HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, KEANE AND NETTLE JJ

MICHAEL JOSEPH LINDSAY APPELLANT

AND

THE QUEEN RESPONDENT

Lindsay v The Queen
[2015] HCA 16
6 May 2015
A24/2014

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of South Australia made on 3 June 2014 and, in its place, order that:*

   (a) the appeal be allowed;

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

   (c) a new trial be had.

On appeal from the Supreme Court of South Australia

Representation

M E Shaw QC with B J Doyle for the appellant (instructed by North East Lawyers)

M G Hinton QC, Solicitor-General for the State of South Australia with F J McDonald for the respondent (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

Lindsay v The Queen

Criminal law – Murder – Defences – Provocation – Where male Caucasian deceased made sexual advances towards male Aboriginal appellant at appellant's home in presence of appellant's de facto wife and family – Where open to jury to find that appellant killed deceased having lost self-control following advances – Where provocation left to jury at trial and appellant convicted of murder – Where Court of Criminal Appeal ("CCA") dismissed appeal against conviction because it concluded provocation should not have been left to jury as evidence, taken at highest, could not satisfy objective limb of provocation – Whether CCA erred in so concluding – Relevance of contemporary attitudes to sexual relations.

Criminal law – Appeal – Appeal against conviction – Application of proviso – CCA dismissed appeal by applying proviso to s 353(1) of *Criminal Law Consolidation Act* 1935 (SA) – Where CCA not invited to apply proviso by prosecution – Whether CCA erred in invoking and applying proviso of its own motion.

Words and phrases – "minimum powers of self-control", "ordinary person", "partial defence".

Criminal Law Consolidation Act 1935 (SA), s 353(1).

1 FRENCH CJ, KIEFEL, BELL AND KEANE JJ. Michael Joseph Lindsay was tried before the Supreme Court of South Australia (Sulan J) on an information that charged him with the murder on 1 April 2011 of Andrew Roger Negre. The jury were directed that it was incumbent on the prosecution to prove that the killing of the deceased was unprovoked. Lindsay was convicted of murder.

2 Lindsay appealed against his conviction to the Court of Criminal Appeal of the Supreme Court of South Australia (Kourakis CJ, Gray and Peek JJ) on grounds which challenged the accuracy and sufficiency of the directions given to the jury on the issue of provocation. The majority (Peek J, with whom Kourakis CJ agreed) found that the directions were flawed in a number of respects and that the cumulative effect of these flaws constituted a miscarriage of justice[1]. However, their Honours were of the "firm view" that in 21st century Australia the evidence taken at its highest in favour of Lindsay was such that no reasonable jury could fail to find that an ordinary person could not have so far lost his self-control as to attack the deceased in the manner that Lindsay did[2]. It followed that the trial judge had been wrong to direct the jury on the alternative verdict of manslaughter based on provocation. The Court of Criminal Appeal majority concluded that, in the circumstances, the erroneous directions had not occasioned a substantial miscarriage of justice and the appeal was dismissed under the proviso to s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) ("the CLC Act")[3].

3 On 14 November 2014, French CJ and Gageler J granted Lindsay special leave to appeal from the order of the Court of Criminal Appeal. The appeal is brought on three grounds: first, that the trial judge was correct to leave provocation to the jury; secondly, that the Court of Criminal Appeal's reasons for concluding the contrary wrongly took into account unidentified academic literature; and thirdly, that in the absence of an application by the prosecution it was wrong to apply the proviso.

4 For the reasons to be given, the trial judge did not err in leaving provocation for the jury's consideration. In this Court, the prosecution does not

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1 *R v Lindsay* (2014) 119 SASR 320 at 378 [225] per Peek J (Kourakis CJ agreeing at 323 [1]).

2 *R v Lindsay* (2014) 119 SASR 320 at 380 [236] per Peek J (Kourakis CJ agreeing at 323 [1]).

3 *R v Lindsay* (2014) 119 SASR 320 at 382-383 [249]-[250] per Peek J (Kourakis CJ agreeing at 323 [1]).

maintain that the directions on provocation given to the jury were sufficient. It cannot be concluded that, if the jury had been correctly instructed on the issue of provocation, the appellant would inevitably have been convicted of murder. It follows that the appeal must be allowed[4]. Neither party submitted that, in this event, this Court should substitute a verdict of manslaughter. The appropriate consequential order is to direct that a new trial be had.

The evidence at trial

5 The appellant, an Aboriginal man, was aged 28 years or thereabouts at the date of the offence. On the evening of 31 March 2011, he, his de facto wife, Melissa, and a friend, Nicholas Hayes, visited the Hallett Cove Tavern. There they encountered the deceased, a Caucasian male who was previously unknown to them. The deceased had been drinking at the Tavern with his partner, Fiona Ninos. The two had quarrelled and she had gone home without him. The appellant and his party and the deceased all drank together and, in the early hours of 1 April 2011, they went to the appellant's Hallett Cove home to continue drinking.

6 The appellant and Melissa had been living together since before the birth of their son, Ethan, who was then nine years old. They shared their home with two boarders: Luke Hutchings and Brigette Mildwaters. When the group arrived at the Hallett Cove home on the morning of 1 April 2011, Luke and Brigette were there, as were the appellant's two younger sisters, Ashleigh and Tahlia, and his cousin, Michael. The group, with the exception of Michael, who was asleep, commenced drinking together.

7 At around 2:00am, Fiona Ninos rang the deceased's mobile telephone. The appellant spoke to her and invited her to join them. Fiona took up the invitation. After her arrival, the appellant showed her around the home. The deceased was seated at the kitchen bench where he was socialising with the group. Fiona stayed for around 45 minutes to an hour. During this time she did not see any aggressive behaviour. The mood of the group was good, they were drinking pre-mixed cans of bourbon and appeared happy and relaxed. Nonetheless, Fiona was annoyed with the deceased's decision to stay at the Tavern and to go out drinking with strangers and she told him so in heated terms.

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4 *Parker v The Queen* (1963) 111 CLR 610 at 647 per Windeyer J; [1963] HCA 14; *Green v The Queen* (1997) 191 CLR 334 at 343-344 per Brennan CJ; [1997] HCA 50; *Pollock v The Queen* (2010) 242 CLR 233 at 252 [70]; [2010] HCA 35.

The appellant suggested that the deceased could stay the night and he offered to bring him home in the morning. Fiona caught a taxi home.

8 Following Fiona's departure, there were two incidents, which together gave rise to the trial judge's decision to leave provocation for the jury's consideration. The first incident took place when the group was outside on the patio. The appellant was seated and the deceased straddled him, moving his hips backwards and forwards in a sexually suggestive manner. The appellant told the deceased that he was not gay and not to do "stuff like that" or he would hit him. Melissa also remonstrated with the deceased. The deceased apologised and the appellant told him "That's okay, just don't go doing stuff like that".

9 Peek J summarised the evidence of the patio incident, observing that, whether the deceased had intended it or not, there was substantial evidence that the incident had caused upset not only to the appellant but, importantly, also to his de facto wife in his presence[5]. His Honour emphasised that the deceased had been told very firmly not to do it again[6].

10 The second incident occurred in the family room. The deceased was tired and the appellant told him that he could sleep in the spare room. The deceased said that he did not want to sleep up there by himself; he wanted the appellant in there with him. He said that he would pay the appellant for sex. The appellant replied "What did you say cunt?". The deceased repeated his proposition, offering to pay the appellant several hundred dollars[7]. The appellant punched the deceased, who fell to the floor. The appellant kicked and punched the deceased as he lay on the floor. At some stage, the appellant took hold of a knife with which he repeatedly stabbed the deceased.

11 The deceased sustained multiple penetrating stab wounds. One group of wounds was in the right arm and chest. A second group of wounds was located over the abdomen. The stab wounds were associated with two significant injuries to the aorta. One completely severed the aorta; another caused a half

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5 *R v Lindsay* (2014) 119 SASR 320 at 350 [107] per Peek J (Kourakis CJ agreeing at 323 [1]).

6 *R v Lindsay* (2014) 119 SASR 320 at 350 [107] per Peek J (Kourakis CJ agreeing at 323 [1]).

7 *R v Lindsay* (2014) 119 SASR 320 at 350 [110] and n 31 per Peek J (Kourakis CJ agreeing at 323 [1]).

thickness cut to it. These two wounds caused massive blood loss, leading to unconsciousness within 20 to 30 seconds and death within two to three minutes[8].

12 The appellant did not give evidence at the trial. It was his case that he had not been present at the time of the fatal assault.

13 It is common ground that there was evidence upon which a reasonable jury might consider it possible that the appellant was provoked by the deceased's conduct and that he lost his self-control and carried out the fatal assault before regaining his composure. In light of the issues raised by the appeal, it is unnecessary to refer to other parts of the evidence that may have placed the events surrounding the killing in a different light.

14 Before closing addresses, the trial judge invited counsel's submissions on whether provocation should be left for the jury's consideration. Trial counsel submitted that provocation was "fairly and squarely there and it really should be left to the jury". The prosecutor acknowledged that there was evidence of loss of self-control and, in light of the decision of this Court in *Green v The Queen*[9], the prosecutor accepted that provocation was raised and that it was incumbent upon the prosecution to negative it. The addresses of each counsel were directed in substantial measure to the issue of provocation.

Provocation

15 Provocation at common law operates to reduce what would otherwise be murder to manslaughter. Although it is common to describe the doctrine as a "partial defence", the true position is that the unlawful intentional killing of another under provocation is not murder[10]. The malice that is implicit in the intention to kill or to do grievous bodily harm is denied in the case of a killing done under provocation[11]. There are two conditions for the operation of the doctrine: first, the provocation must be such that it is capable of causing an ordinary person to lose self-control and act in the way the accused did (the

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8 *R v Lindsay* (2014) 119 SASR 320 at 327 [18] per Gray J.

9 (1997) 191 CLR 334.

10 *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 482 per Viscount Sankey LC.

11 *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 482 per Viscount Sankey LC.

objective limb); and second, the provocation must actually cause the accused to lose self-control and the killing must take place while the accused is deprived of his or her self-control (the subjective limb)[12]. The focus of the objective limb is upon the capacity of the provocation to cause an ordinary person to lose self-control and form the intention to kill or to do grievous bodily harm[13]. Where the evidence raises the issue, the prosecution must prove that the killing was not done under provocation. The prosecution may do so by negativing beyond reasonable doubt either of the limbs of the doctrine.

16 Where provocation is raised by the evidence, the determination of whether it has been negatived is for the jury. Whether the subjective limb is negatived is a question of fact. Whether the objective limb is satisfied is a question of opinion[14] or, to adopt Glanville Williams' classification, it is a question of "evaluative fact"[15]. The threshold question of law is whether there is material in the evidence which sufficiently raises the issue to leave the partial defence for the jury's consideration. The determination of the threshold question requires the trial judge (and the appellate court) to consider the sufficiency of the evidence to allow that an ordinary person provoked to the degree the accused was provoked might form the intention to kill or to do grievous bodily harm and act upon that intention, as the accused did, so as to give effect to it[16]. The respective roles of judge and jury in the latter determination is the issue raised by the first ground of the appeal.

17 In the Court of Criminal Appeal and in this Court, the appellant made a large submission: where there is evidence that is capable of supporting the subjective limb of the partial defence, no threshold question arises of the capacity of the evidence to support the objective limb. The appellant submitted that "the ordinary powers of self-control are to be determined by a jury, not by a court of

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12 *Masciantonio v The Queen* (1995) 183 CLR 58 at 66 per Brennan, Deane, Dawson and Gaudron JJ; [1995] HCA 67.

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

14 *Phillips v The Queen* [1969] 2 AC 130 at 137 per Lord Diplock for the Judicial Committee.

15 Williams, "Law and Fact", [1976] *Criminal Law Review* 472 at 472.

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

appeal"[17] and that only the jury may decide whether changes in the conditions and attitudes of society are such as to require the conclusion that the objective limb is negatived[18].

18 The submission is reminiscent of the unsuccessful submission urged on behalf of the appellant in *Holmes v Director of Public Prosecutions* that "[i]t is safer to trust to the good sense of ordinary reasonable men than to attempt to ... exclud[e] certain matters as matters of law"[19]. It will be recalled that the House of Lords in *Holmes* held that as a matter of law words alone, save in circumstances of a most extreme and exceptional character, are not capable of constituting provocation such as to reduce murder to manslaughter[20]. In so concluding, their Lordships discountenanced a dictum pronounced a little more than 70 years earlier by Blackburn J, who allowed that a sudden and unexpected confession of adultery might support the partial defence[21]. Viscount Simon, with whose reasons the other members of the House agreed, held that, in light of the changed conditions of society, Blackburn J's dictum was no longer good law[22]. His Lordship considered that as society advances the law "ought to call for a higher measure of self-control in all cases"[23]. It followed that the trial judge had been correct to direct the jury that it was not open to return a verdict of manslaughter based on provocation[24].

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17 [2015] HCATrans 052 at 406-415.

18 [2015] HCATrans 052 at 415.

19 [1946] AC 588 at 592.

20 [1946] AC 588 at 600 per Viscount Simon (Lords Porter, Simonds and du Parcq concurring at 601).

21 [1946] AC 588 at 599-600 per Viscount Simon (Lords Porter, Simonds and du Parcq concurring at 601), citing *R v Rothwell* (1871) 12 Cox C C 145 at 147.

22 [1946] AC 588 at 600 per Viscount Simon (Lords Porter, Simonds and du Parcq concurring at 601).

23 [1946] AC 588 at 601 per Viscount Simon (Lords Porter, Simonds and du Parcq concurring at 601).

24 Dissatisfaction with the rigidity of the common law stated in *Holmes* led to statutory reform in England by which the question of whether the provocation was enough to make a reasonable man do as the accused did was exclusively reserved

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19 This Court considered evidence of a sudden and unexpected confession of adultery together with the deceased's other conduct in *Moffa v The Queen*[25]. Each of the Justices, save Murphy J, proceeded upon acceptance of the common law of provocation stated in *Holmes*[26]. Barwick CJ concluded that the circumstances viewed in their entirety did not consist solely of words[27]. It followed that the court was not authorised to take the issue from the jury unless it was quite clear that no reasonable person could possibly conclude, in the situation viewed most favourably from the standpoint of the accused, that no ordinary man could have so far lost his self-control as to form an intent to at least do grievous bodily harm to his wife[28]. Whether it *should* be so concluded was a matter exclusively for the jury regardless of the court's view of the matter[29]. In this connection, his Honour observed that the jury is "credited with a knowledge of how the ordinary man would react in such a situation"[30]. His Honour noted, with respect to the role of the court in deciding the threshold question, that "there are limits to the control of such a factual situation which the court can

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for the jury: *Homicide Act* 1957 (UK), s 3. The position obtaining before the enactment of s 3 of the *Homicide Act* has since been restored under the new partial defence of "loss of control": *Coroners and Justice Act* 2009 (UK), ss 54, 55 and 56. This is in line with the Law Commission's recommendation that restoration of the power to the trial judge, coupled with the supervision of the appellate courts, "will enable the law to set boundaries in a reasoned, sensitive and nuanced way": The Law Commission, *Partial Defences to Murder: Final Report*, 6 August 2004 at [3.142].

25 (1977) 138 CLR 601; [1977] HCA 14.

26 (1977) 138 CLR 601 at 605 per Barwick CJ, 613 per Gibbs J, 619 per Stephen J, 620 per Mason J.

27 (1977) 138 CLR 601 at 605.

28 (1977) 138 CLR 601 at 607 per Barwick CJ.

29 (1977) 138 CLR 601 at 607 per Barwick CJ.

30 (1977) 138 CLR 601 at 606.

exercise"[31]. Stephen and Mason JJ in separate reasons approached the issue along much the same lines[32].

20 The analysis of the majority in *Moffa* was directed to findings open to a reasonable jury taking into account the entirety of the circumstances. It was not an analysis directed to whether in the latter part of the 20th century the law should or should not countenance that a wife's revelation of her adultery and taunts of her husband's sexual inadequacy might support the reduction of murder to manslaughter.

21 Gibbs J, in dissent, considered that, in light of the decision in *Holmes*, the evidence in *Moffa* did not raise an issue fit for the jury's consideration[33]. His Honour said[34]:

> "The question has to be decided in the light of contemporary conditions and attitudes, for what might be provocative in one age might be regarded with comparative equanimity in another, and a greater measure of self-control is expected as society develops."

22 Murphy J agreed with the other members of the majority that to have taken away the issue of provocation in *Moffa* would in the circumstances have been to usurp the function of the jury[35]. His Honour went further, proposing that the objective limb of the doctrine has no place in a rational system of jurisprudence and should be discarded[36]. His Honour's reasons contain a collection of the then current academic criticism of the objective limb of the doctrine[37]. These included the view that the court had proved too ready to exclude from the jury evidence of provocation which it regarded as insufficient to

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31 (1977) 138 CLR 601 at 607.

32 (1977) 138 CLR 601 at 618-619 per Stephen J, 622 per Mason J.

33 (1977) 138 CLR 601 at 616.

34 (1977) 138 CLR 601 at 616-617.

35 (1977) 138 CLR 601 at 627.

36 (1977) 138 CLR 601 at 626.

37 (1977) 138 CLR 601 at 626-627.

reduce murder to manslaughter[38]. Sir Patrick Devlin writing extra-curially had earlier instanced *Holmes* as "an interesting modern example of the way in which the courts are still prepared to encroach on the province of the jury for practical reasons"[39]. The practical justification to which he referred was that a jury might too easily accept a suggestion of provocation out of mercy or sentiment[40]. A similar distrust of the jury informs some of the more recent criticism of the partial defence of provocation as lending itself to verdicts that reflect gender or heterosexist bias[41].

23 The widespread criticism of the partial defence of provocation has led to its abolition or modification in all of the Australian jurisdictions, save South Australia[42]. This appeal is concerned with the common law of provocation, which remains the law in South Australia.

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38 (1977) 138 CLR 601 at 627 per Murphy J, citing Brown, "The 'Ordinary Man' in Provocation: Anglo-Saxon Attitudes and 'Unreasonable Non-Englishmen'", (1964) 13 *International and Comparative Law Quarterly* 203 at 206.

39 Devlin, *Trial by Jury*, (1956) at 87.

40 Devlin, *Trial by Jury*, (1956) at 87.

41 Howe, "*Green v The Queen* – The Provocation Defence: Finally Provoking Its Own Demise?", (1998) 22 *Melbourne University Law Review* 466; Oliver, "Provocation and Non-violent Homosexual Advances", (1999) 63 *Journal of Criminal Law* 586; Bradfield, "Provocation and Non-violent Homosexual Advances: Lessons from Australia", (2001) 65 *Journal of Criminal Law* 76; De Pasquale, "Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy", (2002) 26 *Melbourne University Law Review* 110; Gray, "Provocation and the Homosexual Advance Defense in Australia and the United States: Law Out of Step with Community Values", (2010) 3(1) *The Crit: A Critical Legal Studies Journal* 53; Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective*, (2014).

42 Tasmania abolished the partial defence of provocation in 2003: *Criminal Code Amendment (Abolition of Defence of Provocation) Act* 2003 (Tas), s 4, repealing *Criminal Code* (Tas), s 160. In 2004, the Australian Capital Territory enacted provisions excluding non-violent sexual advances from alone forming the basis of a defence of provocation: *Sexuality Discrimination Legislation Amendment Act* 2004 (ACT), Sched 2, item 2.1, inserting *Crimes Act* 1900 (ACT), s 13(2A). In 2005, Victoria abolished the partial defence and introduced a new offence of defensive

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24 The rationale for the requirement that the court determine as a matter of law whether evidence is capable of constituting provocation was identified by Dixon J in *Packett v The King* as the need to apply an overriding or controlling standard for the mitigation allowed by law[43]. The statement, made with respect to provocation under the *Criminal Code* (Tas), which provided that "the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law"[44], has been accepted as a statement of the common law of provocation in Australia[45].

25 In *Stingel v The Queen*, this Court affirmed that the function of the ordinary person test is to provide "an objective and uniform standard of the

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homicide: *Crimes (Homicide) Act* 2005 (Vic), ss 3, 4 and 6, inserting *Crimes Act* 1958 (Vic), ss 3B, 4 and 9AD. That offence was itself abolished in 2014: *Crimes Amendment (Abolition of Defensive Homicide) Act* 2014 (Vic), s 3. In 2006, the Northern Territory adopted the same approach as the Australian Capital Territory: *Criminal Reform Amendment Act (No 2)* 2006 (NT), s 17, inserting *Criminal Code* (NT), s 158(5). In 2008, Western Australia abolished provocation as a partial defence to murder, but retained it for other offences: *Criminal Law Amendment (Homicide) Act* 2008 (WA), s 12, repealing *Criminal Code* (WA), s 281. In 2011, Queensland restricted the scope of the partial defence in circumstances consisting of words alone or involving domestic relationships: *Criminal Code and Other Legislation Amendment Act* 2011 (Q), s 5, amending *Criminal Code* (Q), s 304. In 2014, New South Wales abolished the partial defence of provocation and introduced a partial defence of extreme provocation: *Crimes Amendment (Provocation) Act* 2014 (NSW), Sched 1, substituting *Crimes Act* 1900 (NSW), s 23. In 2013, the Criminal Law Consolidation (Provocation) Amendment Bill 2013 (SA), which provided that conduct of a sexual nature by a person did not constitute provocation merely because the person was the same sex as the defendant, was introduced in the Legislative Council of the Parliament of South Australia by the Hon Tammy Franks. It was subsequently withdrawn and referred to the Legislative Review Committee, the majority of whose members ultimately resolved not to support the Bill's passage, on a view that the decision in *R v Lindsay* (2014) 119 SASR 320 rendered the reform unnecessary: *Report of the Legislative Review Committee into the Partial Defence of Provocation*, (2014) at [8.1].

43 (1937) 58 CLR 190 at 217; [1937] HCA 53.

44 *Criminal Code* (Tas), s 160(3), since repealed by *Criminal Code Amendment (Abolition of Defence of Provocation) Act* 2003 (Tas), s 4.

45 *Parker v The Queen* (1963) 111 CLR 610 at 660 per Windeyer J.

minimum powers of self-control" which must be observed before provocation may reduce what would otherwise be murder to manslaughter[46]. In this connection, the Court approved Gibbs J's statement respecting the relevance of contemporary conditions and attitudes to that determination[47]. *Masciantonio v The Queen* confirms that the statements in *Stingel*, while made with respect to the *Criminal Code* (Tas), are equally applicable to the common law of provocation in Australia[48].

26 Under the common law of provocation, the trial judge and the appellate court have the task of fixing the boundaries of the minimum powers of self-control that must be observed before it is open to the jury to find that murder is reduced to manslaughter by reason of provocation. The question for the trial judge and the appellate court is the same: whether "on the version of events most favourable to the accused which is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense"[49]. The determination of the question by the appellate court involves somewhat greater exactitude than the determination made by the trial judge. This reflects, as a matter of practicality, the reluctance of trial judges to withdraw the issue from the jury and the tendency to "tilt the balance" in favour of the accused[50].

27 In *Stingel*, the Court disavowed that the threshold test blurs the functions of judge and jury: within the area in which it is open to find that the prosecution has failed to negative provocation, the question is for the jury alone[51]. Importantly, the Court emphasised the "limited scope" of the threshold question

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46 (1990) 171 CLR 312 at 327; [1990] HCA 61.

47 (1990) 171 CLR 312 at 327, citing *Moffa v The Queen* (1977) 138 CLR 601 at 616-617.

48 (1995) 183 CLR 58 at 66 per Brennan, Deane, Dawson and Gaudron JJ.

49 *Masciantonio v The Queen* (1995) 183 CLR 58 at 67-68 per Brennan, Deane, Dawson and Gaudron JJ, citing *Stingel v The Queen* (1990) 171 CLR 312 at 334.

50 *Masciantonio v The Queen* (1995) 183 CLR 58 at 68 per Brennan, Deane, Dawson and Gaudron JJ, citing *Lee Chun-Chuen v The Queen* [1963] AC 220 at 230 per Lord Devlin for the Judicial Committee and *Moffa v The Queen* (1977) 138 CLR 601 at 617 per Gibbs J.

51 (1990) 171 CLR 312 at 334.

of law and the need to exercise caution before declining to leave provocation[52]. While the Court endorsed the relevance of contemporary attitudes and conditions to the threshold question[53], no question of a shift in those attitudes or conditions was raised by the evidence in *Stingel.*

28 There is an evident need for caution before a court determines as a matter of law that contemporary attitudes to sexual relations are such that conduct is incapable of constituting provocation. The partial defence recognises human frailty[54] and requires that the gravity of the provocation be assessed from the standpoint of the accused, taking into account his or her history and attributes[55]. Assessment of the response of the ordinary person to the outrage which the provocative conduct might have engendered in the accused will usually depend upon a range of possible findings. It is this recognition that informed the majority's conclusion in *Green* that a reasonable jury could have entertained a reasonable doubt that the prosecution had negatived provocation[56].

The Court of Criminal Appeal

29 With these observations in mind, it is convenient to turn to the reasons of the Court of Criminal Appeal majority.

30 As earlier stated, the Court of Criminal Appeal majority concluded that the cumulative effect of the errors in the directions given to the jury on provocation was to "establish that [the appellant] has not had a trial according to law and that, in that sense, a miscarriage of justice has occurred"[57].

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52 (1990) 171 CLR 312 at 334.

53 (1990) 171 CLR 312 at 327.

54 *Parker v The Queen* (1963) 111 CLR 610 at 627 per Dixon CJ, 652 per Windeyer J; *Johnson v The Queen* (1976) 136 CLR 619 at 656 per Gibbs J; [1976] HCA 44.

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

56 (1997) 191 CLR 334 at 346 per Brennan CJ, 356-357 per Toohey J, 373-374 per McHugh J.

57 *R v Lindsay* (2014) 119 SASR 320 at 378 [225] per Peek J (Kourakis CJ agreeing at 323 [1]).

31 Peek J, giving the leading majority reasons, moved from this conclusion to a consideration of whether the proviso should be applied. The starting point in that consideration was whether the trial judge was right to have left provocation to the jury[58] and the focus of that consideration, in turn, was the objective limb of the partial defence. The Full Court of the Supreme Court of South Australia held in *R v Dutton* that under the common law words alone may constitute provocation[59]. The correctness of the analysis in *Dutton* was not in issue before the Court of Criminal Appeal or in this Court. Peek J identified the provocative conduct as consisting of the physical gestures on the patio and the deceased's statements in the second incident[60].

32 After reviewing the authorities, Peek J characterised the objective limb of the partial defence as "an instrument of policy employed to keep the partial defence of provocation within bounds acceptable to *contemporary* society"[61].

33 His Honour's analysis continued[62]:

> "There is no doubt that in former times, when acts of homosexuality constituted serious crime and men were accustomed to resort to weapons and violence to defend their honour, a killing under the provocation present here would have been seen as giving rise to a verdict of manslaughter rather than murder. However, times have very much changed. As Gibbs J emphasised in *Moffa v The Queen*:
>
> > 'The question has to be decided in the light of contemporary conditions and attitudes, for what might be provocative in one age

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58 *R v Lindsay* (2014) 119 SASR 320 at 378-381 [228]-[238] per Peek J (Kourakis CJ agreeing at 323 [1]).

59 (1979) 21 SASR 356 at 357 per King CJ, 364 per Sangster J, 376 per Cox J, citing *Moffa v The Queen* (1977) 138 CLR 601.

60 *R v Lindsay* (2014) 119 SASR 320 at 348 [97] and n 17 per Peek J (Kourakis CJ agreeing at 323 [1]).

61 *R v Lindsay* (2014) 119 SASR 320 at 380 [234] per Peek J (Kourakis CJ agreeing at 323 [1]) (emphasis in original).

62 *R v Lindsay* (2014) 119 SASR 320 at 380 [235]-[236] per Peek J (Kourakis CJ agreeing at 323 [1]) (footnote omitted).

> might be regarded with comparative equanimity in another, and a greater measure of self-control is expected as society develops.'
>
> After careful consideration of the authorities, and of some of the extensive academic literature, I have come to the firm view that in 21st century Australia, the evidence taken at its highest in favour of the appellant in the present case was such that no reasonable jury could fail to find that an ordinary man could not have so far lost his self-control as to attack the deceased in the manner that the appellant did. Accordingly, the judge was incorrect in his decision to leave the partial defence of provocation to the jury in this case."

34 His Honour went on to observe that his conclusion was based upon the facts of the case and did not support "some of the more extreme suggestions made in academic debate" since the decision in *Green*[63]. Whether the many critiques of the operation of the partial defence of provocation following *Green*[64] are the "extensive academic literature" which his Honour took into account in his conclusion as to the capacity of the evidence to raise provocation in this case is not known.

Should provocation have been left to the jury?

35 There was no apparent motive for the killing and in the hours leading up to it the jury might consider that the appellant had been well disposed towards the deceased. As Peek J acknowledged[65], there was ample evidence upon which the jury might consider that the prosecution had failed to negative that the deceased's conduct in fact provoked the appellant, causing him to lose his self-control, and that the sustained and vicious assault upon the deceased took place while the appellant was in that state. Peek J's conclusion – that no jury acting reasonably could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct of the deceased fell far below the minimum standard which must be attributed to the hypothetical ordinary man – would appear to be based upon a view about contemporary Australian attitudes to an uninvited non-violent homosexual advance.

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63 *R v Lindsay* (2014) 119 SASR 320 at 380 [238] per Peek J (Kourakis CJ agreeing at 323 [1]), citing (1997) 191 CLR 334.

64 See n 41 above.

65 *R v Lindsay* (2014) 119 SASR 320 at 378 [228] per Peek J (Kourakis CJ agreeing at 323 [1]).

36 Although Peek J summarised findings which he considered it had been open to the jury to make in assessing the gravity of the provocation from the appellant's standpoint[66], the analysis was in the context of addressing a ground of appeal. The appellant complains that when his Honour later came to consider whether there was material in the evidence capable of supporting the objective limb, his analysis was confined to the observation that in former times a man might defend his honour against a homosexual advance and that conditions and attitudes in 21st century Australia have moved on.

37 The capacity of the evidence to support a conclusion that the prosecution might fail to negative the objective limb of the partial defence did not turn upon the appellate court's assessment of attitudes to homosexuality in 21st century Australia. It was open, as the appellant submits, for the jury to consider that the sting of the provocation lay in the suggestion that, despite his earlier firm rejection of the deceased's advance, the appellant was so lacking in integrity that he would have sex with the deceased in the presence of his family in his own home in return for money. And as the appellant submitted on the hearing of the appeal in this Court, it was open to a reasonable jury to consider that an offer of money for sex made by a Caucasian man to an Aboriginal man in the Aboriginal man's home and in the presence of his wife and family may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances might not possess[67].

38 Dixon J pointed out in *Packett* that it may be open to entertain a reasonable doubt concerning provocation although it would be unreasonable to find affirmatively that provocation existed and was sufficient, a consideration which illustrates the need for caution before deciding to take the partial defence away from the jury[68]. The need for that caution has particular force in a case where, as here, there was evidence capable of supporting the subjective limb of the partial defence.

39 The statement in *Stingel* of the limited scope of the threshold question recognises the need for restraint lest the court usurp the function of the jury. Peek J did not purport to decide that a non-violent sexual advance might never amount to provocation in law. Such a conclusion would be inconsistent with the

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66 *R v Lindsay* (2014) 119 SASR 320 at 349-351 [99]-[112] per Peek J (Kourakis CJ agreeing at 323 [1]).

67 [2015] HCATrans 052 at 239-247.

68 (1937) 58 CLR 190 at 213-214.

holding in *Green*[69]. Peek J's conclusion reflected his assessment that there was more evidence to support the objective limb in *Green* than here[70]. This was essentially a factual conclusion which must be taken to encompass his Honour's estimate of the degree of outrage which the appellant might have experienced. It was for the jury to make that assessment.

40 The trial judge did not err in leaving to the jury the alternative verdict of manslaughter based on provocation.

41 This conclusion suffices to determine the appeal. However, there should be reference to the appellant's third ground, which, if it were good, would dispose of the appeal without more.

The proviso

42 The proviso in s 353(1) of the CLC Act is in the common form and provides that:

> "[T]he Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

43 The joint reasons in *Baiada Poultry Pty Ltd v The Queen* hold that if the condition (the conclusion that no substantial injustice has actually occurred) is satisfied, the power must be exercised[71]. The appellant submits that the anterior question is whether the court should embark on the inquiry without invitation.

44 The appellant's submission is that under the adversarial system of criminal justice a court should not dismiss an appeal under the proviso of its own motion. In the Court of Criminal Appeal, the prosecution did not in terms submit that, in the event the Court determined otherwise, the appeal should nonetheless be dismissed because provocation should not have been left for the jury's consideration. The appellant complains that, in the result, the basis for the

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69 (1997) 191 CLR 334 at 346 per Brennan CJ, 370 per McHugh J.

70 *R v Lindsay* (2014) 119 SASR 320 at 381 [238] per Peek J (Kourakis CJ agreeing at 323 [1]).

71 (2012) 246 CLR 92 at 103 [25] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14.

application of the proviso was not laid out and he was not given the opportunity to make submissions on the issue which was determinative of the appeal. However, the foundation for the last-mentioned submission is not established.

45 On the hearing of the appeal before the Court of Criminal Appeal, Kourakis CJ raised with senior counsel for the appellant the prospect of dismissal under the proviso were the Court to form the view that provocation should not have been left to the jury. In this connection, the Chief Justice made plain that the capacity of the evidence to raise the objective limb of the partial defence was the issue. Senior counsel responded submitting that "[i]f you get over the subjective test it's a matter for the jury", and directing the Court's attention to the decision of this Court in *Green*. Kourakis CJ later returned to the issue, raising with counsel the question of whether it mattered if the directions were wrong in a case in which provocation should not have been left in the first instance. Again, his Honour made clear that his focus was upon the objective limb of the doctrine. It cannot be said that the Court of Criminal Appeal failed to squarely put counsel on notice that consideration of the proviso was a live issue because the capacity of the evidence to satisfy the objective limb of provocation was a live issue.

46 As noted earlier[72], practical considerations incline trial judges towards leaving the alternative verdict where there is any suggestion of provocation. A prudent prosecutor will not urge a trial judge against such a course. The appellate court is not governed by the conduct of the prosecution at trial in its determination of whether in law the prosecution was required to negative provocation[73]. The focus of the prosecution's submissions in the Court of Criminal Appeal was on the contention that the trial judge's directions were correct and sufficient. The prosecution did not submit that the Court should apply the proviso upon the footing that provocation had been wrongly left. The prosecution did advert to the application of the proviso as one of the ways in which the Court might dispose of the appeal. However, even if the prosecution had made no reference to the proviso, in circumstances in which the Court of Criminal Appeal raised the proviso and invited counsel's submissions on whether it should be applied the appellant's challenge should be rejected.

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72 At [26] above.

73 *Lee Chun-Chuen v The Queen* [1963] AC 220 at 230 per Lord Devlin for the Judicial Committee; *Moffa v The Queen* (1977) 138 CLR 601 at 613-614 per Gibbs J; *Masciantonio v The Queen* (1995) 183 CLR 58 at 68 per Brennan, Deane, Dawson and Gaudron JJ.

47 This is because the appellant's submission does not address the injunction in *Baiada* to give effect to the text and structure of the proviso[74], neither of which supports the limitation that he proposes. Nor does his submission address the evident purpose of the proviso, which, as has been explained elsewhere, was to do away with the old Exchequer rule[75].

48 The circumstance that the prosecution did not rely on the proviso before the intermediate appellate court has been considered no bar to its engagement in this Court[76], a conclusion which does not sit readily with acceptance of the appellant's submission invoking the adversarial nature of criminal justice. In this context, it should be remembered that the provision for appeal from the verdict of the jury is an exception to the principle of finality. As the joint reasons in *Baiada* point out, "[i]t is not to be supposed that, if an appellate court concluded that there had been no substantial miscarriage of justice, the appellate court could nevertheless allow the appeal and direct that a new trial be had"[77]. The force of that observation applies regardless of whether the prosecution has, in terms, invoked the proviso.

49 The dismissal of the appeal under the proviso and its prominence in the appellant's submissions should not obscure that, if the Court of Criminal Appeal's conclusion that the evidence did not raise provocation were correct, the inadequacy of the directions on that topic did not occasion a miscarriage of justice[78]. The appeal does not provide the occasion to consider the separate issue, addressed by Peek J in connection with the proviso, of whether forensic decisions

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74 (2012) 246 CLR 92 at 103 [24] per French CJ, Gummow, Hayne and Crennan JJ.

75 *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18]; [2005] HCA 81.

76 *Kelly v The Queen* (2004) 218 CLR 216 at 238 [56] per Gleeson CJ, Hayne and Heydon JJ; [2004] HCA 12; *Nicholls v The Queen* (2005) 219 CLR 196 at 268 [192] per Gummow and Callinan JJ, 281 [233] per Kirby J; [2005] HCA 1; *Darkan v The Queen* (2006) 227 CLR 373 at 416 [145] per Kirby J; [2006] HCA 34. Cf *Antoun v The Queen* (2006) 80 ALJR 497 at 509 [58]-[60] per Hayne J; 224 ALR 51 at 65-66; [2006] HCA 2. See also *Antoun v The Queen* (2006) 80 ALJR 497 at 507 [49] per Kirby J; 224 ALR 51 at 63.

77 (2012) 246 CLR 92 at 103 [25] per French CJ, Gummow, Hayne and Crennan JJ.

78 *Moffa v The Queen* (1977) 138 CLR 601 at 617 per Gibbs J; *Lee Chun-Chuen v The Queen* [1963] AC 220 at 235 per Lord Devlin for the Judicial Committee; *R v Tsigos* [1964-5] NSWR 1607 at 1609 per Walsh J, 1635 per Moffitt J.

of trial counsel made in consequence of an erroneous decision to leave a partial defence may constitute a miscarriage of justice[79].

Orders

50 The following orders should be made:

1. Appeal allowed.

2. Set aside the order of the Court of Criminal Appeal of the Supreme Court of South Australia made on 3 June 2014 and in lieu thereof order that the appeal to that Court be allowed, the appellant's conviction be quashed and a new trial be had.

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79 *R v Lindsay* (2014) 119 SASR 320 at 381 [241]-[242].

51 NETTLE J. The appellant was convicted before the Supreme Court of South Australia of the murder by stabbing of Andrew Roger Negre. He appealed to the Court of Criminal Appeal on grounds which included that the trial judge's jury directions concerning the partial defence of provocation were inadequate and resulted in a miscarriage of justice. The appeal was dismissed. Peek J[80], with whom Kourakis CJ agreed[81], held that, although the judge's directions were inadequate and in some respects erroneous, they were not productive of a substantial miscarriage of justice. Their Honours considered that the partial defence of provocation should not have been left to the jury and, therefore, that the proviso should be applied[82]. Gray J was not persuaded that the judge's directions were inadequate or erroneous[83].

52 The appeal to this Court raises three issues for decision:

(1) Given that the trial judge left provocation to the jury as a possible partial defence to murder, and the Crown did not contend at trial or on appeal to the Court of Criminal Appeal that the judge was in error to do so, was it open to the Court of Criminal Appeal to invoke the proviso?

(2) If it were open, did the Court of Criminal Appeal err in its application of the proviso:

(a) by having regard to academic literature not disclosed to the parties, and therefore which the parties did not have an opportunity to address before judgment was delivered; or

(b) by focusing on the homosexual nature of the suggested provocative conduct in circumstances where a jury might have taken the real "sting" and insult of the deceased's conduct to be something other than or in addition to the homosexual nature of the conduct?

53 It is not now disputed that the trial judge's directions as to provocation were inadequate and erroneous.

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80 *R v Lindsay* (2014) 119 SASR 320 at 378 [225].

81 *Lindsay* (2014) 119 SASR 320 at 323 [1].

82 *Lindsay* (2014) 119 SASR 320 at 381-383 [239]-[249].

83 *Lindsay* (2014) 119 SASR 320 at 338 [59]-[63].

The evidence

54 The appellant was a 28- or 29-year-old Aboriginal male who lived with his female partner, their child and another couple who paid a minimal rent for food and utilities.

55 In the early hours of the morning of 1 April 2011, the appellant met the deceased, Mr Negre, at the Hallett Cove Tavern. Mr Negre had been drinking with his female partner until about 11:30pm. At that point he and she quarrelled and, after he declined her request to accompany her home, she departed. He remained at the tavern drinking at first alone and then with the appellant and his companions. At about 2:00am a group which included the appellant, the appellant's partner and Mr Negre left the tavern and travelled by taxi to the appellant's home with the intention of having further drinks.

56 At around 1:30am to 2:00am, Mr Negre's partner woke and attempted to call him on his mobile telephone. The appellant answered and invited Mr Negre's partner to come over and join them. After she arrived, she was heard yelling and swearing at Mr Negre, asking why he had risked their relationship by going out with people he did not know. Subsequently, she appears to have calmed down. After the appellant showed her around the house, she departed in a taxi leaving Mr Negre behind.

57 Following some more drinking and socialising, the first of two incidents occurred in the patio area immediately outside the house. According to some of the evidence given at the appellant's trial, Mr Negre made sexually suggestive gestures towards the appellant by sitting down with one leg on either side of him and making a thrusting motion towards him with his hips. Some of those present who gave evidence said that Mr Negre's conduct in behaving in that fashion considerably upset the appellant and also his partner. One witness recalled that the appellant said to Mr Negre: "Don't go doing stuff like that" and "Don't go doing stuff like that because I'm not gay" and "or I'll hit you". Another witness recalled it as being: "Lucky I don't hit you". The same witness recalled the appellant's partner "growling" and stating that the appellant was not gay and the appellant saying to Mr Negre: "Don't do that". A further witness recalled the appellant's partner saying: "Get him out of here". Mr Negre apologised and said it was only a joke.

58 Later, the group moved inside to the family room. One witness said that Mr Negre appeared to be tired and that the appellant told him that he could sleep on the couch in the spare room. Mr Negre responded to the effect that he did not want to sleep up there by himself and that he wanted the appellant in there with him. Possibly there was then a period of time in which nothing material occurred. Some witnesses heard Mr Negre say to the appellant: "I'll pay you for sex" or "I'll pay you guys for sex". The appellant replied: "What did you say cunt?" to which Mr Negre responded by asking again for the appellant to join

him and by offering the appellant several hundred dollars to do so. Immediately after that, the appellant punched Mr Negre and there was then a brief but violent frenzied attack on Mr Negre in which he was repeatedly stabbed with a kitchen knife. At the time of the attack, those present included the appellant, his partner, the appellant's sisters and the couple who lived with the appellant (one of whom was the appellant's co-accused).

59 Expert forensic evidence established that Mr Negre had sustained multiple penetrating stab wounds, one group of which was in the region of the right upper arm and chest and a second group of which was located over the front of Mr Negre's abdomen. The wounds to the abdomen were associated with two significant injuries to the aorta. One of those wounds completely severed the aorta. The second caused a half-thickness cut to that vessel. The wounds to the aorta resulted in massive blood loss leading to unconsciousness within 20 to 30 seconds and death within two to three minutes.

The conduct of the trial

60 The Crown's case at trial was that the wounds were inflicted by the appellant with a knife. The appellant's only defence at trial was that it was not he who inflicted the knife wounds. The trial judge took the view, however, that there was evidence capable of sustaining a partial defence of provocation, and so left provocation to the jury. The Crown accepted at trial (and again before this Court) that there was evidence which, if accepted, was capable of satisfying the jury that it was reasonably possible that the appellant lost self-control. The jury nonetheless found the appellant guilty of murder and the appellant's co-accused guilty of the lesser offence of assisting the offender.

The appeal to the Court of Criminal Appeal

61 The appellant appealed to the Court of Criminal Appeal on grounds which included that the trial judge's directions on provocation were inadequate and resulted in a miscarriage of justice. As already noted, although the majority accepted that the directions were inadequate and productive of a miscarriage of justice, their Honours concluded that there had been no substantial miscarriage of justice and that the proviso[84] should be applied.

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84 Section 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) provides:

> "The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice,

(Footnote continues on next page)

The appeal to this Court

62 The appellant was granted special leave to appeal to this Court on two grounds (in summary): (1) that the Court of Criminal Appeal erred in applying the proviso in circumstances in which the Crown did not contend for its application and did not identify the basis on which it could be applied; and (2) that the Court of Criminal Appeal erred in holding that there was no evidence capable of sustaining a partial defence of provocation and therefore that the trial judge's misdirections on provocation were not productive of a substantial miscarriage of justice.

Invoking the proviso of the Court's own motion

63 Counsel for the appellant contended with respect to the first ground that, because of the essentially adversarial nature of criminal proceedings, and the consequent importance of the way in which the parties define the issues to which submissions are directed[85], it was not open to the Court of Criminal Appeal to invoke the proviso unless and until the Crown identified the proviso as a specific issue in the appeal and the manner in which it was contended to apply. In counsel's submission, so much was confirmed by the recent observation of Gageler J in *Baini v The Queen*[86] that it has always been understood that it is for the respondent and not the appellant to establish to the satisfaction of the court of criminal appeal that the case is within the proviso.

64 That argument cannot be accepted in the broad terms in which it was stated. Certainly, the Crown carries the onus of establishing that the proviso is applicable and so, unless the court is persuaded that there has been no substantial miscarriage of justice, an appeal must be allowed[87]. But, whether or not the Crown is first to take the point, where a court of criminal appeal makes it clear to an appellant that the court contemplates the proviso might be applicable,

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> and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

85 *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ; [1974] HCA 35; *James v The Queen* (2014) 88 ALJR 427 at 435 [29]-[30] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; 306 ALR 1 at 9-10; [2014] HCA 6.

86 (2012) 246 CLR 469 at 487 [49]; [2012] HCA 59.

87 *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; [1955] HCA 59; *TKWJ v The Queen* (2002) 212 CLR 124 at 143 [63] per McHugh J; [2002] HCA 46.

identifies with sufficient clarity the basis on which the court envisages the proviso could possibly so apply, and gives to the appellant an appropriate opportunity to advance submissions and other material in opposition to the identified basis of application of the proviso, there is nothing in principle or fairness to prevent the court deciding that there has not been a substantial miscarriage of justice and that the proviso should be applied.

65 As this Court observed in *Weiss v The Queen*[88], the common form proviso was calculated to do away with the Exchequer rule that any departure from trial according to law, regardless of the nature or importance of that departure, would result in an appeal being allowed. By using the words "substantial" and "actually occurred" the legislature gave a court of criminal appeal power to dismiss an appeal if it considers that no substantial miscarriage of justice has actually occurred. But to describe the proviso as a power is in some respects misleading. As was later explained in *Baiada Poultry Pty Ltd v The Queen*[89], if a court of criminal appeal considers that no substantial miscarriage of justice has occurred, there is no discretion to allow the appeal and order that a new trial be had. The appeal must be dismissed.

66 Of course, there are unlikely to be many cases where the Crown does not contend for the application of the proviso (either of its own motion or after being invited to do so by a court of criminal appeal) and yet a court of criminal appeal will be satisfied that there has not been a substantial miscarriage of justice. It might also be in some cases that, because of the way in which the Crown has conducted the appeal up to the point where the court first raises the issue, it would be unfair to require the appellant to meet that possibility. In the former class of case, the court would need to be satisfied that the Crown's reluctance to assert the proviso was not based on some underlying consideration which, if identified, would suggest that the proviso was inapplicable. In the latter class of case, the lack of fairness might mean that it would not be open to consider the application of the proviso in any event.

67 Apart from cases of that kind, however, the fact that the Crown is not prepared to contend for the application of the proviso is not of itself a sufficient reason for a court of criminal appeal to decline to apply it.

68 Counsel for the appellant argued that, be that as it may, in this case there was no identification of the basis which the Court of Criminal Appeal had in

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88 (2005) 224 CLR 300 at 308 [18] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2005] HCA 81.

89 (2012) 246 CLR 92 at 103 [25] per French CJ, Gummow, Hayne and Crennan JJ; [2012] HCA 14.

mind for the possible application of the proviso, with the result that the appellant was not given the opportunity to meet and argue against the possibility.

69 That submission must be rejected. The matter first arose in the course of argument in the Court of Criminal Appeal in the following exchange between the Chief Justice and counsel for the appellant:

> "Kourakis CJ: If provocation shouldn't have been left at all by the trial judge, then it might not matter that there were misdirections about it, and if the Court of Criminal Appeal held that provocation should not have been left, it could also then take the view that the misdirections didn't lead to any miscarriage of justice, and that was the difference on the facts between the majority and the minority in *Green*. ...
>
> Counsel: In our submission, the first point of principle that we put forward in response to that is this: that as the cases of *Van Den Hoek* and, indeed, *Pollock* and *Masciantonio* all confirmed, the courts must take a very open view; that is, if in doubt, lead provocation, is the effect of all of those judgments. In other words, the failure to leave it when a man has chased the deceased to the other side of the car and stabbed him while he is on the ground is a far cry from a case such as this where the Crown case is that there was a catalyst, he [the appellant] was angry, and it was a ferocious attack over in seconds, and similarly in *Pollock*. ...
>
> Kourakis CJ: I'm talking about whether it should have been left having regard to the second limb, which requires an objective test to be applied to the gravity of the insult as perceived by the appellant.
>
> ...
>
> Kourakis CJ: [Counsel], can you help me? How does the jury go about formulating the conception of the ordinary person here?
>
> Counsel: The ordinary person is simply a person with ordinary powers of self-control.
>
> ...
>
> Kourakis CJ: How do they go about working out what that is? Who do they look at if they can't look at themselves? Is there a model?
>
> Counsel: They don't look at anyone. The point is they have to look outside themselves.
>
> Kourakis CJ: To what then?

> Counsel: To what are ordinary or minimum powers of self-control. It's not the person, it's the powers of self-control of an ordinary person.
>
> ...
>
> Kourakis CJ: Isn't it really a social judgment on when a certain level of insult will excuse murder to manslaughter, don't they make a social judgment about that? Isn't that really what the test is about?
>
> Counsel: No, in my submission, what the test is about is applying the question of the gravity of the provocation from the point of view of the accused and answering whether or not he lost self-control in the way that it's been defined."

70 Later in argument, Peek J took up the issue again:

> "Peek J: I just mention to you that matter of *Green* you handed up is not particularly helpful on this precise point we are now discussing because of course that turned on a statutory provision which is somewhat different to the common law in this particular regard.
>
> Counsel: Certainly on the ordinary man test the subsection (2)(a) I think it ... spells out I was really referring to the question of the proviso that was raised."

71 Later still, in the course of the Crown's submissions, there was the following exchange between Gray J and counsel for the Crown:

> "Gray J: In determining the proviso, it's my understanding from recent High Court authorities it's not a criteria [sic] of this court to ask what might a reasonable jury do, is it possible the jury might reach a different verdict. The question is, what does this court, as judges, think the result should be.
>
> ...
>
> Counsel: The appeal court makes an independent assessment."

72 As those exchanges demonstrate, the Court of Criminal Appeal did raise the possibility of applying the proviso on the basis that there had not been sufficient evidence of a reasonable possibility of objective provocation to leave to the jury. Counsel for the appellant was given an appropriate opportunity to respond and did in fact respond with a submission that, because there was sufficient evidence of subjective provocation to leave to the jury, the question of

objective provocation should also have been left to the jury, in accordance with the decision of the majority of this Court in *Green v The Queen*[90].

73 Counsel for the appellant further contended that, whether or not the trial judge was correct to leave provocation to the jury, the fact was that his Honour had done so and, as was only to be expected, defence counsel's final address was structured accordingly. In counsel's submission, if provocation had not been left to the jury, defence counsel would have had no reason to submit to the jury that, if the appellant were the culprit, there was a reasonable possibility that the appellant was provoked. And, had that been the case, it cannot be gainsaid that the jury might then have been left with a reasonable doubt as to whether the appellant was the culprit. Accordingly, in counsel's submission, this was a case where, because of the way the trial was conducted, the appellant had been denied a chance of acquittal which was fairly open to him and, therefore, the Court of Criminal Appeal was in error in concluding that there had not been a substantial miscarriage of justice.

74 There is force in that submission. Assuming that provocation should not have been left to the jury, it would be difficult to exclude as a reasonable possibility that by raising it as a partial defence, and defence counsel having to adapt her final address accordingly, the appellant was deprived of a chance of acquittal otherwise fairly open to him. Ultimately, however, the point is moot because, for the reasons which follow, the trial judge was right to leave provocation to the jury.

Application of the proviso – the objective limb of provocation

75 Peek J began his consideration of the proviso with reference to evidence of the effect of the deceased's sexual advances on the appellant and concluded that there was ample evidence to go to the jury on the issue of whether the appellant was in fact provoked[91]:

> "There was ample evidence for the jury's consideration of the subjective limb, namely that the appellant was in fact provoked by the conduct of the deceased and did thereby lose control. This was, in effect, conceded by the prosecutor in submissions in the absence of the jury."

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90 (1997) 191 CLR 334; [1997] HCA 50.

91 *Lindsay* (2014) 119 SASR 320 at 378 [228].

To that point, his Honour's analysis was unexceptionable. Then, however, after referring to a number of authorities concerning the "ordinary person" test, his Honour continued[92]:

> "Thus, the objective test is an instrument of policy employed to keep the partial defence of provocation within bounds acceptable to *contemporary* society.
>
> There is no doubt that in former times, when acts of homosexuality constituted serious crime and men were accustomed to resort to weapons and violence to defend their honour, a killing under the provocation present here would have been seen as giving rise to a verdict of manslaughter rather than murder. However, times have very much changed. As Gibbs J emphasised in *Moffa v The Queen*:
>
> > 'The question has to be decided in the light of contemporary conditions and attitudes, for what might be provocative in one age might be regarded with comparative equanimity in another, and a greater measure of self-control is expected as society develops.'
>
> After careful consideration of the authorities, and of some of the extensive academic literature, I have come to the firm view that in 21st century Australia, the evidence taken at its highest in favour of the appellant in the present case was such that no reasonable jury could fail to find that an ordinary man could not have so far lost his self-control as to attack the deceased in the manner that the appellant did. Accordingly, the judge was incorrect in his decision to leave the partial defence of provocation to the jury in this case."

With respect, that was exceptionable.

76 Peek J did not identify the "extensive academic literature" to which his Honour said he had given careful consideration or reveal how it may have assisted him in reaching his conclusion. The only pointer in that direction is that a little later in his reasons, his Honour said that "my conclusion in no way supports some of the more extreme suggestions made in academic debate since the decision of the High Court in *Green v The Queen*"[93]. One is left to wonder what suggestions his Honour had in mind and which, if any of them, he regarded as not so extreme as to be unacceptable.

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92 *Lindsay* (2014) 119 SASR 320 at 380 [234]-[236] (emphasis in original; footnote omitted).

93 *Lindsay* (2014) 119 SASR 320 at 380 [238].

77 For that reason, there is force in the appellant's complaint that the majority appears to have had regard to academic literature not disclosed to the parties and, therefore, which the parties did not have an opportunity to address before judgment was delivered. Leastways, such ambiguity as there may be should be resolved in favour of the appellant[94].

78 Were that the only criticism of the majority's reasoning, it might be inconsequential. If it were otherwise clear that the proviso should have been applied, the fact that the appellant's counsel was deprived of an opportunity to dissuade the Court of Criminal Appeal from that view would likely be immaterial. But there are also several other aspects of the majority's reasoning which need to be considered.

79 First, although, as Peek J quoted with approval, "[t]he success of a provocation defence rests on establishing the accused's act as one which any ordinary person might have done in the circumstances"[95], it is also essential to keep in mind that the degree of provocation to which it must be assumed the ordinary person is subjected is the degree of provocation which was subjectively perceived by the accused. As this Court made plain in *Stingel v The Queen*[96]:

> "[T]he objective test was [not] intended to be applied in a vacuum or without regard to such of the accused's personal characteristics, attributes or history as serve to identify the implications and to affect the gravity of the particular wrongful act or insult."

80 Secondly, in stating that he took the evidence "at its highest in favour of the appellant", Peek J did not elaborate upon what his Honour meant in the circumstances. The references in the preceding paragraph of his reasons to the historical criminalisation of homosexual acts and men killing "to defend their honour" suggest that he considered the gravamen of the evidence of provocation to be the homosexual nature of the deceased's advances. If that be so, his Honour erred by failing to take into account the full context of the events.

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94 See, eg, *Fleming v The Queen* (1998) 197 CLR 250 at 262-263 [28]-[30] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ; [1998] HCA 68.

95 *Lindsay* (2014) 119 SASR 320 at 379-380 [233], quoting *R v Hill* [1986] 1 SCR 313 at 343-344 per Wilson J.

96 (1990) 171 CLR 312 at 324 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; see also at 326-327; [1990] HCA 61; *Masciantonio v The Queen* (1995) 183 CLR 58 at 67 per Brennan, Deane, Dawson and Gaudron JJ, cf at 80 per McHugh J; [1995] HCA 67.

81 Taking the circumstances disclosed by the evidence as a whole, the provocation as it might have been perceived by the appellant (and thus the force of the provocation to which it must be supposed an ordinary person in the position of the appellant would have been subjected) had a larger dimension than merely an unwanted homosexual advance on a heterosexual man. Other relevant considerations included that the appellant was hosting the deceased as a guest at the appellant's house; had reacted with anguish and loathing when the deceased made his first advance of the evening; had threatened violence if anything of the kind were repeated; and was then insulted in the presence of his partner, sisters and friends with an offer of several hundred dollars to prostitute himself to the deceased's desires. Further, as counsel for the appellant suggested in the course of argument (although no such submission was advanced below), it is not impossible that a jury could reasonably infer that, because the appellant is Aboriginal, he perceived the deceased's conduct towards him to be racially based and for that reason especially insulting[97].

82 Thirdly, although the objective test might aptly be described as "an instrument of policy"[98], it is necessary to keep in mind that the policy is to limit the defence of provocation to what a reasonable jury might consider to be the standard of the minimum powers of self-control of an ordinary person. It is not what academics, the press, pressure groups or judges might hope or wish were the minimum powers of self-control of an ordinary person. Under our system of criminal law, it is the jury as representatives of the community who are entrusted to embody and apply community standards[99]. Thus, as Barwick CJ said in *Moffa v The Queen*[100], subject to very limited exceptions, whether it should be concluded that an ordinary man would lose self-control "is a question exclusively for the jury, however much a court may be inclined to think that a jury should not do so".

83 Fourthly, a reasonable jury is by no means a perfect jury. It is 12 ordinary men and women who between them are likely to embody most of the scruples, doubts, insecurities and predilections which are discoverable in one place or another across the broad range of an increasingly pluralist society. Subject to very limited exceptions, it is the immutable right of an accused to be accorded

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97 *Masciantonio* (1995) 183 CLR 58 at 67 per Brennan, Deane, Dawson and Gaudron JJ.

98 *Lindsay* (2014) 119 SASR 320 at 380 [234].

99 *Brown v The Queen* (1986) 160 CLR 171 at 202 per Deane J; [1986] HCA 11; *Cheatle v The Queen* (1993) 177 CLR 541 at 560; [1993] HCA 44; *Williams v Florida* 399 US 78 at 100 (1970) per White J.

100 (1977) 138 CLR 601 at 606-607, see also at 622 per Mason J; [1977] HCA 14.

the full benefit of any reasonable doubt which those influences might yield him or her.

84 Fifthly, whatever may "have very much changed"[101] since *Green* was decided in 1997, the law remains now as it was then, that the application of the objective test depends on the jury's evaluation of the degree of outrage which the accused might have experienced. As Brennan CJ said in *Green*, "[i]t [is] not for the Court to determine questions of that kind, especially when reaction to sexual advances are critical to the evaluation"[102].

85 There were some suggestions in the course of argument before the Court of Criminal Appeal, and there are also suggestions in Peek J's reasons for judgment[103], that, as a result of this Court's decision in *Weiss*, the task of a court of criminal appeal in applying the proviso is for the court to make its own independent assessment of the evidence and on that basis determine whether, making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record, the appellant was proved beyond reasonable doubt to be guilty of the offence on which the jury returned their verdict.

86 What was said in *Weiss* must now be understood in light of what has since been observed in *Baini*[104] (albeit in the context of the application of s 276 of the *Criminal Procedure Act* 2009 (Vic)) and in *Pollock v The Queen*[105] (in relation to the common form proviso). That is to say, where there has been a miscarriage of justice the consequence of an error in the conduct of a criminal trial, a court of criminal appeal cannot fail to be satisfied that there has been a substantial miscarriage of justice unless it determines that, in the absence of the error, it would not have been open to the jury to entertain a reasonable doubt as to guilt. "Nothing short of satisfaction beyond reasonable doubt will do"[106]. A court of criminal appeal "can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a 'substantial miscarriage

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101 *Lindsay* (2014) 119 SASR 320 at 380 [235].

102 (1997) 191 CLR 334 at 346.

103 *Lindsay* (2014) 119 SASR 320 at 381-383 [239]-[249].

104 (2012) 246 CLR 469 at 480-481 [28]-[32] per French CJ, Hayne, Crennan, Kiefel and Bell JJ. See also *Baini v The Queen* (2013) 232 A Crim R 17.

105 (2010) 242 CLR 233 at 252 [70] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 35.

106 *Baini* (2012) 246 CLR 469 at 481 [33].

of justice' if the … court concludes from its review of the record that conviction was inevitable"[107]. And by "inevitable" what is meant is that, assuming the error had not been made, the result was bound not to have been any different for the jury if acting reasonably on the evidence properly before them and applying the correct onus and standard of proof. Unless it is so possible to conclude that the accused has not been deprived "of a chance fairly open to him of being acquitted of murder"[108], there is no room for the proviso.

87 Finally, "[t]here was ample evidence for the jury's consideration of the subjective limb, namely, that the appellant was in fact provoked by the conduct of the deceased and did thereby lose control"[109]. The jury's assessment of that evidence – and so of the extent to which the appellant was in fact provoked by the conduct of the deceased – was critical to the evaluation of how an ordinary person might have reacted to that degree of provocation and, therefore, critical to satisfaction of the objective limb[110]. In those circumstances, it is surely not open to say that, on the view of the evidence most favourable to the appellant, the jury could not have been left with a reasonable doubt as to whether an ordinary person subjected to that degree of provocation could not have so much lost self-control as to form the intent to kill or inflict grievous bodily harm and before regaining self-control gone on and given effect to that intent in the manner in which the appellant did[111].

Conclusion

88 For these reasons, the trial judge was right to leave provocation to the jury. It was not open to the majority of the Court of Criminal Appeal to be satisfied that the inadequacy of the judge's directions on provocation did not deprive the appellant of a chance which was fairly open to him of a verdict of guilty of manslaughter. The majority of the Court of Criminal Appeal was wrong to conclude that the inadequacy of the directions was not productive of a substantial miscarriage of justice.

89 It follows that the appeal should be allowed. The orders of the Court of Criminal Appeal should be set aside, and in their place it should be ordered that

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107 *Baini* (2012) 246 CLR 469 at 481 [33].

108 *Pollock* (2010) 242 CLR 233 at 252 [70].

109 *Lindsay* (2014) 119 SASR 320 at 378 [228] per Peek J.

110 *Stingel* (1990) 171 CLR 312 at 326-327 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

111 *Green* (1997) 191 CLR 334 at 345-346 per Brennan CJ.

the appeal to that Court be allowed, the conviction quashed and a new trial be had.