



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. B32 of 2020

BETWEEN:

ARONA PENIAMINA  
Appellant

and

10

THE QUEEN  
Respondent

## RESPONDENT'S SUBMISSIONS

### Part I: Certification

1.1 It is certified that this submission is in a form suitable for publication on the internet.

20 **Part II: Issue on Appeal**

The respondent contends that section 304 (3) of the *Criminal Code* (Qld) was engaged in the circumstances of this case. It was therefore properly left for the jury's consideration.

### Part III: Certification regarding s 78B of the *Judiciary Act 1903* (Cth)

3.1 It is certified that notice is not required to be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

### Part IV:

4.1 The respondent does not contest the summary in the appellant's 'relevant facts'  
30 category. However, the respondent seeks to add further facts in order to give full context to the events which led up to the fatal assault and to the nature of the relationship between the appellant and the deceased at that time.

4.2 Prior to Mrs. Peniamina meeting her death on Thursday, the thirty first of March, 2016, significant changes had occurred in the relationship between her and the appellant.

4.3 Having returned from New Zealand on the 28th of February 2016, the evidence revealed that she no longer shared a bedroom with him and had moved into a spare room of the house<sup>1</sup>.

4.4 On the Tuesday prior to her death, the appellant had been made aware that she had been in telephone contact with another male<sup>2</sup>. He had also received information from his aunt, Mrs. Niumata, that the deceased had met a person in New Zealand, which was confirmed via photographs she had observed on Facebook<sup>3</sup>, in which the deceased was described as his girlfriend<sup>4</sup>. The appellant himself had apparent access to the Facebook page of this person<sup>5</sup>.

4.5 The appellant had confided in his cousin, Mrs. Leapai, on that day: that he was worried about the state of his relationship with the deceased<sup>6</sup> and expressed concerns that she would take his children away from him<sup>7</sup>.

4.6 The following day, Mrs. Leapai, had informed him of her research pertaining to his rights regarding the children<sup>8</sup>. He informed her that he and the deceased had spoken to each other and that things had settled<sup>9</sup>.

4.7 On the evening of the murder the appellant asked his aunt to speak to the male that had been communicating with his wife. That did not occur<sup>10</sup>. He informed Mrs. Leapai of his renewed concerns he had regarding the deceased's further contact with the male, that he had communicated with the male and there had been a heated exchange. He was in possession of a mobile telephone which had a cracked screen<sup>11</sup>. He sought further assistance should the deceased leave him so that he could be independent and have access

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<sup>1</sup> RBFM at page 8, lines 11-12; at page 12, lines 35-39

<sup>2</sup> RBFM at page 10, line 10 to page 11, line 6; at page 14, lines 15-31; at page 16, line 44 to page 17, line 24.

<sup>3</sup> RBFM at page 13, lines 24 to 31.

<sup>4</sup> RBFM at page 12, lines 20 to 27.

<sup>5</sup> RBFM at page 17, line 37 to page 18, line 3.

<sup>6</sup> RBFM at page 22, line 31 to page 23, line 12.

<sup>7</sup> RBFM at page 17, line 26-29.

<sup>8</sup> RBFM at page 18, line 32-36.

<sup>9</sup> RBFM at page 18, line 40 to page 19, line 3.

<sup>10</sup> RBFM at page 14, line 38 to page 15, line 2.

<sup>11</sup> RBFM at page 19, line 12 to page 20, line 45; Page 23, line 24 to page 24, line 21.

to his children<sup>12</sup>. He also expressed a desire to resolve the differences between the two of them and have a relationship with his wife<sup>13</sup>.

4.8 One of the children, TP, gave evidence that, after dinner, the appellant was angry at the deceased for using the telephone to communicate with a male<sup>14</sup>. The appellant had ‘snatched’ the phone of the deceased and he argued with a male over the telephone<sup>15</sup>.

4.9 The second of the children, EP, gave evidence that the appellant had taken the phone with him and left in the car. When the appellant returned home, he and the deceased started fighting again<sup>16</sup>.

4.10 After the fatal assault, the appellant’s initial reaction, when interacting with the  
10 police, was to indicate that the deceased had cheated on him<sup>17</sup>; indeed his words to his mother were “She cheat too many time, mum. I try, I try, mum, to stop, but I can’t stop, mum.” When spoken to by police, he told them that she cheated on him and that he tried to talk to her and that he was unable to ‘stop being angry’<sup>18</sup>.

4.11 Thereafter, he explained the cut on his hand having occurred against that context<sup>19</sup>, proclaiming that he simply wanted the truth from the deceased<sup>20</sup>. He later explained that he tried to take the knife from her which she pulled<sup>21</sup>.

4.12 When asked what had started ‘it all’, the appellant explained that the deceased  
cheated on him. He further elaborated on having found numbers inside her phone and she  
did not wish to discuss her relationship with the other male, if there was one. He opined or  
20 was told, depending on how one reads that passage: that she was going to take his children  
away. He tried to discuss the nature of their relationship<sup>22</sup>. He tried conveying to her that  
he wanted to see his children, his entire life. She was disinterested in that concept<sup>23</sup>.

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<sup>12</sup> RFBM, at page 21, lines 1-11.

<sup>13</sup> RFBM, at page 24, lines 16-21.

<sup>14</sup> RFBM, at page 101, lines 72-79.

<sup>15</sup> RFBM, at page 105, lines 239-261.

<sup>16</sup> RFBM, at page 116, line 397 to page 117, line 482.

<sup>17</sup> CAB, at page 12, line 20; at page 14, line 13-46.

<sup>18</sup> CAB, at page 17, lines 32-54.

<sup>19</sup> CAB, at page 18, lines 1-36.

<sup>20</sup> CAB, at page 21, lines 1-22.

<sup>21</sup> CAB, at page 27, lines 39-54.

<sup>22</sup> CAB, at page 37, line 57 to page 38, line 53.

<sup>23</sup> CAB, at page 39, line 45 to page 40, line 5.

4.13 In that context, he assaulted her first. She showed further disinterest in the concept of the relationship; she didn't want to engage in his conversation about the family structure or her alleged infidelity and/or its impact<sup>24</sup>. She walked to the kitchen, he said. And that is when he grabbed the knife she had and pulled it<sup>25</sup>. He felt "more angry" as a result of the pain in his hand<sup>26</sup>.

4.14 The persistent and extreme violence followed thereafter, ultimately resulting in her death on the concrete driveway of the family home.

4.15 The summary by Applegarth J in the Court of Appeal at [95], [96], [104]-[114], [192]-[195] fully furnishes the relevant factual matters necessary for the appeal and are not  
10 in dispute.

#### **Part V: Respondent's argument**

5.1 In 2010, Queensland Parliament introduced the *Criminal Code and Other Legislation Amendment Bill 2010*, with one of the objectives of the bill being the recasting of the 'partial defence of provocation' to 'address its bias and flaws'<sup>27</sup>. Significantly it placed the onus for establishing the partial defence in all cases upon the defence.

5.2 Relevantly, it added that provision 304 (3) be inserted and that it have the effect that 'other than in circumstances of an extreme and exceptional character, provocation cannot be based upon the deceased's choice about a relationship; and to place the onus of  
20 proof upon a defendant seeking to rely upon the partial defence.'<sup>28</sup>

5.3 Thus in 2011, upon its enactment, Queensland significantly restricted the scope of the partial defence in circumstances (at that time) consisting of words alone or involving domestic relationships.

5.4 The defence of provocation was therefore only available if the appellant discharged the onus upon him by section 304 of the Code. It was for the appellant to prove that he had killed in the heat of passion caused by sudden provocation and before there was time for his passion to cool.

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<sup>24</sup> CAB, at page 47, line 23 to page 48, line 42.

<sup>25</sup> CAB, at page 41, line 7 to page 42, line 8.

<sup>26</sup> CAB, at page 44, lines 9-53; page 49, lines 1-35.

<sup>27</sup> Explanatory Notes to *Criminal Code and Other Legislation Amendment Bill 2010*

<sup>28</sup> Ibid.

5.5 The circumstances giving rise to the killing of Mrs. Peniamina are borne out of the frictional nature of the relationship between her and the appellant. The act which caused her death was the use of a bollard against the back of Mrs. Peniamina's head on the driveway of the house, after she fled from within, having received multiple sharp injuries by the appellant.

5.6 The words 'sudden provocation' are not statutorily defined. In light of that, the common law attributable to them is retained. Their meaning has been considered repeatedly by the High Court. The words are concerned with the 'temporary loss of self-control excited by the provocation'<sup>29</sup>.

10 5.7 In terms of elucidation, their common law meaning ascribes to them a person causing the death of another as a result of a sudden and temporary loss of self-control in respect of conduct by the deceased that is said to be provocative in nature. This is the subjective measure of the partial defence. The second part is an objective one. It seeks to grade the provocative conduct, as referenced to the person who kills and their circumstances, as to whether in light of that, it could have caused an ordinary person to form an intention to kill and to act on that intention as the person who killed, did.

5.8 Proof of those respective components are questions of fact and questions of 'evaluative fact'<sup>30</sup>.

20 5.9 The partial defence relied upon was done so in the context of the Crown case. The appellant did not give evidence. The appellant relied upon his utterance to the police that the insulated act of the 'cutting of the knife episode' as being the act that became operative as to his sudden provocation and to discharge the onus upon him.

5.10 However, the appellant's utterance contained a mixture of statements that lent themselves to different interpretations. Particularly telling was the appellant's statement to the police that the deceased had been unfaithful. And that he simply required her to tell him the truth as to the nature of that relationship. He had by that stage described his emotional spiral.

30 5.11 The cutting episode was indeed the culmination of a number of events that had penetrated the relationship between the appellant and the deceased. These events were focused upon the nature and indeed, arguably, the continuation, of their relationship as

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<sup>29</sup> *Pollock v The Queen* (2010) 242 CLR 233 at 247 [52]

<sup>30</sup> *Lindsay v The Queen* (2015) 255 CLR 272 at 279 [16]

husband and wife. Minimally, those factors featured in the gravity of the provocation<sup>31</sup>. Indeed, those contextual factors, gave the sudden provocation, its full meaning<sup>32</sup>.

5.12 However, those factual features were also reflective of section 304 (3).

5.13 The section is worded in a way to capture the complexities of relationships. It is by no means perfect. However, it is clear therefrom, that ‘anything done’ by the deceased is in statutory dialogue with the end, the change or future change as to the relationship between the deceased and the accused person.

5.14 It is that expression ‘anything done’ that then forms the basis of the sudden provocation.

10 5.15 Even at common law, there is no need for immediacy between the induced state of mind and the provocative conduct<sup>33</sup>. This is more pronounced when one comes to understand the interactive nature of 304 (3). It is hostile to a narrow interpretation.

5.16 The words ‘caused by’ from section 304 (1) were not adopted into the phraseology of section 304 (3). Other phrases such as ‘sudden provocation’ were. Thus this was deliberate. It is appropriately reflective of the change of landscape to the availability of the defence of provocation in domestic killings, when the state of the relationship itself is a subject matter connected to the killing.

5.17 The state and/or the nature of the relationship was a topic that occupied the mind of the appellant for a number of days in the lead up to the killing, evidencing his  
20 understanding as to the deceased’s intention or indeed, it was demonstrative of the deceased’s intention in that regard.

5.18 So when contextually placed into the events that occurred on the 31<sup>st</sup> of March 2016, the interaction between the appellant and the deceased was solely focused upon the nature of their relationship. When the appellant initially assaulted the deceased by punching her, it was connected to the continuation or the change of their relationship. That event was shortly followed by the deceased arming herself in defiance of the continuation of her relationship with the appellant.

5.19 That the act itself of the brandishing of the knife may have equally been a sign of protection or indeed a sign of reaction by her as to the physical nature of the atmosphere,  
30 does not deny it its plausibility as evidence capable of being used by a jury as being

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<sup>31</sup> *Masciantonio v The Queen* (1995) 183 CLR 58 at 68

<sup>32</sup> *Moffa v The Queen* (1977) 138 CLR 601 at 606

<sup>33</sup> *Pollock v The Queen* (2011) 242 CLR 233 at 247 [54]

‘anything done’ by her to signify one of the factors in 304(3)(c), particularly when one understands that incident in the wider stratum of their interaction.

5.20 Indeed to accept the underlying theme of the appellant’s assertion, section 304 (3) would only operate when an accused so dictates, rather than when inferences are able to be drawn from evidence as to a particular facet of the partial defence<sup>34</sup>. This would, in the respondent’s submission, be an unintended result of both section 304 (3) and section 304(7), as it stood at the relevant time. It would also be antithetical to the ‘mischief which it may be seen that the statute is intended to remedy.’<sup>35</sup>

10 5.21 The appellant’s reliance in that regard upon 304 (2) as to the self-entitlement as to the provocative conduct is misconceived. The insertion of section 304 (2), as section 304 (3) was designed to restrict the availability of the defence of provocation. In the case of 304 (2), it was to encapsulate the Court of Appeal’s reasoning in *R v Buttigieg*<sup>36</sup>; its focus was not upon the appellant’s sole entitlement to nominate the provocative conduct.

5.22 That decision indeed supports the wide interpretation to be afforded to these sections by promoting the evaluation of all the circumstances in order to assess provocation.

5.23 The respondent submits, for the reasons, expounded by Applegarth J, that the conclusion at [187] of the judgment, is correct.

20 5.24 In actuality, the way in which the matter was ultimately left for the jury, it appropriately, left the issue of provocation to the jury and the insulated nature of the act<sup>37</sup>. And also, allowed for the contextual features to relevantly impact the jury’s fact finding as it pertained to the issue of provocation. For example, his Honour stated this: “Some acts when you consider them alone may not in any view be sufficiently provocative to induce a killing but, when considered in combination with other facts, have that effect<sup>38</sup>.”

The Crown, in that primary state of submission, without regard to 304 (3), argued that this was an ‘anger-driven murder<sup>39</sup>’.

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<sup>34</sup> *Van den Hoek v The Queen* (1986) 161 CLR at 161

<sup>35</sup> *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35, as per Kiefel CJ and Keane J.

<sup>36</sup> (1993) 69 A Crim R 21, see also Explanatory Notes to *Criminal Code and Other Legislation Amendment Bill* 2010, pages 11 and 12.

<sup>37</sup> CAB, at page 40, Summing up, lines 9-11.

<sup>38</sup> CAB, at page 44, Summing up, lines 12-43.

<sup>39</sup> CAB, at page 45, Summing up, lines 8-9.



5.25 There was then a partition, in case of a finding of loss of self-control and ordinary loss of self-control was made by the jury. That partition focused the jury's mind upon factual features that they may or may not find to exclude reliance upon section 304 (1)<sup>40</sup>.

5.26 As it pertained to the factual availability of section 304 (3), his Honour reiterated to the jury that the provocative act was the knife incident, as the defence submitted, and that it, on its own, was not an act that was said to change the nature of the relationship. His Honour, in strong terms, directed the jury accordingly, that being, that this would be the end of the Crown argument on this point, were this so<sup>41</sup>.

5.27 In that context, it is difficult to see how an argument, which was foreclosed  
10 consistent with the defence case, as part of an added direction, created a miscarriage of justice in this case.

**Part VI: Notice of contention**

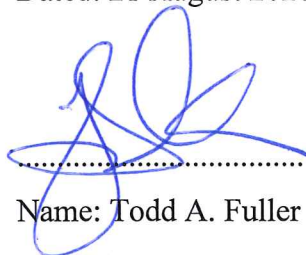
6.1 There is no notice of contention filed by the respondent.

**Part VII: Time estimate**

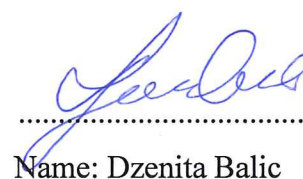
7.1 It is estimated that the respondent's argument will take approximately one hour.

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Dated: 21 August 2020



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<sup>40</sup> CAB, at page 46, lines 31-39.

<sup>41</sup> CAB, at page 47, lines 18-43.

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B32 of 2020

BETWEEN:

ARONA PENIAMINA

Appellant

and

10

THE QUEEN

Respondent

ANNEXURE

RESPONDENT'S LIST OF STATUTES

1. *Criminal Code* (Qld), s304 (Reprint as of 5 May 2016)

RESPONDENT'S LIST OF EXTRINSIC MATERIAL

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1. Explanatory Notes to *Criminal Code and Other Legislation Amendment Bill 2010*