HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND BELL JJ

ANDREW MURRAY POLLOCK APPELLANT

AND

THE QUEEN RESPONDENT

Pollock v The Queen [2010] HCA 35
20 October 2010
B14/2010

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 11 September 2009 and, in lieu thereof, order that:*

   (a) the appeal to that Court be allowed;

   (b) the appellant's conviction be quashed; and

   (c) a new trial be held.

On appeal from the Supreme Court of Queensland

Representation

S J Keim SC with A E Cappellano for the appellant (instructed by Legal Aid Queensland)

M J Copley SC with J A Wooldridge for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Pollock v The Queen

Criminal law – Defences – Provocation – Elements of provocation – Meaning of "sudden" – Whether accused's loss of self-control must immediately follow provocation – Scope of objective test – Whether there exists a discrete requirement that accused must commit fatal act before there has been time for loss of self-control to abate.

Criminal procedure – Directions – Use of model directions – Duty to frame directions by reference to issues.

Words and phrases – "loss of self-control", "sudden provocation", "time for passion to cool".

Criminal Code (Q), s 304.

FRENCH CJ, HAYNE, CRENNAN, KIEFEL AND BELL JJ.

Introduction

1 The appellant was convicted of the murder of his father following a trial before the Supreme Court of Queensland (Atkinson J and a jury). The sole question at the trial was whether the Crown had excluded the reasonable possibility that at the time the appellant did the act causing death he was acting under provocation.

2 Provocation, as a partial defence to murder, is provided in s 304 of the *Criminal Code* (Q) ("the Code"), which states:

> "When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only."

3 This was a retrial. The appellant had been convicted of the murder of his father following an earlier trial and his conviction had later been set aside by the Court of Appeal[1]. The judgment of the Court of Appeal set out seven propositions, any one of which, it was said, if proved beyond reasonable doubt, would exclude that the appellant had been acting under provocation. Those seven propositions were stated as follows[2]:

> "1. the potentially provocative conduct of the deceased did not occur; or
>
> 2. an ordinary person in the circumstances could not have lost control and acted like the appellant acted with intent to cause death or grievous bodily harm; or
>
> 3. the appellant did not lose self-control; or
>
> 4. the loss of self-control was not caused by the provocative conduct; or

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1 *R v Pollock* [2008] QCA 205.

2 *R v Pollock* [2008] QCA 205 at [7] per McMurdo P.

5. the loss of self-control was not sudden (for example, the killing was premeditated); or

6. the appellant did not kill while his self-control was lost; or

7. when the appellant killed there had been time for his loss of self-control to abate."

4 Before the commencement of the appellant's retrial these seven propositions ("the sevenfold test") had been incorporated into the model directions on provocation contained in the Queensland Supreme and District Court Bench Book. The jury was directed in the terms of the sevenfold test at the retrial.

5 Following his conviction, the appellant appealed unsuccessfully to the Court of Appeal (Keane, Muir and Fraser JJA)[3].

6 The appellant appeals by special leave against the order of the Court of Appeal on the ground that the directions incorporating the sevenfold test were wrong in law. He contends that the fifth and seventh propositions are not discrete requirements of the partial defence. More generally, he contends that the sevenfold test unfairly invited the jury to consider each proposition in isolation and not as interrelated parts of a composite concept. As these reasons will show, the sevenfold test was apt to invite the jury to wrongly conclude the issue of provocation against the appellant and for this reason the appeal must be allowed, the appellant's conviction set aside and a new trial ordered.

The facts of the killing

7 The deceased was killed shortly before 6.00am on Saturday 31 July 2004 at his home in Morayfield. His body was found lying face down in the garden. A large rock was nearby, which appeared to have been removed from a retaining wall about two and a half metres away. The vegetation surrounding the body was trampled and was suggestive of a struggle having taken place in that vicinity.

8 The deceased died from head injuries. Severe force was required to have caused them. They could have been occasioned by between two and eight blows. It was likely that the deceased was standing upright at the time the first blow was delivered.

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3 *R v Pollock* [2009] QCA 268.

9 There were signs that a struggle had taken place inside the house. In the appellant's bedroom there was a quantity of blood staining, and beads from a necklace that he had been wearing were scattered on the floor. The string of the necklace was found in the passageway near the front door. There were also blood stains in the bathroom and on a wall near the front door.

10 At about 5.50am the deceased's neighbour, Gerry Hart, called the 000 emergency number. He had been awakened by the sound of a dog barking. After he opened his front door he heard groaning and a voice saying, "Gerry, ring the police". Shortly after 6.00am the appellant telephoned the 000 emergency service, saying that he had killed his dad. Ms Spottiswood, the appellant's companion on the night preceding these events, also made telephone contact with the 000 emergency service.

11 When the police arrived at the home they found the appellant sitting in the shower crying. The police spoke with Ms Spottiswood, who gave an account that she had woken to hear "like arguing and fighting in the bedroom". She said that they were "pounding" on each other and that they dragged "each other" outside. At the time of the trial, Ms Spottiswood was suffering from a serious mental illness and she did not give evidence. However, the recording of her interview with the police was in evidence. Ms Spottiswood was the only person at the Morayfield home at the time of the killing, apart from the appellant and the deceased.

12 In an interview with the police the appellant said that he did not remember what had occurred and that he suffered from blackouts when he drank too much. He said that the deceased had been a "fucking cunt to me my whole life. Oh, no, fucking snapped me last night – I don't know, he just fucking – I don't know what he did, but – I don't know what I did."

13 The appellant did not give or call evidence at the trial.

The evidence raising provocation

14 The following is a summary of the evidence, much of it not in dispute, upon which, in addition to the facts set out above, the partial defence of provocation fell to be determined.

15 The appellant had been living with his girlfriend, Lindsay Brownlie, for around two and a half years at the time of these events. Two weeks before the killing he had lost his job. He was depressed by this setback and he and

Ms Brownlie quarrelled. He packed some clothes and went to his father's Morayfield home on Wednesday 28 July 2004. He was distressed by the break-up and in a tearful telephone conversation with Ms Brownlie on Thursday 29 July he complained that she had not treated him fairly. She went to the Morayfield home and stayed the night with him. On Friday 30 July the appellant telephoned Ms Brownlie and suggested that they go out together. She said that she had quite a bit to do and declined the invitation.

16 Later that evening Ms Brownlie and a friend, Megan Bray, accepted an invitation from the appellant's brother, Graham, to come over to the Morayfield home for a drink. The deceased was at home and he joined the group. He consumed a substantial amount of alcohol during the evening. The appellant came home in the early hours of the morning with Ms Spottiswood, a young woman whom he had met earlier in the evening. He was surprised to find Ms Brownlie in the house and the situation was awkward. After a time the group broke up. The appellant and Ms Spottiswood retired to the appellant's bedroom. Ms Bray and the deceased went for a walk and Ms Brownlie and Graham Pollock went outside and talked in the garden.

17 Some time later the appellant came out of the bedroom and confronted Ms Brownlie in the garden demanding that she leave the premises. She went back inside the house leaving the appellant and Graham talking together in the garden. They discussed their childhood and the deceased's abusive behaviour towards them. They spoke of occasions when the deceased had flogged them. The appellant told Graham of an incident when he was a small boy when the deceased had sexually abused him. He complained of his physical resemblance to the deceased and that he had "the Pollock gene". He spoke of killing his daughter because she, too, looked like the deceased. He said that he should wait on a bridge and "throw a rock through [the deceased's] fucking window".

18 In the early hours of the morning there was a hostile discussion between the appellant and the deceased in which the deceased told the appellant to "fuck off" and that the appellant was "the only one with the problem". The appellant replied to this jibe by referring to his lost job and to having come home to find his ex-girlfriend in the house.

19 During the course of the morning Ms Bray went into the deceased's bedroom and lay down. She was on friendly terms with the appellant and had acted as his confidante. The appellant followed her into the bedroom and he warned that "if the bastard touches either you or Lindsay, I will kill him".

20 Later the deceased joined Ms Bray in the bedroom and they engaged in sexual intimacies. Meanwhile the appellant was demanding to know what Ms Bray was "doing up there with that dirty old cunt".

21 In the course of the morning the appellant told Ms Brownlie that Ms Bray should not be involved with the deceased because he was a disgusting person. He said that his aunt, Andrea, did not want to bring her children to the Morayfield home because of what the deceased had done to her. He complained that the deceased had "anal probed" him when he was a child. Some time after this conversation Ms Brownlie saw the appellant in the alcove near the bathroom holding a 15 cm kitchen knife. He appeared to be very upset. She told him that he was being silly. He said that he was upset about the situation with Ms Bray and the deceased. After this, he returned the knife to its place in the kitchen and he fell asleep in the bar area of the kitchen. When he woke he started threatening that he would tell Ms Brownlie's and Ms Bray's employer that they had been using drugs. It was at this point that Graham Pollock said he had had enough. Graham suggested that Ms Brownlie tell Ms Bray that they were leaving. The appellant asked Ms Brownlie not to tell the deceased why they were leaving.

22 Ms Brownlie knocked on the deceased's bedroom door. She said that they had to leave because the appellant was angry and wanted the two of them out of the house. This prompted the deceased to say that he was "going to kill that fucking little cunt". The deceased was in an angry mood. As Ms Bray left the bedroom he was getting dressed and making threats to kill the appellant. Graham Pollock also heard the deceased threatening to kill the appellant. He said that threats to kill were not unusual in the household; it was the sort of language that was used every time someone got a bit drunk, which happened two or three times a week.

23 Graham Pollock, Ms Bray and Ms Brownlie left the house. There was an issue about the time of their departure. On the evidence it could have been between 5.00am and 5.45am, although it appears to have been more likely to have been after 5.30am.

The admissions made to Ms Brownlie

24 Ms Brownlie visited the appellant in prison a few days after the killing. At the trial she gave unchallenged evidence of admissions made by the appellant during the visit. He said that he wanted to explain what had happened. The deceased had been really "pissed off" with him and came into his, the appellant's, bedroom while the appellant was packing to leave. They wrestled and the appellant thought that he had "ripped" part of the deceased's face. The deceased

went into the bathroom. While he was in the bathroom the appellant banged on the bathroom door and called out that he knew what the deceased had done to Andrea. The deceased jumped out of the bathroom window. The two of them fought in the garden. The appellant picked up a rock and "tapped it or held it up to [the deceased] or something" at which point the deceased had said, "Go on, I bet you can't do it, you pathetic little fuck. Go on, I bet you can't do it".

The issues and the way the parties put their cases

25 There was no issue about the course of events leading to the departure of Ms Bray and the others from the Morayfield home. The deceased's sexual encounter with Ms Bray had been brought to a premature end by the appellant's petulant behaviour. The deceased was in an angry mood fuelled by alcohol. He had got out of bed and was putting on his clothes and threatening to kill the appellant as Ms Bray left the house. Physical evidence pointed to a fight having taken place in the appellant's bedroom. Ms Spottiswood, who had been asleep in the appellant's bed, woke to see the appellant and the deceased fighting in that room. One reasonable inference was that the deceased had come into the room and attacked the appellant. This was conduct which was capable of provoking the appellant.

26 There were no witnesses to the killing and the circumstances of it are largely unknown. One inference from the use of the rock and the number and severity of the blows was that the appellant had lost his self-control at the time of the killing. The appellant's emotional state in the aftermath of the killing and his statement to the police that he had "snapped" were capable of providing support for that conclusion.

27 There were two versions of how the fight had progressed. The first version, which obtained some support from Ms Spottiswood's account, was that the fight had started in the bedroom and had continued from there out into the garden, and, in the course of the fight, the appellant had picked up the rock and struck the deceased. The second version was the account given to Ms Brownlie. On this version, the fight had been interrupted and the deceased had sought refuge in the bathroom before escaping through the window and being attacked in the garden.

28 The appellant's case was that the first version was reasonably possibly true. His counsel disavowed reliance on the version that he had given to Ms Brownlie. Counsel submitted that it did not stand with the objective evidence and suggested that it was a reconstruction made at a time when the appellant was trying to make sense of events of which he had no recollection. The claimed

inconsistencies included that it was a version that did not accord with Ms Spottiswood's description of the fight. Counsel also pointed to the absence of blood staining in the bathroom and, in particular, on the window surrounds, given that the bloodstains in the bedroom pointed to the deceased as having sustained some injury from which he had been bleeding profusely.

29 The Crown Prosecutor's submissions were directed to eliminating provocation on each of the versions, although his principal focus was on persuading the jury to accept and act on the appellant's admissions made to Ms Brownlie. In the respondent's submission the appellant had not lost his self-control: he had been on a "slow boil" for several hours culminating in an intentional killing carried out for revenge. It was submitted that "[t]his was a crime of passion, just that it wasn't a passion that was caused by provocation". The interval while the deceased sheltered in the bathroom demonstrated that any loss of self-control was not sudden (proposition five) or, alternatively, that there had been time for any loss of self-control to abate (proposition seven).

30 The trial was conducted throughout upon the understanding that the jury would be directed in the terms of the sevenfold test. The test provided the structure for counsel's submissions and the summing up. This tended to deflect the parties and the trial judge from identifying the real issues raised by the evidence. The prosecution bore the burden of excluding the reasonable possibility that the appellant was acting under provocation. In closing submissions, the Crown Prosecutor acknowledged that one inference that was open was that the deceased had provoked the appellant by attacking him in the bedroom. He also acknowledged that the circumstances of the killing (the number of blows) were capable of supporting an inference that the appellant had lost his self-control at the time he killed the deceased. Notwithstanding the recognition that the prosecution could not exclude on the criminal standard either that the deceased had provoked the appellant or that, at the time of the killing, the appellant had lost his self-control, the Crown Prosecutor addressed in sequence the propositions in the sevenfold test, inviting the jury to consider how as a matter of possibility each might be proved.

31 For forensic reasons the appellant's counsel chose not to address the jury on how provocation might apply in the event that the jury accepted that the admissions made to Ms Brownlie were reliable. In the result, it may have appeared to the jury that acceptance of the appellant's admissions as true beyond reasonable doubt meant that provocation was excluded.

32 Provocation was raised on each of the versions. It was incumbent on the trial judge to explain how it arose on each version and how it might be excluded on each[4].

33 Central to the concept of provocation is the distinction that the law draws between intentional killing in an uncontrolled emotional state induced by the deceased's provocative conduct and an intentional killing (albeit, in this case, unplanned) induced by a desire for revenge. The "slow boil" submission based on the appellant's statements made in the hours before the killing raised nice questions as to this distinction. On either version of the facts the prosecution could not exclude that the deceased had provoked the appellant. If the jury were not able to exclude the first version as being reasonably possibly true, it would be difficult to establish that the matters upon which the appellant had earlier been brooding had led him to kill deliberately out of a desire for revenge, and not that he killed in an uncontrolled rage induced by the deceased's later provocative conduct.

34 If the jury were satisfied beyond reasonable doubt of the truth of the appellant's admissions, it remained to consider whether it was reasonably possible that the appellant had lost his self-control as the result of the deceased's attack on him, and that he was still in that state when he killed the deceased. There was also the deceased's taunt, to the effect that the appellant was not man enough to hit him with the rock, to be addressed. Although the appellant did not rely on this evidence, the deceased's words (assuming that the prosecution had not excluded the reasonable possibility that he had said them) were themselves capable of amounting to provocation and it was incumbent on the trial judge to direct the jury accordingly.

The summing up

35 The trial judge directed the jury in general terms as to the meaning of provocation, the assessment of the gravity of the provocation, the attributes of the ordinary person and the objective ordinary person test consistently with the law as this Court has explained it in *Stingel v The Queen*[5] and *Masciantonio v The*

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4 *Pemble v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick CJ, 133 per Menzies J; [1971] HCA 20; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 169 per Mason J; [1986] HCA 76.

5 (1990) 171 CLR 312; [1990] HCA 61.

Queen[6]. *Stingel* was concerned with provocation under the Tasmanian Code[7] and *Masciantonio* with the doctrine under the common law. In each case the Court observed that in this area of the criminal law the Codes and other statutory provisions and the common law have tended to reflect a degree of unity of underlying notions[8]. There is no complaint with her Honour's statement of the general principles.

36 Her Honour identified the act relied upon by the appellant causing the loss of self-control as the fight in the bedroom which was alleged to have extended into the garden. She did not explain how provocation might apply were the jury to find the appellant's admissions were true.

37 Her Honour explained that the prosecution would exclude provocation if it proved any one of the propositions in the sevenfold test. Written directions incorporating the sevenfold test were distributed to the jury in these terms:

> "It is for the prosecution to satisfy you beyond reasonable doubt that the defendant did not act under provocation before a verdict of guilty of murder is open. The prosecution will have succeeded in satisfying you that provocation is excluded as a defence, if it has satisfied you beyond reasonable doubt of any one of the following matters:
>
> 1. the potentially provocative conduct of the deceased did not occur; or
>
> 2. an ordinary person of the same age as Andrew Pollock in the circumstances could not have lost control and acted as he acted with intent to cause death or grievous bodily harm; or
>
> 3. Andrew Pollock did not lose self-control; or
>
> 4. the loss of self-control was not caused by the provocative conduct; or

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6 (1995) 183 CLR 58; [1995] HCA 67.

7 *Criminal Code* (Tas), s 160 (since repealed).

8 *Stingel v The Queen* (1990) 171 CLR 312 at 320 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Masciantonio v The Queen* (1995) 183 CLR 58 at 66 per Brennan, Deane, Dawson and Gaudron JJ, 71 per McHugh J.

5. the loss of self-control was not sudden, or

6. Andrew Pollock did not kill Murray Pollock while his self-control was lost; or

7. when Andrew Pollock killed Murray Pollock there had been time for his loss of self-control to abate."

38 The fifth proposition does not include the example (that the killing was premeditated) that formed part of the Court of Appeal's statement of the test. The example was omitted at the request of the Crown Prosecutor, with the consent of the appellant's counsel, because it was not the Crown case that the killing had been premeditated.

39 The summing up contained no elaboration of the various propositions in the sevenfold test or how the evidence related to the determination of the questions posed by each. The only directions touching on the issues raised by the fifth and seventh propositions were:

> "What you have to consider here is whether Andrew Pollock acted in the heat of passion caused by sudden provocation and before there was time for his passion to cool. You must consider whether he was actually deprived of self-control and killed the deceased while so deprived.
>
> …
>
> The prosecution says there was time for his passion to cool. The defence submits you could not be satisfied beyond reasonable doubt that he was not acting while provoked. The answer to that question is one for you to judge."

The fifth proposition – the jury's question

40 "Sudden" in ordinary English has a number of meanings. These include "immediate" and "without delay" as well as "unexpected" and "unpremeditated"[9]. The jury were troubled by the meanings of "sudden" and "loss of self-control". They asked for clarification of the definitions of each. With the agreement of both counsel, her Honour answered the question as to the definition of "sudden" in this way:

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9 *Oxford English Dictionary*, 2nd ed (1989), vol 17 at 115-116, "sudden".

> "Well, 'sudden' in that context I've taken from the Oxford English Dictionary, and it means – it says 'of actions and feelings, unpremeditated, done without forethought, acting without forethought or deliberation, performed or taking place without delay; speedy, prompt, immediate'. But 'sudden' is an ordinary, English word. It doesn't have any special legal meaning in this context. It's an ordinary, English word that means what you understand it to mean as ordinary members of the community. But the dictionary has these meanings: 'Unpremeditated, done without forethought, acting without forethought or deliberation, performed or taking place without delay, speedy, prompt, immediate'. But what it means in the Criminal Code, what it means in this part of the law is its own meaning. It means sudden. If there was another word that was better, another word would have been used, but that gives you some idea of the ordinary, English meaning of the word sudden in this context."

The appellant's submissions – the fifth and seventh propositions

41 The appellant complains that absent a direction that "sudden" in the fifth proposition connotes the absence of premeditation, it was left to the jury to exclude provocation in the event that there was any interval between the provocative conduct and the loss of self-control. In the Court of Appeal, and in the appellant's written submissions in this Court, a second criticism was made of the fifth proposition. "Sudden", it was said, qualifies the deceased's provocative conduct under s 304 and has been wrongly transposed in the fifth proposition to qualify the accused's loss of self-control.

42 The complaint with the seventh proposition is that, read with the sixth proposition, it states an objective element of the defence that is additional to the threshold "ordinary person" test.

Provocation in s 304 of the Code

43 It will be recalled that s 304 provides:

> "When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only."

44 On the hearing of the appeal each of the parties submitted that "sudden provocation" under s 304 is to be understood by reference to the common law. This acceptance is fatal to the appellant's second criticism of the fifth proposition.

45 Keane JA in the Court of Appeal rejected the contention that "sudden" qualifies the deceased's provocative conduct. His Honour explained that the expression "sudden provocation" is "necessarily concerned with, and related to, the temporary loss of self-control excited by the provocation"[10]. This was a reference to the modern statements of the doctrine that speak of a "sudden and temporary loss of self-control"[11].

46 Section 304 of the Code is substantially in the form in which it was enacted[12]. Judges of the Supreme Court of Queensland have for many years interpreted the provision by reference to the common law[13]. This is because, as McTiernan ACJ and Menzies J explained in their joint reasons in *Kaporonovski v The Queen*, s 304 does not express the conditions upon which provocation is given legal effect: it is only by reference to the common law that one can determine the circumstances in which provocation operates to reduce a killing from murder to manslaughter under the provision[14].

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10 [2009] QCA 268 at [50].

11 *Parker v The Queen* (1963) 111 CLR 610 at 652 per Windeyer J; [1963] HCA 14; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 168 per Mason J; *R v Duffy* [1949] 1 All ER 932; *R v Ahluwalia* [1992] 4 All ER 889 at 894-896 per Lord Taylor of Gosforth CJ.

12 Section 304 of the Code was amended by *The Criminal Code and Offenders Probation and Parole Act Amendment Act* 1971 (Q) to remove the reference to wilful murder.

13 *R v Herlihy* [1956] St R Qd 18; *R v Young* [1957] St R Qd 599; *R v Johnson* [1964] Qd R 1; *R v Callope* [1965] Qd R 456; *Buttigieg* (1993) 69 A Crim R 21; *R v Pangilinan* [2001] 1 Qd R 56.

14 (1973) 133 CLR 209 at 219 per McTiernan ACJ and Menzies J; [1973] HCA 35. Note: the definition of provocation in s 268 of the *Criminal Code* (Q) does not apply to provocation for the purposes of s 304. See *Kaporonovski v The Queen* (1973) 133 CLR 209 at 218-219.

47 The use of the expression "sudden provocation" was intended to import well-established principles of the common law concerning the partial defence in the law of homicide[15]. Thus, the provision is to be understood as requiring that the provocation both involve conduct of the deceased and have the capacity to provoke an ordinary person (to form the intention to kill or to do grievous bodily harm and to act in the way the accused acted), although neither requirement is stated in terms. In interpreting the language of s 304 it is permissible to have regard to decisions expounding the concept of "sudden provocation" subsequent to the Code's enactment[16].

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15 Section 304 of the Code was taken directly from cl 312 of Sir Samuel Griffith's draft code. See Griffith, *Draft of a Code of Criminal Law*, (1897) at 123. The marginal note to cl 312 refers to ss 58 and 172 of the Criminal Code Bill (Bill 2) in *House of Commons Parliamentary Papers*, (1880), Vol 2 at 1. Section 172 of the Bill provided:

> "Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
>
> Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden and before there has been time for his passion to cool.
>
> …"

Section 172 of the Bill was based on cl 176 of the draft code appended to: United Kingdom, *Report of the Royal Commission Appointed to Consider the Law relating to Indictable Offences*, (1879) [C 2345] ("Report of the Royal Commission") at 100-101. The Commissioners regarded s 176 as reflecting the common law save for the inclusion of insults as capable of amounting to provocation: Report of the Royal Commission at 22, 24-25. Sir Samuel Griffith considered cl 312 of his draft to embody the common law: Griffith, *Draft of a Code of Criminal Law*, (1897) at xii.

16 *Boughey v The Queen* (1986) 161 CLR 10 at 30 per Brennan J; [1986] HCA 29; *R v LK* (2010) 84 ALJR 395 at 422 per Gummow, Hayne, Kiefel, Crennan and Bell JJ; (2010) 266 ALR 399; [2010] HCA 17.

Suddenness and time for passion to cool

48 The issues raised by the challenge to the fifth and seventh propositions make it necessary to say something about the related concepts of "suddenness" and of there being time "for passion to cool" in the development of the law of provocation. They can be traced to the emergence of the doctrine as the conceptual basis for reducing murder to voluntary manslaughter in the 17th century. Each has undergone development in the modern law. The history is detailed in *Parker v The Queen*, where it is noted that the doctrine was being worked out at a time when duelling was commonplace[17]. In the early cases and commentaries the quality of "suddenness" is used to describe both the incident and the accused's emotional response to it. Thus in 1666, when the judges of England met to consider aspects of the law of provocation (which were expected to arise in the trial of Lord Morley on a charge of homicide), they were agreed that if both parties "suddenly fight" and one kills the other the offence was manslaughter because "it is a combat betwixt two upon a sudden heat"[18]; whereas when two men argue and after such time as, "in reasonable intendment, their heat might be cooled" they fight (and one was killed) the offence was murder, because it was presumed "to be a deliberate act, and a premeditated revenge upon the first quarrel"[19].

49 The rationale for the development of the doctrine was the recognition that lesser moral responsibility attaches to an intentional killing done in a state of temporary loss of self-control caused by provocation than attaches to a deliberate killing "in cold blood"[20]. The related ideas of suddenness and the absence of cooling time were concerned with the absence of premeditation. At a time before the accused was competent to give evidence at trial the law presumed that a killing after a sufficient interval was not done under provocation. Blackstone said that if there were "sufficient cooling time for passion to subside and reason to interpose" and the accused thereafter kills, the offence is murder because it

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17 *Parker v The Queen* (1963) 111 CLR 610 at 625-628 per Dixon CJ, 650-652 per Windeyer J.

18 *The Trial of Lord Morley* (1666) 6 St Tr 770 at 771.

19 *The Trial of Lord Morley* (1666) 6 St Tr 770 at 771-772.

20 *Parker v The Queen* (1963) 111 CLR 610 at 651 per Windeyer J.

was "deliberate revenge and not heat of blood"[21]. East said of the interval between the provocation and the retaliation that it "aids very much the presumption of malice in law; for that is in some cases evidence in itself of deliberation"[22]. East's use of the expression "sudden provocation" was to connote the absence of premeditation[23].

50 The sixth edition of *Russell on Crimes and Misdemeanours*, current at the time Sir Samuel Griffith was writing his draft code, stated the law of provocation in terms that were drawn from East[24]. The language of s 304 reflects the way provocation was explained to the jury in *R v Hayward*[25]. Chief Justice Tindal directed them to consider "whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given"[26]. In contemporary explanations of the doctrine it has been common to speak of the requirement that the provocative conduct induce in the accused a "sudden and temporary loss of self-control".

51 The concepts of suddenness and temporariness are explained by McHugh J, dissenting in the result, in *Masciantonio v The Queen*[27]:

> "The concept of suddenness negatived any question of premeditation. The concept of temporariness ensured that an intentional killing would be excused as manslaughter only where it was committed while the killer's capacity for self-control had been overwhelmed by the desire for retribution that often arises when an interest or relationship that a person

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21 Blackstone, *Commentaries on the Laws of England*, 15th ed (1809), bk 4, c 14 at 190-191.

22 East, *Pleas of the Crown*, (1803), vol 1 at 252-253.

23 East, *Pleas of the Crown*, (1803), vol 1 at 241.

24 Russell, *A Treatise on Crimes and Misdemeanours*, 6th ed (1896), vol 3 at 54.

25 The point is made by Gleeson CJ in *Chhay* (1994) 72 A Crim R 1 at 8 citing *R v Hayward* (1833) 6 Car & P 157 [172 ER 1188].

26 *R v Hayward* (1833) 6 Car & P 157 at 159 [172 ER 1188 at 1189].

27 (1995) 183 CLR 58 at 80.

values is harmed or threatened by the conduct of another person [reference omitted]."

52 Keane JA was correct to say that the expression "sudden provocation" in s 304 is concerned with the temporary loss of self-control excited by the provocation.

The fifth proposition

53 The difficulty with the fifth proposition is that it was susceptible of being understood as requiring that the loss of self-control immediately follow the provocation. The directions given in answer to the jury's question referred to meanings of the word "sudden" which included "unpremeditated". However, other meanings of "sudden" including "immediate" were given. It was left to the jury to decide what "sudden" meant when applied to the appellant's loss of self control.

54 The law requires that the killing occur while the accused is in a state of loss of self-control that is *caused* by the provocative conduct, but this does not necessitate that provocation is excluded in the event that there is any interval between the provocative conduct and the accused's emotional response to it[28]. The fifth proposition was misleading in the absence of further explanation.

55 The respondent submitted it had been necessary to direct the jury in terms of the fifth proposition in this case. This is because the appellant's statements and conduct in the earlier part of the morning had given rise "to a very real suspicion" that his intention to kill or to do grievous bodily harm was the product of brooding anger and not of provocation. For this reason, it had been necessary to guard against the jury wrongly concluding that an unprovoked intentional killing in anger might be reduced to manslaughter. It is sufficient to note that the fifth proposition hardly served to make the distinction clear. Reference has already been made to the care with which it was necessary to direct the jury as to the respondent's "slow boil" submission.

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28 *Parker v The Queen* (1964) 111 CLR 665 at 679; [1964] AC 1369; *Chhay* (1994) 72 A Crim R 1 at 10 per Gleeson CJ; *R v Ahluwalia* [1992] 4 All ER 889 at 896 per Lord Taylor of Gosforth CJ.

The seventh proposition

56 The seventh proposition assumes the loss of self-control and directs attention, objectively, to whether there had been time for the loss to abate. The respondent submits that it is an accurate statement of the law as it is explained in the joint reasons in *Masciantonio v The Queen*[29]:

> "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 and to act in the way in which the accused did. 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*." (emphasis added)

57 The alternative submission, which the respondent developed in oral argument, is that, regardless of whether the common law requires as a discrete, objective, element that there not have been time for the accused to regain his composure, this is a requirement of the partial defence under the Code. The respondent submits that the seventh proposition is a statement of the concluding words of s 304 without the metaphor. It cannot be an error, so it is said, to direct a jury in the terms of the statute. It is a submission which assumes that the concluding words of s 304 commencing "and before there is time" are the statement of a condition that is separate from the condition stated in the preceding phrase "in the heat of passion caused by sudden provocation".

58 The language of s 304 reflects statements of the doctrine which pre-date the emergence of the "ordinary person" objective test. This threshold objective test was not part of the law at the time Tindal CJ formulated his classic direction in *Hayward*. Thirty-six years later the "reasonable man" had made his appearance in this area of the law. Keating J's directions in *R v Welsh* required the jury to consider whether the provocation was such that a reasonable man might be induced in the anger of the moment to commit the act[30]. By 1914 the

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29 *Masciantonio v The Queen* (1995) 183 CLR 58 at 66 per Brennan, Deane, Dawson and Gaudron JJ.

30 (1869) 11 Cox CC 336 at 338.

"reasonable man" test was accepted as being an essential requirement for the operation of the partial defence[31].

59 In *Mancini v Director of Public Prosecutions*, Viscount Simon LC explained the "reasonable man" test as serving to ensure that "an unusually excitable or pugnacious individual" could not rely on provocation which would not have led an ordinary person to act as he did[32]. In applying the test, his Lordship said that it was important to consider whether a sufficient interval had elapsed since the provocation to allow a reasonable man time to cool[33]. "Cooling time", which in the early development of the doctrine operated presumptively to exclude provocation (and in this way to keep the doctrine within bounds), had come to be a factor bearing on the determination of the threshold objective "reasonable man" test.

60 In *Stingel v The Queen* this Court approved Viscount Simon's statement in *Holmes v Director of Public Prosecutions* that the provocation must have the capacity to provoke an ordinary person "to the degree and method and continuance" of the violence causing death[34]. "Continuance" relates to the duration of the loss of self-control. It is the issue addressed by the seventh proposition. The significance of the inclusion of "method" and "continuance" in Viscount Simon's formulation of the ordinary person test was considered by this Court in *Masciantonio v The Queen*[35]. The question raised by that appeal was whether the trial judge had been right to withdraw provocation with respect to the "second stage" of the fatal event. The majority, referring to *Johnson v The Queen*, observed that it is now well established that the question of whether the retaliation is proportionate to the provocation has been absorbed into the application of the ordinary person test[36]. Their Honours said that the question of

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31 *R v Lesbini* [1914] 3 KB 1116 at 1120.

32 [1942] AC 1 at 9.

33 *Mancini v Director of Public Prosecutions* [1942] AC 1 at 9.

34 *Stingel v The Queen* (1990) 171 CLR 312 at 325, citing *Holmes v the Director of Public Prosecutions* [1946] AC 588 at 597 per Viscount Simon.

35 (1995) 183 CLR 58 at 69-70 per Brennan, Deane, Dawson and Gaudron JJ.

36 *Masciantonio v The Queen* (1995) 183 CLR 58 at 67 per Brennan, Deane, Dawson and Gaudron JJ citing *Johnson v The Queen* (1976) 136 CLR 619 at 639, 640 per Barwick CJ, 659 per Gibbs J; [1976] HCA 44.

whether an accused had regained self-control was not answered by reference to the ordinary person. It was a question to be determined by reference to the conduct of the accused and to the common experience of human affairs[37].

61 The point being emphasised in the joint reasons in *Masciantonio* was that the objective test concerns the nature and extent of the reaction which might be caused in an ordinary person rather than its duration or precise physical form[38]. The question of whether an ordinary person could have formed the intention to kill or to do grievous bodily harm is of greater significance than the question of whether an ordinary person could adopt the means adopted by the accused to carry out the intention. So, too, the duration of the loss of self-control is of lesser significance than the capacity of the provocation to induce in the ordinary person the requisite intention. The determination of whether the prosecution has proved that an ordinary person, provoked to the degree that the accused was provoked, could not have formed the intention to kill or do grievous bodily harm and to have acted as the appellant acted does not require the jury to hypothesise the time that an ordinary person might have taken to regain composure.

62 The circumstance that an accused had time to reflect before reacting to provocation may show that the later killing was an intentional killing carried out from motives of revenge or punishment[39]. The interval between the deceased's provocative conduct and the killing may tend to show that the accused had regained control at the time of the killing[40]. These are matters bearing on the determination of whether the killing was in fact caused by provocation and done at a time when the accused was in a state of temporary loss of self-control.

63 In *Parker v The Queen* Windeyer J, speaking of the common law as well as the New South Wales statute under consideration, disavowed that the "first beginning of emotion [the loss of self-control] must not be earlier than just before

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37 *Masciantonio v The Queen* (1995) 183 CLR 58 at 69 per Brennan, Deane, Dawson and Gaudron JJ.

38 *Masciantonio v The Queen* (1995) 183 CLR 58 at 69-70 per Brennan, Deane, Dawson and Gaudron JJ.

39 *Moffa v The Queen* (1977) 138 CLR 601 at 611 per Barwick CJ; [1977] HCA 14; *R v Ahluwalia* (1992) 4 All ER 889 at 895-896 per Lord Taylor of Gosforth CJ.

40 *R v Ahluwalia* (1992) 4 All ER 889 at 895 per Lord Taylor of Gosforth CJ.

the fatal act"[41]. His Honour cautioned against interpreting the words of the New South Wales statute as if it were stating several matters to be considered independently of one another[42]. He said that all of the circumstances were to be considered and that general statements about passion having time to cool had little place in the circumstances of that case[43]. His Honour's dissenting judgment (and that of Dixon CJ) was upheld in the Privy Council. Their Lordships agreed that it was an error to have construed the provision of the New South Wales statute as stating several matters to be considered separately and independently of one another[44].

64 Reference has been made to *Johnson v The Queen*, in which this Court rejected proportionality as constituting a discrete element of the partial defence[45]. In that case Barwick CJ explained a statement by Lord Devlin in *Lee Chun-Chuen v The Queen*, that there are three main elements of provocation, in this way[46]:

> "His Lordship did not set out separate elements to be considered disjointly in some temporal order. On the contrary, he emphasized the interaction of the several matters, which might be called considerations, to be in mind in

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41 *Parker v The Queen* (1963) 111 CLR 610 at 662.

42 *Parker v The Queen* (1963) 111 CLR 610 at 658. The reference to statute was to s 23(2)(c) of the *Crimes Act* 1900 (NSW) which, at the time, required "[t]hat the act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life".

43 *Parker v The Queen* (1963) 111 CLR 610 at 663.

44 *Parker v The Queen* (1964) 111 CLR 665 at 680.

45 *Johnson v The Queen* (1976) 136 CLR 619 at 636-637. At issue in *Johnson* was provocation as then provided by s 23(2) of the *Crimes Act* 1900 (NSW). The majority concluded that proportionality was not a discrete element of provocation either under the statute or under the common law: see at 636-637, 642 per Barwick CJ, 657-658 per Gibbs J, 660 per Mason J, 666 per Jacobs J; cf at 671 per Murphy J.

46 *Johnson v The Queen* (1976) 136 CLR 619 at 637, referring to *Lee Chun-Chuen v The Queen* [1963] AC 220 at 231-232.

deciding whether the provocation was, or could in law be permitted to be, operative in reducing the crime to manslaughter."

65 The words of s 304 that require that the act causing death is done "in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool" are the expression of a composite concept incorporating that the provocation is such as could cause an ordinary person to lose self-control and to act in a manner which encompasses the accused's actions. It is the last-mentioned objective requirement that keeps provocation within bounds. The concluding words beginning "and before" are not the statement of a discrete element of the partial defence.

66 The jury were required to determine whether the prosecution had proved beyond reasonable doubt that the appellant did not kill the deceased while in a state of loss of self-control induced by the deceased's provocative conduct, being conduct that had the capacity to cause an ordinary person to lose self-control and form the intention to kill or to do grievous bodily harm and to act as the appellant acted. If they were not so satisfied it was not open to proceed to proposition seven and to exclude provocation upon a view that, objectively, there had been time for the appellant's loss of self-control to abate.

67 In every case in which provocation is raised it is necessary for the trial judge to explain the concept and the ways in which the prosecution may eliminate it. Model directions, when appropriately adapted to the case, may assist trial judges in this task, but model directions must not be used in a way that distracts attention from the central task of the judge in instructing the jury. That task is to identify the real issues in the case and to relate the directions of law to those issues[47]. The seven propositions identified by the Court of Appeal in the earlier appeal in this matter were not intended to be used as a template for jury directions. That they came to be included in the Bench Book may explain their use by the trial judge and trial counsel's acquiescence in that course. But, as these reasons explain, their use in this case misdirected the jury.

68 The difficulty with the fifth proposition, stated as a discrete element, was highlighted by the jury's question. The appellant's counsel did not ask the trial judge to explain that "sudden" in this context signified the absence of premeditation. However, there is no reason to view his failure to do so as

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47 *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ; [1952] HCA 3.

reflecting a decision thereby to obtain a perceived forensic advantage for the appellant.

The respondent's submissions – miscarriage of justice

69 The respondent submitted that whatever criticisms might be levelled at the sevenfold test, its use had not occasioned a miscarriage of justice in this case. There was no danger, so it was said, that the jury might have excluded provocation because they were satisfied that the appellant's loss of self-control had not been sudden or that objectively there had been time for the loss of self-control to abate. This was because on any view of the facts the interval between Ms Bray's departure and the killing was short. Whatever had occurred between the appellant and the deceased had happened rapidly and the appellant's response had been "immediate". These submissions do not come to grips with the way the prosecution's case was put at trial. The jury were invited to find that the appellant's loss of self-control was not "sudden" because there had been an interval during which the deceased was in the bathroom, because the appellant had the time to wipe his hand on the wall (leaving the blood-stained handprint) and because the appellant had time to prise the rock from the wall. The same factual matters appear to have been relied on in support of the submission that the prosecution had excluded provocation because there had been time for the appellant's loss of self-control to abate.

70 The directions wrongly invited the jury to exclude that the appellant was acting under provocation if the jury found that there had been any interval between the deceased's provocative conduct and the act causing death. In the light of the way the parties had put their cases it cannot be said that the misdirection did not deprive the appellant of a chance fairly open to him of being acquitted of murder. It follows that the appeal must be allowed.

71 The evidence was capable of eliminating that the killing was done under provocation. This includes that on either version of the events leading to the killing it was open to the jury to find that provocation had been negatived by the application of the threshold ordinary person test. For these reasons the consequential order should be that a new trial be held.