable to the appellant, those aspects of the appellant's evidence relied on as supportive of provocation were only capable of being considered if they could reasonably be extricated from the aspects of the

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[6] The questions are framed in the Appellant's Written Submissions ('AS') [7]. Similarly, see the appellant's submissions: AS[19] "The role of the CCA was to identify the entirety of the evidence that *might have* been thought by the jury to be provocative"; AS[54] "...the relevant inquiry for the CCA was to identify what the jury *might* accept"; AS[55] "...in order to ascertain what the jury *might* have thought was the provocative conduct and its sting."; AS[57] "...the task of the appellate court is to identify what *the jury might have* thought was the degree of outrage experienced by the accused in the face of the provocative conduct of the deceased, having regard to the scenario most favourable to the accused." AS[60], [61], [63], [66], [68], [71] contain the same vice, while AS[41] is the exception.

[7] *R v Miller* [2019] SASCFC 91 [5]-[114]; AB256-275

[8] Respondent's Book of Further Materials ('RFM')70-94, filed with these submissions in accordance with Rule 44.03.4 *High Court Rules 2004*

appellant's version the jury would necessarily have rejected in order for provocation to arise for their consideration.

15. To aid in the consideration of the 000 call,[9] referred to in detail by Stanley J in his judgment, the respondent refers to the aid provided to the jury,[10] and a summary of the 000 call[11] which was before the trial judge and which allows cross-referencing of the key events and statements with real time and other evidence.

Part V: Respondent's argument in answer to the argument of the appellant

THE APPELLANT'S GROUNDS

10 16. The appellant advances two grounds, complaining first [12] that the CCA wrongly held that provocation did not arise on the evidence based on a misapplication of the principles set out in *Masciantonio v The Queen ('**Masciantonio**')* [13] and *Lindsay*. On the appellant's argument, this ground raises three questions in the application of the threshold test:

1) How a judge identifies or frames the potentially provocative conduct, or, the 'provocation matrix';[14]

2) How a judge identifies the potential gravity or 'sting' of the provocative conduct from the perspective of the appellant;[15] and

3) Whether in this case in the application of the threshold test, the judge
20 conflated the task with that of the jury in determining the ultimate issue.[16]

17. Second,[17] the appellant complains that in any event the CCA erred in holding that the trial judge did not commit an error of law in failing to leave provocation to the jury.

GENERAL PRINCIPLES AND RESPONDENT'S POSITION

18. The elements of the common law doctrine of provocation are settled.[18] So too the principles governing 'the threshold test' [19] and those applying when an appeal court

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[9] Exhibit P15; AFM624-651

[10] Document marked for identification as 'MFI P25', RFM36, provided during the prosecutor's address at T799-800 (AFM517-518), being a version of Exhibit P15 with elapsed time references added to the transcript.

[11] Summary of 000 call RFM64-69.

[12] Ground 2.1 Notice of Appeal

[13] *Masciantonio v The Queen* (1995) 183 CLR 58 (Brennan, Deane, Dawson and Gaudron JJ)

[14] Appellant's Written Submissions ('AS') [7.1]; AS[19-25]; AS[44]-[56])

[15] AS[7.2]; AS[26-35]; AS[57-72]

[16] AS[7.3]; AS[73-77]

[17] Ground 2.2 Notice of Appeal

is asked to determine whether a trial judge has erred in declining to leave provocation.[20]

19. In *Moffa v The Queen* (‘***Moffa***’) Barwick CJ said:[21]

> … the court cannot refuse to allow the tribunal of fact to decide the matter unless it is quite clear that no reasonable person could possibly conclude that, in the situation most favourably viewed from the standpoint of the accused, an ordinary man could have so far lost his self-control as to form an intent at least to do grievous bodily harm to his wife.

20. The court to which Barwick CJ was referring was this Court, standing in the shoes of the Full Court of the Supreme Court of South Australia.[22] The joint reasons in *Lindsay* adopted the above statement of principle as authoritative.[23] In the present case the CCA applied the principles affirmed in *Lindsay* and concluded, correctly, that the trial judge did not err.

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APPEAL GROUND 2.1

21. Questions 1, 2 and 3 can largely be dealt with together.

22. The threshold question can only be answered if an appellate court or trial judge first identifies the relevant factual circumstances most favourable to the accused, and then assesses the *sufficiency or capacity* of that evidence to raise the question for a *reasonable jury* to determine. Both steps are evaluative. Neither requires a consideration of the ultimate question (in the sense that the trial judge does not attempt to answer the ultimate question), but the task would be meaningless without the judge identifying and evaluating what evidence may be sufficient to suggest the possibility of provocation.

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23. This remains the case where the trial judge or appellate court moves to the second step, asking whether a reasonable jury might conclude there is a reasonable possibility, in the situation viewed most favourably from the standpoint of the accused, that an ordinary person could have so far lost their self-control in response to the provocative conduct, so as to form an intent at least to do grievous bodily harm

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[18] *Lindsay v The Queen* (2015) 255 CLR 272 at [15] (French CJ, Kiefel, Bell and Keane JJ); *Masciantonio v The Queen* (1995) 183 CLR 58 at 66-67 (Brennan, Deane, Dawson and Gaudron JJ).
[19] *Lindsay v The Queen* (2015) 255 CLR 272 at [16], [26] (French CJ, Kiefel, Bell and Keane JJ); *Masciantonio v The Queen* (1995) 183 CLR 58 at 67-68 (Brennan, Deane, Dawson and Gaudron JJ).
[20] *Lindsay v The Queen* (2015) 255 CLR 272 at [16], [26] (French CJ, Kiefel, Bell and Keane JJ); *Masciantonio v The Queen* (1995) 183 CLR 58 at 67-68 (Brennan, Deane, Dawson and Gaudron JJ).
[21] *Moffa v The Queen* (1977) 138 CLR 601 at 607. See also, *Masciantonio v The Queen* (1995) 183 CLR 58 at 67-68 (Brennan, Deane, Dawson and Gaudron JJ); *Stingel v The Queen* (1990) 171 CLR 312 at 334 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[22] *Green v The Queen* (1997) 191 CLR 334 at 343-344 (Brennan CJ).
[23] *Lindsay v The Queen* (2015) 255 CLR 272 at [19] (French CJ, Kiefel, Bell and Keane JJ).

and act on it. This latter question is one that assesses the capacity (gravity) of the evidence which the court determines the jury might consider provocative, and the circumstances the jury might consider most favourable to the accused in that regard.

24. The CCA followed this process.

25. After identifying the potentially provocative conduct[24] and the potential 'sting'[25] and concluding that there was evidence which would be capable of raising the subjective limb for the jury's consideration,[26] the CCA then turned to specifically consider the threshold test applying to the objective limb.[27] The conclusions reached by Stanley J,[28] with whom Parker and Doyle JJ agreed,[29] must be considered in the light of his Honour's evaluation of the evidence from the viewpoint most favourable to the accused and of his Honour's assessment of the potential sting in the provocative conduct identified. Stanley J reasoned:

> [135] A consideration of the evidence indicates that, at its most favourable to the applicant, the evidence of the deceased's conduct that could be characterised as provocative was his verbal abuse of the applicant on the street outside Jessica Bridgland's residence; [30] his taunting of the applicant to put down the knife and "fight like a man";[31] the removal of his shirt and his challenge to the applicant to stab him; [32] his shaping up to fight; his arming himself with a rod and the threat to "spear" the applicant with it; [33] and his attack on the applicant with a pole which he used to strike the applicant up to three times immediately prior to the applicant disarming him and inflicting the fatal stab wound. [34]
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> [footnotes added]

26. This encapsulation was exhaustive in identifying the potentially provocative conduct operative at the time of the stabbing.

27. Stanley J then considered the potential sting in that conduct from the perspective of the appellant. His Honour rightly observed that to do so necessitated a consideration of the wider context in which the events of the night of 1 February 2017 unfolded. He said:

> [137] In my view, that evidence demonstrates that there was a history of antipathy between them. There were occasions where they verbally abused each other. The

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[24] *R v Miller* [2019] SASCFC 91 [135]
[25] *R v Miller* [2019] SASCFC 91 [136-140]
[26] *R v Miller* [2019] SASCFC 91 [142]
[27] *R v Miller* [2019] SASCFC 91 [143]ff
[28] *R v Miller* [2019] SASCFC 91 [142]-[148]
[29] *R v Miller* [2019] SASCFC 91 at [179] (Parker J), at [180] (Doyle J)
[30] T414 (AFM211); T744 (AFM462).
[31] T713 (AFM431); T 425 (AFM222), Exhibit P15 Qs 95-102 (AFM637ff); Summary of 000 call RFM64-69
[32] T425 (AFM222), Exhibit P15 Qs 100-102; Summary of 000 call RFM64-69
[33] T711 (AFM429)
[34] T718 (AFM436)

> applicant considered the deceased to be violent. The applicant gave evidence that on one occasion that antipathy had culminated in the deceased threatening the applicant with a knife and a shiv. However, that had not resulted in the deceased stabbing, striking or inflicting any injury on the applicant. The applicant gave evidence the deceased caused him anxiety and he did not feel safe in his presence. All this evidence informs the assessment of the gravity of the conduct of the deceased on the day of the stabbing which is said to be provocative. But it is notable that the evidence indicates much of the verbal abuse was hurled by the applicant at the deceased, the applicant was on medication for his anxiety and there was no evidence of any actual violence between them.
>
> [138] There was nothing in the evidence of the nature of their relationship which equates to the power dynamics, particular and individual frailties or cultural differences that the authorities have previously held relevant to an assessment of the alleged provocative conduct. For example, in *Moffa v The Queen* the accused killed his wife after she told him she was leaving him and confronted him with her history of extramarital affairs, displaying photographs of her naked, and verbally abusing him. In *The Queen v R* the accused had killed her husband in circumstances where he had been sexually abusing their children. In *Van Den Hoek v The Queen* the accused had killed her estranged husband in circumstances where they had argued violently about divorce. In *Masciantonio v The Queen* the accused had killed his son-in-law who had a history of violence directed towards the accused's daughter, had caused financial difficulties in the marriage due to his excessive gambling and had recently left the daughter, taking property belonging to her. In *Green v The Queen* the accused was a 22-year-old man with a special sensitivity to matters of sexual abuse who killed his 36-year-old male friend who made a sexual advance. In *Lindsay* the accused, an Aboriginal man, killed a Caucasian man he had invited into his house who repeatedly propositioned the accused, in front of his *de facto* wife, including for paid homosexual sex, after the accused had made clear that such advances were unwelcome.
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> [footnotes omitted]

28. Stanley J noted that the evidence of the relationship could not, for the purposes of the objective test, diminish the power of self-control of the hypothetical ordinary person.[35] His Honour then turned to deal with a submission made by the appellant to the effect that the verbal abuse directed at the appellant was emasculating, essentially calling him a coward. Stanley J reasoned:

> [140] … whether that evidence provides a sufficient basis to leave provocation to the jury, either alone or in combination with the other factors I have identified which might constitute provocation, depends upon the particular sting those words carry for the applicant. On this occasion, as on previous occasions, abuse was being hurled in both directions. The applicant called the deceased a "cock-sucker" and a "paedophile". When the deceased told the applicant to "fight like a man" the applicant responded by saying "I cannot fight you like a man because you're not a man". There is no basis upon which the jury could consider that the verbal abuse hurled at the applicant by the deceased would occasion any great offence. In any event, the issues are first whether there is sufficient evidence that the insults hurled by the deceased at the applicant and his taunting of him, the threat to spear him with the rod and the deceased's actions in striking the applicant up to three times with the pole could have resulted in a momentary loss of self control, and second

[35] *R v Miller* [2019] SASCFC 91 [139] citing *Stingel v The Queen* [1990] HCA 61; (1990) 171 CLR 312 at 335-336

> whether that conduct could have been sufficient to cause the ordinary hypothetical 36-year-old man to momentarily lose self-control to the extent of forming an intention to inflict grievous bodily harm or kill the deceased and to act upon that intention.
>
> [footnotes omitted]

29. After reviewing the relevant evidence Stanley J held:

> [144] Considering all the evidence at its most favourable to the applicant, I do not consider that the evidence raised the issue of whether the ordinary hypothetical 36-year-old could have so lost self-control momentarily as a result of the provocative conduct to have formed an intention to inflict grievous bodily harm or kill and act upon that intention as the applicant did, so as to give effect to it. The critical question is whether the jury might have entertained a reasonable doubt about whether the objective test was not satisfied having regard to the evidence. In my view no jury could have entertained such a reasonable doubt. While the evidence of the provocative conduct might have been sufficient to have caused the ordinary hypothetical 36-year-old momentarily to lose self-control such as to retaliate physically, ***I consider that it could not have satisfied the jury beyond reasonable doubt that that conduct could have so provoked the ordinary hypothetical 36-year-old to have formed an intention to inflict grievous bodily harm or kill the deceased and to act upon it.***

And:

> [148] In my view while the provocative conduct might have been capable of provoking the hypothetical person to some retaliation, it was not capable of provoking the hypothetical ordinary 36-year-old to form an intention to inflict grievous bodily harm or to kill and to act upon that intention. Allowing for the limited scope of the threshold question ***this is a case where no jury, properly instructed and acting reasonably, taking the evidence at its most favourable to the applicant, could fail to be satisfied beyond reasonable doubt that the conduct of the deceased was not of such a nature that it could or might deprive and hypothetical ordinary 36-year-old of the power of self-control to the extent that he would fatally stab the deceased.*** To put it another way, ***no jury properly instructed and acting reasonably, could fail to be satisfied beyond reasonable doubt that the applicant's reaction to the conduct of the deceased fell far below the minimum limits of the range of powers of self-control which is to be attributed to a hypothetical ordinary 36-year-old.*** In those circumstances the judge did not err in declining to leave provocation to the jury.
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> [emphases added]

30. In *Lindsay* the joint reasons embrace the approach of Barwick CJ in *Moffa*, as accepted in *Stingel v The Queen* ***(Stingel)***[36] and *Masciantonio*.[37] In *Lindsay* the joint reasons state:[38]

> Under the common law of provocation, the trial judge and the appellate court have the task of fixing the boundaries of the minimum powers of self-control that must be observed before it is open to the jury to find that murder is reduced to manslaughter by reason of provocation. The question for the trial judge and the appellate court is the same: whether "on the version of events most favourable to the accused which is

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[36] *Stingel v The Queen* (1990) 171 CLR 312 at 334 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[37] *Masciantonio v The Queen* (1995) 183 CLR 58 at 67-68 (Brennan, Deane, Dawson and Gaudron JJ).

[38] *Lindsay v The Queen* (2015) 255 CLR 272 at [26] (French CJ, Kiefel, Bell and Keane JJ).

> suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense". The determination of the question by the appellate court involves somewhat greater exactitude than the determination made by the trial judge. This reflects, as a matter of practicality, the reluctance of trial judges to withdraw the issue from the jury and the tendency to "tilt the balance" in favour of the accused.
>
> [footnotes omitted]

31. The italicised and emboldened portions of paragraphs [144] and [148] from Stanley J's judgment quoted above demonstrate a correct understanding by the CCA of its task as stated authoritatively by this Court.[39] As much is plain from the fact that Stanley J adopts the language of Barwick CJ in *Moffa* repeated in the joint reasons in *Lindsay*. The CCA did not determine the ultimate question which would be for the jury, but ruled upon the *capacity* of the evidence, having first determined what were the circumstances most favourable to the appellant.

32. The distinction between the threshold question for the trial judge and the ultimate question for the jury has regularly been affirmed by this Court.[40]

33. True it is that this Court has advised caution before a judge or court of criminal appeal decides that the evidence is not capable of satisfying the objective limb,[41] but the CCA was alive to this,[42] as was the trial judge.[43] Whilst caution must be exercised, trial judges and appeal courts must also remember that the task of the trial judge is to direct the jury only as to so much of the law as they need to know to resolve the real issues in the case.[44] Even acting cautiously, the question of provocation should not have been introduced unless the threshold test was met.

34. Accepting this, the CCA's approach in the present case was consistent with the principles prescribed by this Court.

Direct response to Question 1 - Identifying or 'framing' the potentially provocative conduct, or, the 'provocation matrix'. (AS [7.1]; AS[19-25]; AS[44]-[56])

35. The particular criticisms by the appellant, which arise from Stanley J's encapsulation of the potentially provocative conduct at paragraph [135], are misconceived. First,

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[39] *Lindsay v The Queen* (2015) 255 CLR 272 at [19] (French CJ, Kiefel, Bell and Keane JJ).
[40] See for example, *Packett v The King* (1937) 58 CLR 190 at 217-8 (Dixon J); *Stingel v The Queen* (1990) 171 CLR 312 at 334 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Lindsay v The Queen* (2015) 255 CLR 272 at [27] (French CJ, Kiefel, Bell and Keane JJ).
[41] *Lindsay v The Queen* (2015) 255 CLR 272 at [27]-[28] (French CJ, Kiefel, Bell and Keane JJ).
[42] *R v Miller* [2019] SASCFC 91 [129]
[43] T510-512 (AFM617-619); T590-591 (AFM621-622); T600 (AFM623)
[44] *Perara-Cathcart v The Queen* (2017) 260 CLR 595 at [60] (Kiefel, Bell and Keane JJ)

there is no 'contrast'[45] between the conduct encapsulated in paragraph [135] and paragraph [143].[46] Reading those paragraphs side-by-side, the very same elements of the potentially provocative conduct (viewed most favourably to the appellant) are present. Notwithstanding the latter paragraph contains a more concise reference to the 'taunts', when read in light of the earlier paragraph, it is plain his Honour was referring to the very same evidence and inferences, which his Honour had earlier detailed.[47]

36. As for the appellant's complaint that there were certain factual matters 'omitted'[48] from paragraph [135],[49] that too must be considered in light of Stanley J's detailed
10 summary of the evidence which included references to all of those matters.[50] Each of the specific matters allegedly 'omitted' are encompassed within his Honour's more general references in the impugned paragraph.[51]

37. This same manner of encapsulation was employed by this Court in *Masciantonio*, which was a case involving a complex factual matrix including prolonged objectionable conduct by the deceased toward the appellant's daughter. Just as the CCA did in the present case, this Court articulated in brief terms the version most favourable to appellant as to the provocative conduct, then moved to consider the gravity of the provocative conduct. The joint reasons stated:[52]

> Upon the version most favourable to the appellant, the deceased told the appellant to
> 20 "piss off" and attempted to kick him. The deceased also pushed the appellant so that he fell to the ground injuring his elbow.

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[45] AS[51]
[46] *R v Miller* [2019] SASCFC 91 [135], [143]; AB280; AB282
[47] *R v Miller* [2019] SASCFC 91 [95-114]; cf AS[51]
[48] AS[45]
[49] The alleged omissions at AS[45-49] are: (a) "[t]he deceased eagerly came out of his house…as the appellant walked down the adjacent footpath"; (b) "After the verbal confrontation commenced, the appellant retreated to the middle of the road"; (c) "The deceased approached him, having left his property to do so, on two separate occasions"; (d) The deceased was very angry and was walking up and down the footpath"; (e) "After the deceased taunted the appellant with a metal rod, the appellant was too scared to turn his back on the deceased"; (f) "The appellant produced the knife to warn the deceased off [telling him] 'you come at me, I will defend myself';" (g) "the deceased approached the appellant 'trying to act big'; (h) "the deceased had been told to go inside but refused"; (i) the apparent reference to the earlier incident where [on the version most favourable] the deceased confronted the appellant with a knife; (j) the deceased armed himself with a pole when a shovel couldn't be located; (k) the appellant was shouting because he wanted help and was scared the deceased could stab him; (l) "the events unfolded quickly"; (m) the appellant acted defensively.
[50] That is exposed by the appellant's ability to cite passages from the judgment without needing to refer to the evidence of these allegedly 'omitted' matters at AS[45-49]
[51] for example: 'verbal abuse…on the street', 'taunting', and the deceased's 'attack on the appellant with a pole…'
[52] *Masciantonio v The Queen* (1995) 183 CLR 58 at 68 (Brennan, Deane, Dawson and Gaudron JJ)

With that concise statement, their Honour's then turned to consider the gravity by reference to the broader context.[53]

Direct response to Question 2 - Identifying the potential gravity or 'sting' of the provocative conduct from the perspective of the appellant. (AS [7.2]; AS[26-35]; AS[57-72])

38. The appellant contends that Stanley J trespassed upon the 'sole province' of the jury as finder of fact. It is complained that Stanley J failed to appreciate or diluted the gravity or sting of the provocative conduct and has, in any event, taken into account his Honour's own evaluation of the gravity of the provocative conduct rather than
10 what the jury *might have thought* was the sting in that conduct for the appellant. The appellant contends that Stanley J undertook an evaluation of the evidence and applied the objective limb as if he were the trier of fact.

39. In *Stingel v The Queen* this Court said:[54]

> A trial judge must also be mindful of the fact that the question is not whether he or she considers that there is a reasonable doubt that the killing was unprovoked. As s. 160(3) makes clear, that is a question for the jury. The question for a trial judge is whether there is material in the evidence which is "capable of constituting provocation". The result is that the question for a trial judge under s. 160(3) can be summarized as being whether, on the version of events most favourable to the accused which is suggested
> 20 by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense.

40. Although that comment was made in relation to s 160(3) of the *Criminal Code* (Tas), it is applicable equally to the common law doctrine of provocation. The point to be had is that the task of determining the factual basis most favourable to the accused, including an assessment of the gravity, is undertaken from the position of what the jury *might* accept, *acting reasonably*.[55] Put slightly differently, the circumstances of the provocative conduct and the sting of the provocative conduct taken at its highest from the accused's viewpoint provide one extreme of the possible conclusions that a jury might reach, *acting reasonably*.

30 41. This necessarily involves a consideration of the facts and their capacity to support provocation (as a reasonable possibility). But Stanley J was not trespassing on the

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[53] *Masciantonio v The Queen* (1995) 183 CLR 58 at 68ff (Brennan, Deane, Dawson and Gaudron JJ)
[54] *Stingel v The Queen* (1990) 171 CLR 312 at 333 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[55] *Stingel v The Queen* (1990) 171 CLR 312 at 335-6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

role of the jury in applying the threshold test by asking the 'critical question',[56] in line with *Stingel*:

> [t]he critical question is whether the jury might, if it accepted that view of the gravity and implications of the provocative conduct, have entertained a reasonable doubt about whether the objective test was not satisfied.[57]

42. Caution is required here because the "[a]ssessment of the response of the ordinary person to the outrage which the provocative conduct might have engendered in the accused will usually depend upon a range of possible findings"[58] and caution is particularly required in cases where the accused has some sensitivity or attribute relevant to the assessment of the gravity of the provocation and to the level of power of self-control expected of the ordinary person.[59]

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43. That is why Stanley J deals with the question of whether, taking the evidence at its highest from the viewpoint of the appellant, the evidence throws up a particular sensitivity or attribute relevant to the assessment of the gravity of the provocative conduct and determines that it does not.[60] Bearing in mind the appellant's evidence that he was only angry because the deceased "was a threat to me",[61] and that the sting must rest upon something more than conjecture,[62] this case was comparable to *Stingel* in that there was an absence of such particular sensitivity or particular attribute thereby reducing the range of possible findings that a jury might make. It was a case in which it was appropriate for the CCA to determine that no jury properly instructed and 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 is to be attributed to a hypothetical ordinary 36-year-old.[63]

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44. The appellant asserts[64] that in addressing the question of gravity, Stanley J disregarded aspects of the deceased's provocative conduct, or devalued or 'muted' its gravity. His Honour did not. Rather he examined the evidence in its context and in

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[56] AS[74-75]; *R v Miller* [2019] SASCFC 91 [144]
[57] *Stingel v The Queen* (1990) 171 CLR 312 at 336 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[58] *Lindsay v The Queen* (2015) 255 CLR 272 at [28] (French CJ, Kiefel, Bell and Keane JJ).
[59] *Stingel v The Queen* (1990) 171 CLR 312 at 332 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Green v The Queen* (1997) 191 CLR 334 at 356-357 (Toohey J).
[60] *R v Miller* [2019] SASCFC 91 [138]
[61] *R v Miller* [2019] SASCFC 91 at [114].
[62] *R v Baden-Clay* (2016) 258 CLR 308 at 324 (French CJ, Kiefel, Bell, Keane and Gordon JJ)
[63] *R v Miller* [2019] SASCFC 91 [148]
[64] AS[59]

light of the available evidence as to the characteristics of the accused,[65] which was *required* in order for his Honour to determine its capacity to influence the sting in the conduct from the appellant's point of view. The appellant had been told of the deceased's violence toward Bridgland[66] and the appellant said he was anxious and fearful of the deceased. [67] His Honour referred to these factors, at the appropriate stage, as impacting on the gravity of the potentially provocative conduct.[68]

45. The appellant asserts that Stanley J ignored aspects of the appellant's evidence, particularly his evidence about his 'cognitive response to the deceased's behaviour'.[69] Aside from the fear and anxiety already referred to, which the appellant said was not such that he was 'consumed with worry',[70] the only other evidence which could even possibly have been capable of contributing to the question of provocation, was the appellant's evidence that he felt 'confused'[71] and 'panicked'.[72] But to assert this evidence is supportive of loss of self-control faces the hurdle that these descriptions of his state of mind were inextricably tied to his claim of accident. He explained he 'froze' in 'shock',[73] felt 'glued to the spot',[74] felt like the deceased had 'called his bluff',[75] and he was 'panicked and taken by surprise'.[76] It would have been virtually impossible to separate the claimed 'confusion' and 'panic' from this context, and it is difficult to maintain this evidence of 'cognitive response' is consistent with a loss of self-control when the appellant's other evidence of his state of mind included:[77] he was only 'moderately angry'[78] and not in a rage;[79] he did not retaliate;[80] he did not hate the deceased;[81] there was never a time he wanted to hurt him;[82] and his anger was not in any way out of control.[83]

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[65] AS[26]; *Masciantonio v The Queen* (1995) 183 CLR 58 at 67 (Brennan, Deane, Dawson and Gaudron JJ)
[66] AS[59.1]; *R v Miller* [2019] SASCFC 91 [7], [95]
[67] AS[59.2]; *R v Miller* [2019] SASCFC 91 [98], [110], [137]
[68] *R v Miller* [2019] SASCFC 91 [136-137]
[69] AS[59.3]; AB170-174, 176
[70] T742-743 (AFM460-461)
[71] T745 (AFM463)
[72] T706-708 (AFM424-426); T745 (AFM463); T774 (AFM492)
[73] T714 (AFM432)
[74] T708 (AFM426); T705-708 (AFM423-426); T711-712 (AFM429-430); T736 (AFM454); T775 (AFM493)
[75] T745 (AFM463); T749 (AFM467); T774 (AFM492)
[76] T774 (AFM492)
[77] See prosecution summary of the appellant's evidence RFM89-94 [114-135]
[78] T746-7 (AFM464-465)
[79] T747 (AFM465)
[80] T766 (AFM484)
[81] T775 (AFM493)
[82] T724-725 (AFM442-443); T755-756 (AFM473-474)
[83] T751 (AFM469)

46. The relevant version of the evidence which falls to be considered in determining whether provocation was open as a matter of law is that version of the evidence, taking into account all of the evidence including that given by the appellant, which is most favourable to the appellant on the question of provocation. An accused denying a loss of self-control will not be determinative. In that way the 'lens' through which the evidence is to viewed distorts the evidence in favour of an accused, but it does not permit artificial dissection and reassembling of evidence, stripped of its context, in order to achieve a factual paradigm for provocation which is not reasonably open on the evidence. The threshold test asks what a jury *acting reasonably* might do[84]
10 and it is not open for the jury to speculate when the appellant's evidence is inconsistent with a hypothesis about which there is no other evidence.[85]

47. Thus when considering the viewpoint of the appellant, it was relevant that he gave sworn evidence, consistent with the objective evidence, that:

1) he himself threatened the deceased as evidenced in the 000 call, including that he called the deceased a "paedophile, a dog, a 'tamp', a boneyard maggot"; [86]

2) despite calling the deceased a paedophile he "never actually had any reason to believe that [the deceased] was a molester or paedophile"; [87]

3) he continued calling the deceased those things "getting louder and louder"
20 including when the deceased had armed himself with a metal rod,[88] but his own anger levels did not really rise that much and he did not notice whether the deceased was getting increasingly angry; [89] and

4) when the deceased told him to "fight like a man" he responded by saying "I cannot fight you like a man because you're not a man."[90]

48. Stanley J's finding that there was no basis upon which the jury could consider the verbal abuse would occasion any great offence,[91] which the appellant asserts is the 'starkest illustration' of an erroneous approach,[92] must be viewed in this light. It

[84] *Masciantonio v The Queen* (1995) 183 CLR 58 at 67-68 (Brennan, Deane, Dawson and Gaudron JJ); *Lindsay v The Queen* (2015) 255 CLR 272, 283.
[85] *The Queen v Baden-Clay* (2016) 258 CLR 308 at 327-328 (French CJ, Kiefel, Bell, Keane and Gordon JJ)
[86] T710 (AFM428)
[87] T756 (AFM474)
[88] T711 (AFM429)
[89] T751 (AFM469)
[90] T749-750 (AFM467-468)
[91] *R v Miller* [2019] SASCFC 91 [140]
[92] AS[62]

would be both to ignore the concessions made by the appellant in evidence and to engage in speculation to suppose that a jury nonetheless *might reasonably* have considered the verbal abuse may have caused the appellant great offence.

49. For the potentially provocative conduct available on the evidence to have a particular sting such as to cause a loss of control and formation of an intent to cause at least grievous bodily harm, in these circumstances would require a particular sensitivity or vulnerability. That does not, as the appellant argues, introduce a general precondition of pre-exisiting violence, or a precondition in all cases that there be some particular sensitivity or vulnerability. [93]

10 50. The appellant nonetheless asserts that he was 'somewhat emotionally or psychologically vulnerable'.[94] For this reason too, it was appropriate for Stanley J to recognise that the relationship was materially different from those marked with power dynamics, particular and individual frailties or cultural differences, which have been previously considered particularly relevant to an assessment of the gravity of provocative conduct.[95]

Question 3 - Whether the threshold test was conflated with the ultimate issue. (AS [7.3]; AS[73-77]).

51. Paragraph [144] of Stanley J's judgement does contain an error in the final sentence.[96] This is an error in the form of expression, not an error of substance. To be

20 correct, the sentence which referred to the provocative conduct should have read:

> "…I consider that it could not have [failed to satisfy] the jury beyond reasonable doubt that that conduct could [not] have so provoked the ordinary hypothetical 36-year-old to have formed an intention to inflict grievous bodily harm or kill the deceased and to act upon it."

52. It is clear from the context of the paragraph and from paragraph [148] which follows, that the error highlighted by the appellant in the passage above represents an attempt to further explain the conclusion at the commencement of that paragraph, though his Honour neglected to preserve all of the required double-negatives. It cannot be said

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[93] AS[67]
[94] AS[28]
[95] Cf *The Queen v R* (1981) 28 SASR 321 (wife and husband who had been sexually interfering with the couple's children); *Van Den Hoek v The Queen* (1986) 161 CLR 158 (wife and husband who were separated and who had argued violently about divorce); *Masciantonio v The Queen* (1995) 183 CLR 58 (father and son-in-law who had acted violently toward the father's daughter and caused financial difficulties with excessive gambling); *Green v The Queen* (1997) 191 CLR 334 (22 year old man with a special sensitivity to matters of sexual abuse and his 36 year old male friend who made a sexual advance); *Lindsay v The Queen* (2015) 255 CLR 272 (Aboriginal man who was repeatedly propositioned for paid homosexual sex by a Caucasian man he had invited into his house).
[96] *R v Miller* [2019] SASCFC 91 [144]; the impugned sentence extracted in AS[17]

this represents an error in understanding or application of the threshold test, however, because his Honour stated the relevant principles correctly earlier in the judgment,[97] formulated his conclusion in conventional terms in the first sentence of paragraph [144] and repeated the correct formulation again at paragraph [148].

53. In any event, his Honour's conclusion, applying the threshold test, is correct.

APPEAL GROUND 2.2

54. For the reasons above, the CCA was correct in finding provocation did not need to be left to the jury.

Part VI: Argument on the respondent's notice of contention

10 55. If the evidence was insufficient to raise *either or both* limbs of provocation, there was no error in the judge declining to leave provocation.

56. Contrary to the findings of Stanley J favourable to the appellant,[98] the subjective limb of provocation was not raised by the evidence.

57. Stanley J concluded, correctly, from the body of uncontentious evidence his Honour referred to,[99] that that evidence did not provide a sufficient basis to leave to the jury the question of whether there was evidence of actual loss of self-control by the appellant operating at the time of the fatal stabbing.

58. However, his Honour went on to find that the description of one witness, Lillian Bridgland, who said she saw the appellant on the roadway "going crazy" was some evidence from which the jury could infer a momentary loss of self-control on the part of the appellant.[100]

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59. Stanley J recognised the difficulty accepting that description could reasonably be taken literally (to indicate someone apparently acting without self-control) because it 'lacks obvious support in [Lillian's] description of [the appellant's] actual behaviour while on the roadway and in speaking directly with her.'[101] Despite that, approaching the threshold test with caution, the CCA was prepared to accept this was some evidence from which a subjective loss of self-control might be inferred.

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[97] See *R v Miller* [2019] SASCFC 91 [116], [124], [127]-[129], [131], [132]

[98] *R v Miller* [2019] SASCFC 91 [142]

[99] Accurately summarized in *R v Miller* [2019] SASCFC 91 at [141]. While the appellant did not admit it was he who is heard saying "cocksucker" when the deceased had gone inside his house, he conceded it could have been: T753-754 (AFM471-472). He admitted it was he who said 'come at me you cunt' immediately after the stabbing: T775 (AFM493)

[100] *R v Miller* [2019] SASCFC 91 [142]; T394 (AFM191)

[101] *R v Miller* [2019] SASCFC 91 [142]

60. The CCA failed to appreciate that what the witness characterised as "crazy" behaviour was behaviour not occurring contemporaneously with the stabbing. The witness described the appellant's behaviour as "crazy" when asked what she observed upon her *arrival* at the scene, before she was handed the telephone to police, which was objectively established as being very early in the recorded altercation, at least 11 minutes before the fatal stabbing.[102]

61. Provocation requires, for its subjective limb, both that the provocative conduct actually caused the accused to lose self-control, and that the killing takes place while the accused is deprived of his self-control.[103] Therefore, the loss of self-control must continue to operate at the time of the fatal act.

62. No witness described the appellant as "going crazy" immediately before or at the time of the fatal stabbing. It was objectively established, and never disputed, that in the 11 minutes between the conduct so described and the stabbing, the appellant demonstrated self-control by exercising physical restraint. Therefore, while the events leading up to the stabbing were relevant to an assessment of the gravity of what was said to be provocative conduct, this single description of the appellant's behaviour could not comprise 'some evidence upon which a jury could infer a momentary loss of self-control on the part of the [appellant]' *at the critical time of the fatal stabbing.*

63. No jury, acting reasonably, could have considered it reasonably possible that there had been a sudden and temporary loss of self-control at the time of the stabbing because, if both the appellant's account at the scene, and his evidence given at trial as to why the fatal act occurred, were rejected, then the only evidence that might have been said to give rise to any inference of sudden and temporary loss of self-control (caused by the conduct of the deceased) at the critical moment was:

    1) The appellant's belief the deceased was a violent man and that he had been violent to his partner Jessica Bridgland, which the appellant found objectionable.[104]

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[102] By reference to the prosecution Summary of the 000 Call – RFM64-69, Lillian is handed the phone at Q27, elapsed time 0:02:23, RT 8:39:01. The stabbing occurs at the earliest 11 minutes later, at Q112; elapsed time 0:13:28; RT 8:50:06; See also timestamped version of P15 'MFI P25' – RFM36ff, pages 4 and 17.
[103] *Lindsay v The Queen* (2015) 255 CLR 272 at [15]; *Masciantonio v The Queen* (1995) 183 CLR 58 at 66 and 69-70
[104] T568-570 (AFM354-356); T581 (AFM367); T584 (AFM370); T688-690 (AFM406-408); T695 (AFM413).

2) The appellant and the deceased had a hostile relationship[105] and one had in the past pulled a knife on the other.

3) The appellant suffered from anxiety,[106] though the only evidence of this was from the appellant and he said that his medication was effective at the time.[107]

4) The altercation was emotionally charged and during the altercation, the appellant was being taunted by the deceased.[108]

5) At the time of the altercation, the appellant's thinking, judgment and inhibition would have been impaired due to his intoxication which was
10 approximated to be 0.125%.[109]

6) The deceased ran at the appellant and started swinging, it all happened very quickly and the appellant felt panicked.[110]

64. The comments of Gleeson CJ in *R v Chhay* are apposite:[111]

> Emotions such as hatred, resentment, fear, or the desire for revenge, which commonly follow ill-treatment, and sometimes provide a motive for killing, do not of themselves involve a loss of self-control although on some occasions, and in some circumstances, they may lead to it. What the law is concerned with is whether the killing was done whilst the accused was in an emotional state which the jury are prepared to accept as a loss of self-control.

20 65. The above evidence cannot be viewed in isolation from the uncontested evidence summarised by Stanley J[112] which, if accident were rejected, was demonstrative of a measured action.

66. The circumstances of this case can be contrasted, for example, with the repeated stabbing and profound loss of self-control - and statements consistent with a loss of control at the time of the relevant events - in *Masciantonio*;[113] and the punching, kicking and ferocious repeated stabbing of the deceased in *Lindsay*[114] where there was evidence upon which the jury might consider the prosecution had failed to negative the subjective limb, including the fact that there was no apparent motive for

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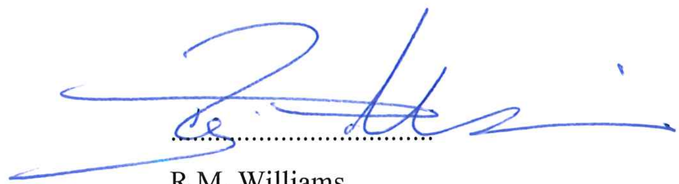
105 T540-546 (AFM326-332)
106 T682 (AFM400); T703 (AFM421)
107 cf. *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 165
108 T710-711 (AFM428-429)
109 T505-506 (AFM302-303)
110 T718 (AFM436); T774 (AFM492)
111 *R v Chhay* (1994) 72 A Crim R 1 at 14.
112 *R v Miller* [2019] SASCFC 91 [141]
113 *Masciantonio v The Queen* (1995) 183 CLR 58 at 68.
114 *Lindsay v The Queen* (2015) 225 CLR 272 at 277

the killing and in the hours leading up to it the jury might consider that the appellant had been well disposed towards the deceased.[115]

Part VII: Estimate of the respondent's oral argument

67. The respondent estimates that one (1) hour and 15 minutes is required for the presentation of the respondent's oral argument.

Dated: 30 October 2020



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[115] *Lindsay v The Queen* (2015) 225 CLR 272 at 286 [35]