HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

MICHAEL HERON APPLICANT

AND

THE QUEEN RESPONDENT

Heron v The Queen
[2003] HCA 17
8 April 2003
S30/2001

ORDER

Application for special leave to appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

T A Game SC with D Jordan for the applicant (instructed by Legal Aid Commission of New South Wales)

R D Ellis with G E Smith for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

Heron v The Queen

Criminal law – Application for special leave to appeal – Applicant to argue point not raised at trial or in intermediate appellate court – Whether circumstances of the case are exceptional.

Criminal law – Murder trial – Defences – Provocation – Misdirection of trial judge – No objection to direction – No request for further directions – Significance of misdirection in circumstances of the case.

1 GLEESON CJ. It is now settled that this Court has jurisdiction to entertain a criminal appeal on a ground not taken at the trial or in an intermediate court of appeal. In *Crampton v The Queen*[1], Hayne J and I, adopting the language of Gibbs CJ in *Giannarelli v The Queen*[2], qualified that by saying that special leave to appeal on such a ground would only be granted in exceptional circumstances. In our separate reasons, we explained the considerations which give rise to that qualification[3]. Kirby J referred to "repeated statements in this Court [which] acknowledge that to permit a new ground to be added in this Court requires exceptional circumstances to be shown"[4]. Gaudron, Gummow and Callinan JJ said that the Court may perhaps only choose to grant special leave in such a case rarely, but the power should be exercised to cure a substantial and grave injustice[5]. Whatever the difference, if any, between circumstances that are rare and circumstances that are exceptional, it is not one upon which the outcome of the present application turns.

2 In both *Giannarelli* and *Crampton*, the point taken for the first time in this Court was a point of law that constituted an unanswerable defence to the charge of which the applicant had been convicted. The present case is very different.

3 The facts are set out in the reasons for judgment of Callinan J. The applicant was tried for murder following the death of a man who was stabbed in the course of a bar-room brawl. The trial judge, out of an abundance of caution, directed the jury on provocation. On the evidence, any case of provocation was extremely tenuous. The applicant did not claim to have lost self-control; the description by eye-witnesses of his behaviour indicated brutal thuggery, but not loss of self-control; and, in the context and circumstances in which it was uttered, the alleged insult proffered by the victim could hardly have been thought to satisfy the objective part of the test for provocation stated in *Masciantonio v The Queen*[6].

4 In his directions, the trial judge did not, as submitted by counsel, reverse the onus of proof. However, he mis-stated the objective part of the test for

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1 (2000) 206 CLR 161.

2 (1983) 154 CLR 212 at 221.

3 (2000) 206 CLR 161 at 172-173 [14]-[20] and at 216-219 [156]-[163].

4 (2000) 206 CLR 161 at 206-207 [122].

5 (2000) 206 CLR 161 at 185 [57].

6 (1995) 183 CLR 58 at 66-67.

provocation by referring to what an ordinary person "must" or "would" have done, rather than what such a person "could" have done.

5 Trial counsel made no complaint about the mis-direction. This, in combination with the failure to make such a complaint in the Court of Criminal Appeal, brings into play the principle enunciated in *Crampton*, including the qualification to that principle. That qualification is necessarily imprecise, but it is to be taken seriously. It was not a rhetorical flourish. Furthermore, in the circumstances of the present case, the failure of trial counsel to take the point now relied upon reinforces the strong impression created by a reading of the record, which is that the issue of provocation was of little, if any, practical significance.

6 It is understandable that the trial judge felt it prudent to give directions on provocation. It is also understandable that trial counsel either did not notice the error, or did not think it necessary to raise the matter for correction. In the context of the case, the error was not important. It was certainly not, like the errors in *Giannarelli* and *Crampton*, decisive of the outcome. The circumstances are not exceptional. No grave and substantial injustice has been shown.

7 Special leave to appeal should be refused.

8 McHUGH J. The applicant was tried for murder before a judge and jury in the Supreme Court of New South Wales. The jury convicted him of murder although the trial judge left to the jury an alternative verdict of manslaughter based on the alleged provocation of the applicant by the deceased. The trial lasted 23 days. The Court of Criminal Appeal dismissed the applicant's appeal against the conviction. He now seeks special leave to appeal against the order of the Court of Criminal Appeal on the ground that the trial judge misdirected the jury on provocation. The question in this application is whether the applicant should be granted special leave to raise this ground despite not raising any objection to the directions on provocation at his trial or in the Court of Criminal Appeal. In my opinion, the circumstances of the case are not so exceptional that the Court should entertain a special leave application in respect of a point that was not raised at the trial or in the intermediate court of appeal.

9 The principal issue at the trial was whether the applicant stabbed the deceased with a knife or whether the fatal wound was the accidental result of the deceased impaling himself on a shard from a broken glass. At no stage in his evidence did the applicant suggest that he lost self-control, evidence that would have been led if he had relied on provocation as a defence. Although the applicant's defence was that the deceased died by accident, the learned trial judge left the issue of provocation to the jury. His Honour took the view that there was evidence that could justify the jury holding that the provocative conduct of the deceased made the case one of manslaughter, not murder. The relevant evidence is set out in the judgment of Callinan J, who holds that the evidence was insufficient to raise the issue of provocation. Although the evidence of provocation was weak, I think that the trial judge was justified in leaving the issue to the jury. On the applicant's version of the incident, the deceased punched him while a friend of the applicant was restraining him and then the deceased kicked him. Although the applicant gave no evidence that he then lost self-control, I think on that evidence the trial judge was probably right to leave the issue of provocation to the jury.

10 But I do not think that there is anything so exceptional or extraordinary about this case that it would be proper for this Court to grant special leave to appeal on the ground that the trial judge misdirected the jury on the issue of provocation. The applicant did not ask the trial judge for further directions on provocation to overcome the errors of which he now complains. Nor were the trial judge's directions on provocation the subject of argument in the Court of Criminal Appeal. Because that is so, this Court would grant special leave to appeal only if the circumstances of the case were exceptional[7].

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7 *Crampton v The Queen* (2000) 206 CLR 161.

11 It is true that the trial judge misdirected the jury on the issue of provocation. He did so by directing the jury to consider what an ordinary person "must" or "would" have done, instead of directing the jury to consider what an ordinary person "could" have done. But this misdirection is only one factor to be considered. Provocation was an issue that was probably technically open on the evidence. But it was an issue remote from the way the applicant conducted his case at the trial.

12 The applicant's case was that he did not have a knife with him that day and that he did not stab the deceased. But the evidence tending to prove that the applicant stabbed the deceased was overwhelming. The applicant's friend and two independent witnesses testified that the applicant had a knife in his hand while he was fighting. The applicant's friend testified that during the fight the applicant was holding the knife in his right hand "in an arc from left to right". He said that he saw the applicant stab the deceased "more than once". Another two witnesses also testified that the applicant stabbed the deceased. Two witnesses testified that, during the fight, someone called out "he's got a knife". Witnesses also said that the deceased called out, "he's killed me" or "he's stabbed me" or words to that effect. The person who drove the applicant to the hotel where the fight took place said that the applicant took a knife with him to the hotel. He claimed that the applicant had said "your friends, you can't rely on them, they can run but knife is always your friend and is in your hands, never run away, it's always with you."

13 All the evidence, except that of the applicant, suggested that he was the aggressor. Most importantly, the evidence, including the evidence of the applicant's friend, contradicted the applicant's claim that the deceased had punched him while his friend held him. The friend said that, after being held, the applicant broke away and ran around the pool table to get to the deceased.

14 Given the way that the applicant conducted his case and the evidence against him, I do not think there is a real chance that the trial judge's misdirection has resulted in any miscarriage of justice. In my opinion, a rational jury would be convinced beyond reasonable doubt that the deceased did not provoke the applicant. Because that is so, no miscarriage of justice has occurred. The case would not be one for the grant of special leave even if counsel for the applicant at the trial had asked the learned trial judge to withdraw the erroneous direction.

15 The application for special leave to appeal must be dismissed.

16 KIRBY J. The applicant, Michael Heron, seeks special leave to appeal from a judgment of the Court of Criminal Appeal of New South Wales[8]. By that judgment, that Court confirmed the applicant's conviction of murder that followed a trial in the Supreme Court of New South Wales before Sully J and a jury. The application was referred to a Full Court of this Court by the panel to which it was originally assigned. In accordance with directions then given, it was argued before us as on the return of an appeal.

17 The facts are stated in the reasons of Callinan J[9]. As is there explained, the applicant argued his entitlement to a retrial on the basis that the trial judge gave the jury directions on the law of provocation that were erroneous in law. If the jury, properly instructed in the law, concluded that the prosecution had not negatived provocation in the circumstances of the case, they would have been bound to return a verdict of manslaughter[10]. By inference, this could have resulted in a reduction in the custodial sentence to be served by the applicant. As it was, the trial judge sentenced the applicant to penal servitude for a minimum of 14 years, with an additional term of four years[11].

18 In the present case the applicant did not raise the issue of provocation before the jury. Nor was any complaint made to the Court of Criminal Appeal concerning the trial judge's directions on that issue. Had any such complaint been made, it would have required the leave of that Court because of the way the trial had been conducted[12]. On the issues argued before it (none of which are now before this Court), the Court of Criminal Appeal confirmed the applicant's conviction. On the premises argued, it also dismissed his application for leave to appeal against his sentence.

Four issues

19 Four issues are presented for decision:

(1) Should this Court, having heard full argument, simply deal with the application by dismissing it peremptorily on the ground that no "special"

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8 *R v Heron* [2000] NSWCCA 312.

9 Reasons of Callinan J at [67]-[72].

10 *Crimes Act* 1900 (NSW), s 23.

11 *R v Heron* [2000] NSWCCA 312 at [1].

12 Criminal Appeal Rules (NSW), r 4.

or "exceptional" circumstances have been shown to permit the new point to be argued for the first time in this Court[13]?

(2) Should the trial judge have given the jury directions on provocation in the circumstances of the trial?

(3) Having given the directions on provocation, were they wrong on "any question of law"[14]?

(4) If a relevant error of law in the directions to the jury is demonstrated, should the appeal nonetheless be dismissed on the ground that no substantial miscarriage of justice has actually occurred?

Disposition as on an appeal

20 There are certain attractions in dealing with this application as one would the determination of an ordinary hearing seeking special leave to appeal. To do so affirms the primacy of the trial and of the function of the Court of Criminal Appeal. It reinforces the role of this Court in correcting errors of those courts made in deciding the matters put before them. It highlights the importance of ensuring the availability of the consideration of questions of law and fact by the intermediate court, for the assistance of this Court. It respects the special experience of the judges of the Supreme Court, both at trial and in the Court of Criminal Appeal. It avoids any inclination to bypass the requirement of leave in that Court, to raise grounds not argued at trial. It conserves the time of this Court. It permits the appeal to be disposed of by short reasons addressed principally to the manner in which the applicant's case was conducted below, reflecting also an opinion that, largely because of that conduct, there has been no miscarriage of justice in the case that requires the intervention of this Court.

21 Tempting although it is to adopt that approach, I do not believe that we should. The application having been referred to a Full Court, it was argued in full. The Court received the assistance of detailed written and oral submissions. There is no constitutional impediment to this Court's hearing and determining a new ground that was not raised at trial or in the intermediate court[15]. The new

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13 *Giannarelli v The Queen* (1983) 154 CLR 212 at 221; *Crampton v The Queen* (2000) 206 CLR 161 at 172 [14], 185 [57], 207 [122], 216-217 [156].

14 *Criminal Appeal Act* 1912 (NSW), s 6(1).

15 *Gipp v The Queen* (1998) 194 CLR 106 at 116 [23], 153-155 [134]-[138], 164 [170]-[171]; *Crampton v The Queen* (2000) 206 CLR 161 at 171 [10], 184 [52], 206-207 [122], 214 [148].

ground is one of law. It invokes the application to the trial of an Act of the New South Wales Parliament. Miscarriage of justice can include departures in a trial from the accurate application of the law. The applicant has been convicted of the most serious crime in the criminal calendar. He has, in consequence, been subjected to punishment that, arguably, would be reduced if his point of law is good and a new trial were to result in a conviction of a lesser offence[16]. The formula permitting new grounds to be raised for the first time in "special" or "exceptional" circumstances is open-ended. It is wide enough to include directions to a jury amounting to legal error. And the correction of such error in the particular case serves to discourage its repetition in later cases.

22 There is one point upon which I would insist. The mere fact that a case was "fought at trial"[17] in a particular way is not, in my opinion, a sufficient response to a complaint of legal error and miscarriage of justice, whether at the stage of a special leave application or on the hearing of an appeal. Ordinarily, strategies at trial are decided by legal representatives with varying input from the accused. It must necessarily be so. The law will normally hold the accused to the choices so made[18]. However, occasionally, errors and oversights occur which, with hindsight, may cause injustice to the accused. This is why the "focus of appellate attention is not upon how the appellant or his representatives played the forensic game in the trial at which he was convicted"[19]. In *Conway v The Queen*[20] I explained this point thus:

> "The 'miscarriage of justice' with which an appellate court is concerned in a criminal appeal is addressed to matters of substance and not just procedure. Courts of criminal appeal, and ultimately this Court, must be guardians against wrongful convictions of persons accused of crimes. Recent notorious cases of convictions, later shown by scientific and other evidence to have been mistaken[21], demand rejection of an appellate principle which is complacent and formalistic. Courts of criminal appeal are not mere referees of a game that can only be played once in accordance with a single game plan. … There will be cases where there is no procedural injustice (because of the way the trial was conducted) and

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16 cf *Charlie v The Queen* (1999) 199 CLR 387 at 399-400 [29].

17 Reasons of Hayne J at [59].

18 *R v Birks* (1990) 19 NSWLR 677 at 683-684.

19 *Conway v The Queen* (2002) 76 ALJR 358 at 379 [102]; 186 ALR 328 at 356.

20 (2002) 76 ALJR 358 at 379-380 [104]; 186 ALR 328 at 357.

21 eg *R v Button* [2001] QCA 133 per Williams JA, White and Holmes JJ concurring.

yet a substantive injustice is shown (because a real possibility exists that the prisoner is innocent of the crime in respect of which a conviction has been entered)."

23 Once an application is referred into a Full Court and heard as on an appeal, it is my respectful opinion that it will be rare indeed, certainly in the case of a conviction for murder, that it should be disposed of without responding to the arguments of the parties[22]. The applicant, serving his long sentence, is at least entitled to know why the arguments advanced in full on his behalf by his counsel were rejected[23]. Especially is this so because, in my view, the applicant in this case has made good the submission that an error of law occurred in the instruction to his jury on the law that was to be applied by the jury.

The need for instruction on provocation

24 The law of provocation has been considered by this Court on a number of occasions in recent years[24]. One of the reasons for the cases has been the obscurity, and internal ambivalence, of statutory expressions of the competing considerations of an objective and subjective kind involved in the law of provocation[25]. The language of s 23 of the *Crimes Act* 1900 (NSW), in issue in this case, is a good illustration[26]. The section, as it has been amended and as it

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22 cf *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-667; *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72 at 85-86 [31]-[33]. See also *South-West Forest Defence Foundation Inc v Executive Director, Department of Conservation & Land Management (WA)* (1998) 72 ALJR 837 at 840 [22]-[23]; 154 ALR 405 at 410.

23 cf *North Range Shipping Ltd v Seatrans Shipping Corporation* [2002] 1 WLR 2397; [2002] 4 All ER 390; *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409; [2002] 3 All ER 385; *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at 565 [76] per Elias CJ.

24 *Stingel v The Queen* (1990) 171 CLR 312; *Masciantonio v The Queen* (1995) 183 CLR 58; *Green v The Queen* (1997) 191 CLR 334; cf *McGhee v The Queen* (1995) 183 CLR 82.

25 The Australian Model Criminal Code Officers' Committee recommended abolition of the defence of provocation: *Fatal Offences Against the Person*, Discussion Paper (1998), at 83 extracted in Eburn and Hayes, *Criminal Law and Procedure in New South Wales*, (2002) at 69-73. The New South Wales Law Reform Commission recommended the abolition of the ordinary person test and the substitution of a general discretion to convict of manslaughter: *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) at 51-53.

26 The section is set out in the reasons of Callinan J at [74].

stood at the relevant time, presents difficulties for a judge in explaining its requirements to a jury, in simple terms so that they may be applied to the facts of the particular case[27].

25 So far as those requirements are concerned, I remain of the opinion that I expressed in *Green v The Queen*[28]. However, I was in dissent in that case. I am content, therefore, as Callinan J does, to accept that the reasons of McHugh J in *Green* state the applicable law on the aspects of the law of provocation relevant for the resolution of this application[29].

26 The reason why, in the applicant's trial, his counsel did not raise the issue of provocation before the jury is easily explained. It reflects a dilemma that an accused will often face with provocation. The applicant's real defence at the trial was that he did not stab the deceased. To the extent that he relied upon provocation, and elaborated circumstances giving rise to arguments on that issue, the applicant would necessarily have to emphasise evidence tending to conflict with his primary defence. If the jury found that the applicant did not stab the deceased, but that he died from the accidental penetration of his vital organs by a shard of glass, the applicant would have been entitled to acquittal of murder. The most he could hope for on a favourable resolution of the issue of provocation was conviction of manslaughter with the possibility of a shorter custodial sentence than he has received. There were therefore tactical or forensic reasons to justify the omission of the applicant's counsel to press provocation before the jury.

27 Nevertheless, seeking (as he was entitled) to have it both ways, counsel at the end of the evidence and in the absence of the jury, raised with the trial judge whether it was incumbent on his Honour to instruct the jury on the issue of provocation. This presented the judge with an acute dilemma. Was he to give the jury instruction upon an issue that neither the accused nor the prosecutor had

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27 This point is made in *Mankotia* (2001) 120 A Crim R 492 at 495-496 per Smart AJ. See also *R v Smith (Morgan)* [2001] 1 AC 146 at 156 per Lord Slynn of Hadley, 172-174 per Lord Hoffmann.

28 (1997) 191 CLR 334.

29 As was pointed out by the Court of Criminal Appeal of New South Wales, no other Justice of this Court has adopted McHugh J's view, expressed in *Masciantonio v The Queen* (1995) 183 CLR 58 at 73 and repeated in *Green v The Queen* (1997) 191 CLR 334 at 368, that the "ordinary person standard" incorporates "the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue": *Mankotia* (2001) 120 A Crim R 492 at 494 per Heydon JA, 495 per Smart AJ; cf Eburn, "A New Model of Provocation in New South Wales", (2001) 25 *Criminal Law Journal* 206 at 211.

raised? Or was he to omit the instruction, although (upon one view) the evidence required assistance to the jury on an issue which they were obliged by law to consider?

28 This is not a new problem. In *Bullard v The Queen*[30], Lord Tucker, giving the reasons of the Judicial Committee of the Privy Council said:

> "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

29 The obligation of the trial judge, so stated, is supported by much authority, both in this country[31] and overseas[32]. The question is therefore whether, in the particular case, there is evidence of provocation fit to be left to the jury. If there is, the trial judge's duty is clear. It is not controlled by the way the case was fought at trial.

30 For much the same reasons as I expressed in *Green*, I am extremely doubtful that, viewing the applicant's case at its highest (as the jury were entitled to accept it) there was evidence to ground a conclusion of provocation in the sense specified in the applicable section. However, the majority view of this Court in *Green* was more sympathetic to the availability of provocation than I was. A review of the cases in this Court shows how minds can differ on the issue of whether there was evidence fit to go to a jury on provocation[33]. This was a point I made in *Green* directing attention to the dissenting opinions in *Parker*[34],

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30 [1957] AC 635 at 642.

31 *Parker v The Queen* (1964) 111 CLR 665 at 681-682; [1964] AC 1369 at 1392; *Da Costa v The Queen* (1968) 118 CLR 186 at 213; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161-162, 169. See also *Pemble v The Queen* (1971) 124 CLR 107 at 117-118, 132-133.

32 *Mancini v Director of Public Prosecutions* [1942] AC 1 at 7; *Kwaku Mensah v The King* [1946] AC 83 at 91-92; *Lee Chun-Chuen v The Queen* [1963] AC 220 at 232-233.

33 cf Eburn, "A New Model of Provocation in New South Wales", (2001) 25 *Criminal Law Journal* 206 at 214.

34 (1963) 111 CLR 610 at 628-632 per Dixon CJ, 660 per Windeyer J.

later endorsed by the Privy Council[35]; in *Moffa v The Queen*[36] and in *Masciantonio*[37]. Similarly, a division of opinion arose in *Green* both in this Court[38] and in the New South Wales Court of Criminal Appeal.

31 Given some of the views expressed in *Green* I am not so certain that "looks or expressions"[39] could not constitute provocative conduct, at least in particular circumstances. Nor am I sure that it could be said, as a general rule, that the law of provocation is unavailable to the circumstances of a bar room brawl of the kind in which the applicant and the deceased became embroiled in this case[40]. Once there is evidence that arguably raises the issue of provocation "in the legal sense", the actual interpretation of the facts is a matter for the jury[41]. That was the approach of the majority in *Green*. Thus, a jury might take the view that it was impossible, and artificial, to dissect the chain of events in which the applicant and the deceased became engaged. They might regard the earlier racial insult ("well fuck you, you black cunt") as still operating in the subconsciousness of the applicant, possibly rendered susceptible to its effects by earlier insults, frustration, alcohol intake and the alleged action of the deceased in "kneeing" him when he was on a couch. Within the approach adopted in *Green*, I could not, therefore, say that there was no evidence fit to place before the jury the issue of provocation.

32 The trial judge had a further responsibility. He was concluding a trial that had lasted 23 days. It represented a public accusation of the gravest kind. Not only was the resolution important for the applicant and the community. At stake,

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35 (1964) 111 CLR 665 at 680; [1964] AC 1369 at 1390.

36 (1977) 138 CLR 601 at 616-617 per Gibbs J.

37 (1995) 183 CLR 58 at 80 per McHugh J.

38 (1997) 191 CLR 334 at 387 per Gummow J (diss) and at 416 of my own reasons.

39 Reasons of Callinan J at [82].

40 Reasons of Callinan J at [88]. In *Green* (1997) 191 CLR 334 at 375-376, Gummow J pointed out that the effect of the amendment to s 23 of the *Crimes Act* 1900 (NSW) was to broaden provocation in a way more generous to the accused than at common law as stated in *Moffa* (1977) 138 CLR 601 at 605. The contemporary "defence" of provocation had its origin in drunken brawls and dangerous duels and this feature of its history has been one of the repeated sources of criticism of the law on the subject: Australian Model Criminal Code Officers' Committee, *Fatal Offences Against the Person*, Discussion Paper, (1998) at 73.

41 *Masciantonio* (1995) 183 CLR 58 at 70; *Green* (1997) 191 CLR 334 at 414.

in the accurate conduct of the trial, was a very large public investment of actual and opportunity costs amounting to hundreds of thousands of dollars. In such circumstances, it was unsurprising, the question having been raised, that the trial judge should give the jury a direction on provocation in this case. In my view, he cannot be criticised for doing so. It was an entirely prudent and proper course in the circumstances.

The directions contained legal errors

33 In his reasons, Callinan J identifies the two errors of law of which the applicant complained before this Court. They were that, in instructing the jury on the meaning of provocation, the trial judge on a number of occasions used the word "would" or "must" for the statutory word "could"[42]. On one occasion, he also asked whether it was reasonable that an ordinary person "would have responded to an insult of that particular gravity by stabbing fatally the person who had insulted him?" By the terms of the statute the test in New South Wales is one of possibilities. Further, it is not limited to the formation of "an intent to kill"[43]. It extends to the infliction of grievous bodily harm. The distinction is not a trivial or irrelevant one. In *Green*, it was drawn to notice by Brennan CJ[44]. The correct statutory language was also used by the other members of this Court[45].

34 The second error complained of concerned the suggestion that the trial judge's directions to the jury effectively imposed upon the applicant the burden of establishing provocation whereas, in law, it is for the prosecution to disprove the operation of that "defence"[46].

35 I consider that there is no substance in this second complaint. Both in his oral charge to the jury and in the written directions that he gave them, the trial judge made it clear that the onus was upon the prosecution. Thus, in the written directions the judge told the jury:

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42 See reasons of Callinan J at [75]-[78].

43 s 23(2)(b).

44 (1997) 191 CLR 334 at 340.

45 *Green* (1997) 191 CLR 334 at 351 per Toohey J, 374 per McHugh J, 381 per Gummow J, 413 of my own reasons. See also *Stingel* (1990) 171 CLR 312 at 335. Note however that in *Green* (1997) 191 CLR 334 at 355, Toohey J quoted the Attorney-General introducing the Bill that inserted s 23 of the Act as using the word "would".

46 The main passages are set out in the reasons of Callinan J at [99].

"The question to be decided is:

Has the Crown proved beyond reasonable doubt that such intentional killing of the victim by the accused was not the result of the provocation, in the requisite legal sense, of the accused by the victim?"

36 At several points during the oral instruction, the judge explicitly said that it was for the Crown to prove beyond reasonable doubt that the "accused was not provoked by the victim". Read in the context of these clear directions on this point, the complaint about onus is unconvincing.

37 Nevertheless, the applicant has, in my opinion, made good his complaint of misdirection, both in the oral and written instructions to the jury, involved in the repeated juxtaposition of the words "would" or "must" for the statutory word "could".

Legal error and the conduct of the trial

38 The establishment of legal error in the direction to the jury raises two threshold points before any application of the "proviso" arises[47].

39 The first is whether, given the conduct of the trial and the need for "special" or "exceptional" circumstances, this Court should entertain the point at all. For reasons that I have already given, I cannot agree that the failure of the applicant to rely on the issue of provocation at the trial is fatal to the consideration of the issue in an appeal following conviction or in an application to this Court for special leave to appeal. Long ago, Isaacs J pointed out that the introduction of appeals against criminal convictions by the *Criminal Appeal Act* 1907 (UK), copied throughout Australia, worked a legal revolution and one of a beneficial kind[48]. In the place of the technical procedures of the past governing criminal appeals was substituted a simple procedure of appeal. In the place of concern only with questions of law was substituted a large jurisdiction concerned with the prevention of miscarriages of justice. In such appeals, courts are not now confined to errors of law[49]. The very language of s 6(1) of the *Criminal Appeal Act* makes it clear that the common concern of all of the grounds mentioned is "miscarriage of justice"[50].

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47 The proviso to s 6(1) of the *Criminal Appeal Act* 1912 (NSW).

48 *Hargan v The King* (1919) 27 CLR 13 at 23.

49 *De Gruchy v The Queen* (2002) 76 ALJR 1078 at 1088 [65]; 190 ALR 441 at 456.

50 *MFA v The Queen* (2002) 77 ALJR 139 at 148 [50], 149-150 [59]; 193 ALR 184 at 196, 198.

40 Once this changed feature of criminal appeals is appreciated, it becomes unacceptable to confine attention to the manner in which a trial was run. If an issue is properly raised before an appellate court – whether a court of criminal appeal or this Court – the proper subject of attention is ultimately the miscarriage issue[51]. Whilst the ways a trial and an appeal are run are relevant to that issue, they do not determine it.

41 Secondly, an issue is presented as to whether, when an error of law in the directions given to the jury is shown, the error is "fundamental"[52]. If it is, as McHugh J pointed out in *Green*[53]:

> "… the question as to whether a reasonable jury would have found the accused guilty does not arise. In such circumstances, the accused has not had a trial according to law and that itself constitutes a relevant miscarriage of justice."

42 In *Green* provocation was one of the key issues at trial. McHugh J was of the view that the errors by the trial judge in his directions on provocation "led to the trial being fundamentally flawed"[54]. That conclusion was not shared by the other members of the majority[55]. In the opinion of Brennan CJ, the error fell short of "a departure from the essential requirements of the law that … goes to the root of the proceedings"[56]. In my opinion, the most that could be said of the erroneous directions given to the jury in the present case is that they involved "a misdirection on a particular point of fact or law arising in the trial"[57]. It is therefore necessary to turn to the proviso.

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51 Lord Steyn has described the belated quashing of wrongful conviction in several cases in England in the 1990s as causing "a seismic shock" for the English legal system. "Nowadays we have come to realise that the risk of convicting the innocent is ever present": Steyn, "Human Rights: The Legacy of Mrs Roosevelt" (2002) *Public Law* 473 at 474.

52 *Wilde v The Queen* (1988) 164 CLR 365 at 372-373; *Glennon v The Queen* (1994) 179 CLR 1 at 8.

53 (1997) 191 CLR 334 at 371.

54 (1997) 191 CLR 334 at 372.

55 (1997) 191 CLR 334 at 346 per Brennan CJ. See also at 358 per Toohey J.

56 *Wilde* (1988) 164 CLR 365 at 373.

57 *Green* (1997) 191 CLR 334 at 347 per Brennan CJ.

The application of the proviso

43 *Arguments against*: Certain features of this case lend support to the applicant's argument that it is not one suitable for the proviso. The erroneous directions to the jury were repeated. They were included not only in the oral charge but in the written directions given to the jury. The difference between "would" or "must" and "could" in the statute (being the main aspect of the error) is not inconsequential. The verbal differences address attention to possibilities of human reaction and, to that extent, renders provocation more available to an accused person than would be the case if the provision were expressed in terms of probabilities ("could").

44 One reason for assigning importance to legal directions given by a trial judge to a jury is the necessary assumption that juries comply with judicial instructions about the content of law[58]. Even if the error is not fundamental, it does constitute a departure from an accurate trial which is a form of miscarriage of justice in itself. There is no way of knowing exactly how the jury reasoned for they give no explanation for their verdicts. Even if a view were taken that the judge did not have to give instruction on the law of provocation, once he decided to do so it was his duty to give legally accurate instruction which, unfortunately, did not occur in this case.

45 *Arguments in support*: As against these considerations, to which I give due weight, many others tell in favour of application of the proviso.

46 First, courts must obviously give effect to the will of Parliament expressed in the language of the proviso. It applies to cases where there has been "an erroneous ruling on the admissibility of evidence or a misdirection on a particular point of fact or law arising in the trial"[59]. The statute then requires courts to address the question whether "a substantial miscarriage of justice has actually occurred". This formulation reflects the anxiety that existed in England, as in Australia, before the introduction of the *Criminal Appeal Act*. That anxiety related to whether the larger facility for appeals would become a means for permitting "substantially unmeritorious" points to displace the substantively accurate determination of contested trials reflected in the verdicts of juries[60].

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58 *Zoneff v The Queen* (2000) 200 CLR 234 at 260-261 [65]-[66]; cf *MFA v The Queen* (2002) 77 ALJR 139 at 154 [85]; 193 ALR 184 at 204 citing *R v Kirkman* (1987) 44 SASR 591 at 593; *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

59 *Green* (1997) 191 CLR 334 at 347.

60 *Conway* (2002) 76 ALJR 358 at 372 [69]; 186 ALR 328 at 346 with reference to O'Connor, "Criminal Appeals in Australia Before 1912" (1983) 7 *Criminal Law*

(Footnote continues on next page)

47 The language of s 6(1) of the *Criminal Appeal Act* makes it clear that, notwithstanding rulings and directions of law that are erroneous in point of law, the proviso is still applicable. It evokes an appellate judgment. It may be true that there is a tendency in recent times to apply the "proviso" less frequently, particularly where a misdirection on a key point of law is shown[61]. Nevertheless, the "proviso" remains an important provision of statutory law. In most trials, slips and mistakes of a relatively minor kind will occur, even in relation to the instruction of the jury on the law[62]. The application of the proviso, therefore, obliges the appellate court to examine the error in context and having regard to the evidence and substance of the trial. If that court concludes that there is no real possibility that the error has affected the outcome and occasioned a miscarriage of justice, the proviso applies. Notwithstanding the error, the conviction will not be disturbed.

48 Secondly, it is important to consider the precise nature of the error of law identified and to view it in the context of the entirety of the judge's directions[63]. When that is done in the present case, it is clear that the judge raised for the jury's consideration the issue of provocation, although neither side in the trial had addressed argument on that point. He instructed the jury to consider the gravity of the particular provocative conduct and that they were "permitted to take into a fair and sensible account any demonstrated relevant characteristics personal to the accused [such as] the age, the worldly wisdom, any relevant personal history, ethnicity and its social and cultural implications to and for the accused, and his powers of reasoning and of judgment". This was arguably more favourable to the accused than the statute required. His Honour specifically directed the jury's attention to the insult of a racial kind of which the applicant had testified (although other witnesses denied it). He also directed the jury to the physical assault of which the applicant complained.

49 Whilst there were legal errors in the way the issue was framed, those errors must be read in the context of very clear directions, repeatedly given, that

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Journal 262 at 275; cf Kirby, "Why has the High Court become more involved in criminal appeals?", (2002) 23 *Australian Bar Review* 4 at 17-18

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61 *Gilbert v The Queen* (2000) 201 CLR 414 at 438 [86] citing *Whittaker* (1993) 68 A Crim R 476 at 484.

62 *MFA v The Queen* (2002) 77 ALJR 139 at 155 [96]; 193 ALR 184 at 206 citing *Green* (1997) 191 CLR 334 at 398.

63 *Conway* (2002) 76 ALJR 358 at 374-375 [82], [84]; 186 ALR 328 at 350, 351.

it was for the prosecution to prove beyond reasonable doubt that the killing was not the result of provocation of the accused by the victim. Read as a whole, and especially remembering the form of the applicable question given to the jury, it cannot be said that they would ultimately have been misled on the onus issue. So far as the failure to use the word "could" is concerned, it must be remembered that the mistake appeared in isolated passages of long and careful instructions. Elsewhere in his charge, his Honour explicitly referred to possibilities. The overall impression of the directions on provocation is by no means unfavourable to the applicant. Given that experienced judges have not always noticed the difference between "could" and "would" or "must" in this context, it asks too much to conclude that a jury's verdict on the provocation issue would have turned, in this case, upon such a small difference[64].

50 Thirdly, several recent decisions of this Court illustrate the fact that, notwithstanding established errors, appellate courts have felt able in the facts of the case to conclude that a new trial should not be granted[65]. The authority of this Court demands that a stringent approach be taken to legal error[66]. In part, this is because of the language of the statutes in which the "proviso" appears[67] and in part because an appellate court has no way of knowing, with certainty, whether a misdirection has actually influenced the jury's deliberations or not[68]. Various formulae have been used to explain the invocation of the "proviso" notwithstanding established error. Commonly it is said that the conviction of the prisoner was "inevitable"[69]. Or that the error would not reasonably have influenced the outcome[70]. In *Festa*[71], McHugh J held that, in deciding whether

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64 *Zoneff* (2000) 200 CLR 234 at 260-261 [65]-[67].

65 eg *Festa v The Queen* (2001) 208 CLR 593 at 633 [127], 657 [213], 671 [263]; *Conway v The Queen* (2002) 76 ALJR 358 at 366-367 [37]-[40], 381 [114]; 186 ALR 328 at 339-340, 359.

66 See eg *Domican v The Queen* (1992) 173 CLR 555 at 562 noted in *Festa v The Queen* (2001) 208 CLR 593 at 645-646 [173]-[176].

67 eg *Criminal Appeal Act* 1912 (NSW), s 6(1) which states that the Court "shall allow the appeal": cf *TKWJ v The Queen* (2002) 76 ALJR 1579 at 1589-1590 [62] per McHugh J; 193 ALR 7 at 21-22.

68 A point made by the majority of this Court in *Domican* (1992) 173 CLR 555 at 566-567.

69 *Festa* (2001) 208 CLR 593 at 655 [204].

70 cf *Conway v The Queen* (2002) 75 ALJR 358 at 366 [32], 381 [114]; 186 ALR 328 at 338, 359.

the proviso should be applied, the appellate court is necessarily involved in weighing up the evidence for itself. His Honour said that it "should assume that ordinarily if it thinks that the accused must be convicted, so would a reasonable jury". Commentary has argued that this approach avoids rhetorical and implausible explanations about the inevitability of what a jury would do and having "the merit that it is probably in accordance with what appellate courts actually do"[72]. Whichever test is applied in the present case, it leaves me convinced that no miscarriage (and certainly no substantial miscarriage) has actually occurred[73]. The conviction of murder was inevitable.

51 Fourthly, the foregoing conclusion is reinforced by the way in which the applicant's case was conducted at trial and in the Court of Criminal Appeal. Whilst that consideration is not determinative of the application, it can at least be said that it deprives the applicant of any argument that would be available had provocation been an important issue in the proceedings.

52 In *Green*, for example, the accused had admitted killing the deceased. Provocation was therefore the key issue in the trial and subsequent appeals. The trial judge had ruled against the reception of evidence of the past history of the accused tendered for the defence on that issue[74]. The evidence was subsequently admitted for a different purpose, and the trial judge instructed the jury not to take that evidence into account for the purposes of provocation. As a result, McHugh J was of the opinion that the "accused's real case on provocation was never left to the jury"[75]. None of those complaints avail the applicant in these proceedings. To that extent, his appeal lacks the substance that carried the day in *Green*. So far as substance was concerned, the real issue that the applicant wished to tender to the jury was whether he had stabbed the deceased. Upon that issue the jury's verdict must be taken to have rejected the applicant's defence.

Conclusions and order

53 In the result I am of the opinion that the judge was probably entitled, and certainly well advised, to leave provocation to the jury. In doing so he made errors of law in the instruction he gave them on the requirements of the

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71 (2001) 208 CLR 593 at 632 [123].

72 Pincus, "Criminal Cases in the High Court of Australia – *Festa v The Queen*" (2002) 26 *Criminal Law Journal* 241 at 243.

73 *Hembury v Chief of the General Staff* (1998) 193 CLR 641 at 651 [22]-[23].

74 *Green* (1997) 191 CLR 334 at 342.

75 *Green* (1997) 191 CLR 334 at 372.

applicable statute. Such errors did not deprive the applicant's trial of its fundamental quality as a trial according to law. They were no more than a misdirection on a particular point of law arising within the trial limited to the use on some (but not all) of the occasions of the incorrect verb of probability rather than possibility.

54 Although not taken at trial or in the Court of Criminal Appeal, the point remains open in this Court. It has been fully argued. The applicant is not deprived of it simply because of the way his trial or the earlier appeal were run. Having heard full argument on the point, this Court should deal with its merits and not dispose of the application as if it were back before a panel of the Court as an ordinary application for special leave. The case is one where, notwithstanding established legal error, it has not been shown that a miscarriage of justice has actually occurred. The verdict of guilty of murder was inevitable. The demonstrated mistake in the directions on provocation do not justify disturbance of the conviction that followed that verdict.

55 Although my preference, the application having been argued as an appeal, would be to grant special leave and dismiss the appeal, nothing turns on the disposition. I will therefore join in the order proposed by the other members of the Court. Special leave should be refused.

56 HAYNE J. In the Supreme Court of New South Wales, after a trial which lasted 23 days, the applicant was convicted of murder. The facts which gave rise to the charge are described in the reasons of Callinan J.

57 At trial the applicant did not submit to the jury that he had been, or at least had not been proved not to have been, acting under provocation. His contention was that he had not stabbed the deceased; the deceased must have suffered the fatal wound in some other accidental way. Nonetheless, at the suggestion of the applicant's counsel, the trial judge (Sully J) gave the jury directions about provocation. The applicant now contends that those directions were wrong.

58 The applicant made no application at trial for any redirection about provocation. Had he done so, what now are said to have been errors in the directions given by the trial judge could have been corrected. Not only was no complaint made to the trial judge about the directions that were given about provocation, no such complaint was made to the Court of Criminal Appeal in the applicant's appeal to that Court against his conviction. The first time the applicant has complained about the directions that were given on the subject of provocation is in his application for special leave to appeal to this Court.

59 As the case was fought at trial, the central question of fact for the jury was whether the applicant stabbed the deceased with a knife. The applicant did not suggest that there was evidence that he may have lost self-control. Indeed, the whole thrust of his evidence was that he had not and that the deceased's death was an accident.

60 There was ample evidence from which the jury could have concluded that the applicant had brought a knife with him to the place where the fatal fight occurred and had used it to stab the deceased, thus bringing a prolonged and episodic bar-room brawl between the two men to its fatal conclusion. If the jury accepted this evidence, and their verdict reveals that they did, the issue fought at trial was decided against the applicant. There was evidence that, in the course of the brawl, words were said and things were done that might be said to invite consideration of the issue of provocation. It may be, therefore, that after a trial of this length, abundant caution suggested that it was prudent to instruct the jury about the topic. But the course of proceedings at trial and on appeal to the Court of Criminal Appeal reveals that any error in the instructions given about provocation is not such as to require the intervention of this Court. No special circumstance of the kind referred to in *Crampton v The Queen*[76] is shown for this Court to entertain the ground of appeal which it is sought to raise for the first time in this Court.

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76 (2000) 206 CLR 161.

61 The interests of justice neither in this case nor more generally require the grant of special leave. It is not arguable that there has been any miscarriage of justice.

62 Special leave should be refused.

63 CALLINAN J. In this matter the applicant seeks special leave to appeal from a decision of the Court of Criminal Appeal of New South Wales dismissing an appeal to that Court against his conviction for murder in July 1998 following a trial before a judge and jury which lasted 23 days. At an earlier incomplete hearing of his application, the applicant was confined to one ground only, on any appeal that he might be granted leave to pursue, and informed that he should be prepared to argue his application as if he were arguing an appeal. The ground was:

> The trial judge erred in his directions on provocation and on the burden of proof as it related to provocation. The Court of Criminal Appeal erred in holding that these directions were "appropriate".

64 The applicant submits that the ground presents the following issues for determination:

(i) Did the trial judge err in his directions on provocation?

(ii) Did the trial judge err in his directions on the burden of proof as it related to provocation?

(iii) Did the trial judge's directions on provocation result in a miscarriage of justice?

65 Two anterior questions do however arise: was it necessary that directions with respect to provocation be given anyway; and, why should the applicant, his counsel not having sought directions at the trial, and not having relied on any alleged inadequacies in the directions as to provocation in the Court of Criminal Appeal, now be permitted to rely upon a ground that raises them in this Court for the first time?

66 The applicant submits that the answer to the second question, the correctness of which I will assume for present purposes, is that this is a case of the same kind as *Crampton v The Queen*[77] in which this Court held that there was no inhibition upon it to entertain an appeal on grounds raised here for the first time, although special leave to appeal on such grounds should be granted only in exceptional circumstances.

Facts and previous proceedings

67 At about 7 o'clock in the evening of 27 October 1996 the applicant and Mr Jularic were arguing and fighting in a bar at the Beresford Hotel at Darlinghurst

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77 (2000) 206 CLR 161.

in Sydney. During the fight a sharp object penetrated Mr Jularic's chest. He collapsed. The applicant ran away. Mr Jularic died very soon afterwards.

68 The prosecution case at trial was that the applicant stabbed Mr Jularic with a knife. The applicant gave evidence at the trial that he did not have a knife with him and that he did not stab anyone. He suggested that the fatal wound was caused by a shard from a glass broken during the fight. A friend of the applicant, however, Mr Niumeitolu, said that he actually saw him stab Mr Jularic with a knife. Two other witnesses confirmed Mr Niumeitolu's evidence and another saw the applicant with a knife in his hands.

69 Although provocation was not part of the applicant's case the trial judge left it as an issue to the jury. It is necessary to refer to the evidence in some detail. In doing so I will take the case for the applicant at its highest by relevantly quoting his version of events as he recounted it in evidence in chief.

70 The applicant described his occupation as a barman at a strip club. He worked there throughout the night before the slaying. At the beginning of his shift he took amphetamines and at the end of it he drank whisky mixed with a soft drink. For the period from 9 am until the death of Mr Jularic he was drinking continuously but was unable to make any estimate of how much he drank. At some time in the late afternoon or early evening he went to the Beresford Hotel where Mr Jularic was playing pool.

71 After Mr Jularic had finished playing a game with some other people, the applicant began a game of pool with him. In the applicant's own words, the following events occurred:

"Q: … you had a number of drinks, is that right?

…

A: I was pretty drunk.

Q: So you got up to play the game of pool. What happened next?

A: Towards the end of the game, I think there was only about – maybe – I don't know – I can't guess – like there was a couple of balls left on the table. I just like walked over to get to the other side and I accidentally bumped his pool cue. I said 'sorry' but he just gave me a dirty look and shook his head and when I stood by the sliding door –

…

Well, after the game he kind of looked at me and come over to shake my hand and me being drunk I thought I would give him a

bit of his own medicine and shake my head to see how he felt. He just said, 'Well f*** you, you black c***' and walked off. I pushed him.

Q: Can I ask you to pause there – he walked off where?

A: Just to my other side, just a metre away.

…

Q: After those words were said and the deceased walked away from you, what happened then?

A: I pushed him and asked him what he said. He laughed at me so I pushed him again and he pushed me back and then I hit him. Then we started fighting. I can remember falling backwards and taking out the sliding door. After that we was broke up. Rob had a hold of me and I thought it was over. I thought I got my black c***'s worth and as Rob was holding me the deceased came up and like, hit me and I kind of like slumped and then he kicked me. Then I got back up.

Q: Can I ask you to pause there. Where did the kick connect?

A: In the chest.

Q: Go on.

A: Then I got back up and Rob wouldn't let go of me, so I screamed at him to let go of me. Then the deceased said, 'Let him go, I want to see what he's got.' As soon as they let go of me, I shoulder barged him to the ground. We wrestled there for a while.

…

Q: How did you feel about the words that you say had been said to you by the deceased?

A: I was pretty mad, you know, just angry.

Q: You barged the deceased into the corner, is that right?

A: Yes.

…

Q: What happened next?

A: I can remember Rob grabbing me, pulling me off the deceased and throwing me on the couch and as I was sitting on the couch the deceased come over and started kneeing me in the head, I kind of like I covered up and then Rob started pushing him away. I can remember one of the guys in there hitting him with a pool cue.

...

Q: We will turn to when you were on the couch. You say the deceased kneed you; what happened then, can you remember?

A: I can remember Rob pushing him away, telling him to go and somebody, a guy, come over with a pool cue and started hitting him across the back, I can't really remember, a pool cue, and telling him to get out of the pool room, I don't know.

Q: What happened next?

A: The deceased walked off.

Q: In which direction?

A: Into the direction towards the glass house. I walked behind the deceased and then I come and I sit on these chairs over here [Indicating], where it says 'pool cue' here, like here [Indicating], but on the side.

…

Q: What happened next?

A: The deceased come back in with a bar stool, kind of looked at me, started to approach. I grabbed the glass, I threw it at him and I go to the pool table, I grabbed another pool ball and I threw it at him again.

…

Q: What do you recollect happened next?

A: Well, punching on again.

Q: Go on.

A: I can remember punching on with him and somebody called out 'police' and then I heard somebody else say, 'Let's get the f*** out of here', and then everybody started running and I suppose I ran too and jumped over the wall and ran down the street."

72 There was other evidence of the applicant's state of mind and demeanour before the fight. The applicant himself gave evidence that before the pool game he went into the lavatory and asked a "couple of familiar faces" if they had a "line of speed". They said "No". Mark McConnell testified that he saw the applicant in the lavatory pacing up and down and saying "f***, f***, f***". He said the applicant asked for a line of speed and that the applicant said to him "Come on, I really need some, man". Mark McConnell said that he thought the applicant was under the influence of some kind of drug and referred to his manner as one of "jitteriness, nervousness" and involving "pacing back and forth". John Williams saw the applicant speaking loudly and "very aggressively" in the same area. The applicant and Mr Jularic had made a bet of $20 on the game which the applicant lost.

Appeal to this Court

73 The Court does not have the benefit of any consideration by the Court of Criminal Appeal of the arguments of the applicant because they were not advanced in that Court.

Provocation

74 On this branch of his argument the applicant drew attention to a repetition, in the directions by the trial judge, Sully J, of departures from the language of s 23, especially sub-s (2)(b), of the *Crimes Act* 1900 (NSW) ("the Act") which relevantly provides as follows:

> "**23 Trial for murder—provocation**
>
> (1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.
>
> (2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:
>
> (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and
>
> (b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,

> whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time."

75 The defect in the directions was, it was submitted, the substitution, in both their written and oral forms, of the words "must" and "would" for "could". In the written directions his Honour said this:

> "Secondly, the particular conduct of the victim which is said to have so provoked the accused *must* have been sufficient to have induced an ordinary person to have so far lost his self-control as to have formed an intent to kill the victim, or to inflict upon the victim really serious bodily injury." (emphasis added)

76 Later in the written directions his Honour said:

> "The question for you is whether you think that an ordinary member of the contemporary Australian community, aged in his mid twenties, and towards whom the victim had behaved as he behaved towards the present accused *would* have responded by shooting the victim dead." (emphasis added)

77 In drawing together the subjective and objective elements required to establish provocation, his Honour again used the word "would":

> "The subjective test to begin with: what was the level of affront in fact to this accused? The objective test: transposing an insult of that level of gravity to the case of an ordinary person in October 1996, is it reasonable to say that such an ordinary person *would* have responded to an insult of that particular gravity by stabbing fatally the person who had insulted him?" (emphasis added)

78 At another point the trial judge again chose not to use the word "could":

> "Making the assessment you are to bear carefully in mind the underlying assumption of the law, which is that the particular provocative conduct may be such as to cause an ordinary person to lose his self-control to such an extent that he does what is unreasonable and extraordinary, that is to say, an act which, were it not for the provocation, *would* amount to the crime of murder." (emphasis added)

79 The applicant relied on the observations of Brennan CJ in *Green v The Queen*[78]:

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78 (1997) 191 CLR 334 at 340.

> "The objective test prescribed by par (b) turns not on what the ordinary person *would have done* in response to the provocation experienced, but on what the ordinary person *could have been induced to intend*. Dependent on the circumstances of the trial, the jury may need a direction to draw their attention to the difference between 'would' and 'could' and will ordinarily need a direction to distinguish between what the ordinary person could have been induced to intend and what the ordinary person could have been induced to do."

80 It must be accepted that the use of the word "would" was a misdirection: whether however it led to any possibility of a miscarriage of justice is another matter.

81 The Act relevantly looks to "an *ordinary* person in the position of the accused". The use of the words, "an ordinary person" in the sub-section must have been intended to impose some objective limits to the kind of behaviour which might be regarded as sufficiently provocative to answer the statutory description of provocation.

82 Section 23 requires the Crown to exclude or negate beyond reasonable doubt one or more of the matters to which the section refers.

1. The accused lost self-control.
2. The loss of self-control caused the act or omission causing the death.
3. The provocative conduct was the conduct of the victim.
4. The provocative conduct consisted of grossly insulting words or gestures (not, it may be observed, looks or expressions).
5. The provocative conduct was directed towards, or affected the accused.
6. The provocative conduct could cause the formation of an intent to kill, or to inflict grievous bodily harm.
7. The provocative conduct could have induced an ordinary person in the position of the accused to think and act as the accused did.
8. The provocative conduct was of such a kind as to cause the accused, not merely to lose some self-control, but to so far lose self-control as to form the requisite intent.

83 As will appear, I am of the opinion that there was evidence capable of negating beyond reasonable doubt the first, seventh and eighth matters.

84 What s 23(2)(b) does not indicate is the stage in a course of events that "the position of the accused" has to be considered, a matter upon which Criminal Code provisions do shed some light by referring, for example, to an act done "in the heat of passion caused by sudden provocation, and before there is time for the

person's passion to cool"[79]. The absence of language of that kind compounds the difficulties in a case such as this one, of an initial mild slight by a look, of insulting language, of a fight, an interruption to the fight, the applicant's forcible restraint by others, blows by the deceased, and a deliberate resumption of violence by the applicant. I doubt whether the possibilities should be confined (as to the loss of self-control) to the precise moment at which (assuming it to be ascertainable) the applicant formed the intent (which the sub-section requires) to kill or inflict grievous bodily harm.

85 Section 23 of the Act was last considered by this Court in *Green*[80]. There McHugh J quoted[81] from the joint judgment of Brennan, Deane, Dawson and Gaudron JJ in *Masciantonio v The Queen*[82]:

> "Homicide, which would otherwise be murder, is reduced to manslaughter if the accused causes death whilst acting under provocation. The provocation must be such that it is capable of causing an ordinary person to lose self-control ... The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control before he has had the opportunity to regain his composure.
>
> It follows that the accused must form an intention to kill or to do grievous bodily harm (putting recklessness to one side) before any question of provocation arises. Provocation only operates to reduce what would otherwise be murder to manslaughter. Since the provocation must be such as could cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions, it must be such as could cause an ordinary person to form an intention to inflict grievous bodily harm or even death[83].
>
> The test involving the hypothetical ordinary person is an objective test which lays down the minimum standard of self-control required by the

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79 See the Criminal Code of Queensland: s 304, "Killing on provocation"; s 268 defines provocation generally in relation to assault which contemplates an entirely objective test of an "ordinary person" and excluding "a lawful act" as an act of provocation; and s 269, which expressly requires proportionality of the response to the provocation.

80 (1997) 191 CLR 334.

81 (1997) 191 CLR 334 at 367-368.

82 (1995) 183 CLR 58 at 66-67.

83 *Johnson v The Queen* (1976) 136 CLR 619 at 639 per Barwick CJ.

law. Since it is an objective test, the characteristics of the ordinary person are merely those of a person with ordinary powers of self-control. They are not the characteristics of the accused, although when it is appropriate to do so because of the accused's immaturity, the ordinary person may be taken to be of the accused's age.

However, the gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and [form an intent to kill or inflict grievous bodily harm]."

86 In *Green* McHugh J offered one qualification to that[84]:

"The only qualification I would make to this statement is to add considerations of 'ethnic or cultural background of the accused' to age and maturity as relevant to any inquiry into the objective standard by which the self-control of an accused is measured.[85]"

87 McHugh J's summary of the relevant principles to be distilled from the sub-section was as follows[86]:

"All of the accused's attendant circumstances and sensitivities are relevant in determining the effect of the provocation on 'an ordinary person in the position of the accused'. Indeed, '[w]ere it otherwise, it would be quite impossible to identify the gravity of the particular provocation.'[87] As the Court said in *Stingel*[88]:

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84 (1997) 191 CLR 334 at 368.

85 See generally McHugh J's comments in *Masciantonio* (1995) 183 CLR 58 at 72-74: cf Yeo, "Sex, Ethnicity, Power of Self-Control and Provocation Revisited", (1996) 18 *Sydney Law Review* 304.

86 (1997) 191 CLR 334 at 369.

87 *Stingel v The Queen* (1990) 171 CLR 312 at 326.

> '[N]one of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and *past history* may be relevant.' (emphasis added).
>
> The fact that an accused is especially sensitive to the conduct constituting the provocation, or that he or she takes the conduct as being aimed at a particular sensitivity when in fact it is not, will not preclude a finding of provocation, nor prevent it from being attributed to the hypothetical ordinary person. For example, in *Luc Thiet Thuan v The Queen*[89], the Privy Council held that the accused's impaired mental condition which made him prone to respond explosively even to minor provocation was a factor which could properly be taken into account when assessing the gravity of the conduct by the deceased. Similarly, the fact that the accused in the present appeal had a special sensitivity to sexual assault because of what he believed had occurred to his sisters was relevant to the issue of provocation under s 23(2)(a) and the extent of his provocation must be attributed to the ordinary person for the purpose of s 23(2)(b)."

88 Even with the benefit of his Honour's careful exposition of the meaning and effect of the sub-section, it is not easy to see how it can operate in the circumstances of a bar room brawl of the kind that occurred here in which, however the dispute may have started, there came a stage at which the applicant appears to have become, if not the instigator, at least a fully voluntary participant not any longer acting under an uncontrollable impulse. A further difficulty of applying the section arises out of the two almost irreconcilable concepts contained within it, of, on the one hand, a loss of self-control, and, on the other, the deliberate mental process of the formation of the requisite intent.

89 A submission of the applicant was that he did not lose self-control: according to him he did not even have a knife and never stabbed the deceased, propositions clearly rejected by the jury in finding the applicant guilty of murder. The applicant's own description of his state of mind during the fight was "pretty aggressive, angry". He did not say in terms, and I do not think that it may fairly be inferred from anything that he said in evidence, that he had truly lost self-control.

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88 (1990) 171 CLR 312 at 326.

89 [1997] AC 131 at 146.

90 The observations of Gleeson CJ in the Court of Criminal Appeal of New South Wales in *Chhay* are in point[90]:

> "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."

91 I am unable to accept that an *ordinary* person in the position of the applicant here could have so far lost, and indeed did in fact so far lose self-control as to have formed an intent to kill, or to inflict grievous bodily harm on Mr Jularic. What was in reality the position of the applicant? He had drunk a very large amount of alcohol. He was in an angry and aggressive mood. The fight began because of a "look" on the face of Mr Jularic. This was so even though Mr Jularic had offered to shake the applicant's hand. The applicant was carrying a knife before the fight began and during it. An offensive racist remark was made to him. Following an interruption to the fight the applicant was punched and kicked. The applicant was restrained but on his release insisted on resuming the fight. He very soon thereafter stabbed Mr Jularic. In my opinion an *ordinary* person in the position of the applicant, that is, in all of the circumstances to which I have just referred, could not have been induced so far to lose self-control as to intend to kill or inflict grievous bodily harm to the deceased. One particular requirement of the sub-section, the possible reaction of the hypothetical *ordinary* person, is not satisfied here even though the applicant was insulted and was at one stage pushed and kneed or kicked by Mr Jularic.

92 Accordingly it was unnecessary for his Honour to give any directions on provocation although it is easy to understand, why after a long trial as this one was, a trial judge would out of caution choose to do so. The giving of them, even in the form in which they were given could have caused no miscarriage of justice.

93 I am reinforced in my opinion by these matters: first, that the applicant's counsel did not directly raise provocation by seeking from the applicant any answer whether he had lost self-control, and did not refer to provocation in his speech to the jury. Instead he submitted to the trial judge that there were matters deserving of attention relating to provocation and to intoxication. He said that he did not propose to address the jury in relation to them but suggested that his Honour might think it appropriate to sum up on them.

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90 (1994) 72 A Crim R 1 at 14.

94 Secondly, the trial judge himself was doubtful whether there was evidence of provocation sufficient to form a basis for a direction about it.

95 Thirdly, the applicant's counsel made no request for any relevant redirections.

96 Fourthly, the applicant did not raise the matter in the Court of Criminal Appeal.

97 Fifthly, there were obvious forensic reasons why the applicant's counsel might not have wished to adduce evidence for the applicant of loss of self-control, or to address on provocation: in particular, that if he had, the jury might regard that as an implicit admission of the matters so vehemently denied by the applicant, that he had a knife and formed an intent to stab Mr Jularic with it in order to kill him or inflict grievous bodily harm on him.

98 Having said that, I would not however wish to be taken as saying that a judge is not obliged to put provocation to a jury if there is a basis for it and even if counsel for the defence has not raised it. Once a basis for it exists it is for the prosecution to negate it beyond reasonable doubt.

99 The other matter is the related one of the onus of proof. The applicant points to passages in the trial judge's summing up and a statement made in the absence of the jury which he submits had the effect of reversing the onus of proof with respect to the negating of provocation.

> "If you accept that the deceased did in fact make that particular remark to which the accused referred in his evidence, and of which I reminded you yesterday, then you would be entitled to regard that as an act of provocation. I do not mean by that that all the consequences that we have been discussing would immediately follow. All I am saying is that you would be entitled to find as a fact – but it would be a matter for you – that that was a provocative thing to do; and you would thereupon be put upon the first stage of the inquiry that we have been discussing: what was in fact the affront, the level of affront, the level of the gravity of the affront to this particular accused?
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> …
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> If you find as a fact that in the course of what developed from that point on, the deceased in fact fomented an intensification of the argument by saying provocatively and aggressively and challengingly, 'Let him go. I want to see what he's got'; if you find that as a fact, that too would be behaviour of which you would be entitled to find that it was provocative in the sense that we are discussing.

…

I stopped myself when I was on the verge of saying you have got to be satisfied. I knew I had better not say that; and the only alternative is to say to them, you have to find as a fact a basis upon which you can then move to apply the principles. You cannot apply them in a vacuum. You either find facts on which you can bring those principles to bear or you do not. Now I do not know how much more plainly one can bring it to the jury's attention.

…

The law will not regard the accused as having been provoked in the requisite legal sense by the victim, unless two conditions are both satisfied."

100 It is true that the passages to which the applicant points may at least imply that there was an onus of proof upon the applicant to establish facts to ground a defence of, or to prove provocation, rather than that it was for the prosecution to negative it if there were any basis for it in the evidence. But those passages, and those where "would" instead of "could" were used, are a few only in an otherwise careful summing up which made it clear from beginning to end that it was for the prosecution to prove the case beyond reasonable doubt and to negative defences available on the evidence, including provocation. The respondent makes the important point that again the applicant made no application to the trial judge for any relevant redirections on the onus of proof. What I have said in relation to the other aspects of the applicant's proposed grounds of appeal also applies to this one.

101 For the reasons given therefore, that it was unnecessary to leave provocation to the jury, that the case against the applicant was a strong one, and because there are no real prospects of a successful appeal, I would refuse special leave.