

HIGH COURT OF AUSTRALIA

BELL, GAGELER, KEANE, GORDON AND EDELMAN JJ

ARONA PENIAMINA

APPELLANT

AND

THE QUEEN

RESPONDENT

Peniamina v The Queen

[2020] HCA 47

Date of Hearing: 15 October 2020

Date of Judgment: 9 December 2020

B32/2020

ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 29 November 2019 and, in lieu thereof, order that the appeal to that Court be allowed and the appellant's conviction be set aside and a new trial be had.*

On appeal from the Supreme Court of Queensland

Representation

M J Copley QC with K Prskalo for the appellant (instructed by Legal Aid Queensland)

T A Fuller QC with D Balic for the respondent (instructed by Office of the Director of Public Prosecutions (Qld))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Peniamina v The Queen

Criminal law – Defences – Provocation – Where appellant killed his wife in circumstances that left it open to find he was angered by belief she had been unfaithful and planned to leave him – Where appellant pleaded not guilty to murder on basis that killing resulted from loss of self-control caused by provocation by deceased – Where appellant contended at trial that state of loss of self-control excited by deceased's conduct in grabbing knife, threatening him with it and cutting his right palm – Where s 304(3) of *Criminal Code* (Qld) excluded defence of provocation (save in circumstances of most extreme and exceptional character) in case of unlawful killing of accused's domestic partner where sudden provocation "based on" anything done, or believed to have been done, by deceased to end or change nature of relationship or indicate in any way that relationship may, should or will end or change ("to change relationship") – Whether exclusion of defence in s 304(3) confined (save in circumstances of most extreme and exceptional character) to cases where conduct of deceased relied upon as causative of accused's loss of self-control consists of thing done, or believed to have been done, by deceased to change relationship – Whether operation of s 304(3) to exclude defence question of law.

Words and phrases – "based on", "causation simpliciter", "causative potency", "caused by", "domestic killing", "domestic relationship", "elements of the defence", "loss of self-control", "nominated conduct", "partial defence", "provocation", "provocative conduct", "question of law", "sudden provocation", "to change the nature of the relationship", "true defence", "wider connection".

Criminal Code (Qld), s 304(1), (2), (3), (7).

1 BELL, GAGELER AND GORDON JJ. This appeal concerns the partial defence of provocation, which operates to reduce what would otherwise be murder to manslaughter, under s 304 of the *Criminal Code* (Qld) ("the Code"). Section 304 was amended in 2011¹ ("the 2011 amendments"), relevantly, to exclude the defence (save in circumstances of a most extreme and exceptional character) in the case of the unlawful killing of the accused's domestic partner where the sudden provocation is based on anything done by the deceased, or anything the accused believes the deceased has done, to end or to change the nature of the relationship or to indicate in any way that the relationship may, should or will end or change (collectively, "to change the relationship")².

2 The 2011 amendments made provocation a true defence in that the burden of proof of the defence was placed on the accused³. The issue raised by the appeal is whether in discharging this burden the appellant was required to prove that the provocation was not "based on" anything done (or believed to have been done) by the deceased to change the relationship, notwithstanding that such conduct (or believed conduct) was not the conduct that he claimed had induced his loss of self-control. The answer is that he was not. The 2011 amendments did not alter the elements of the defence of provocation in the case of the unlawful killing of a person with whom the accused was in a domestic relationship. The accused nominates the thing done (or believed to have been done) by the deceased and it is for the accused to prove, as a matter of probability, not only that the killing was done in a state of loss of self-control but that that state was induced by the nominated conduct. Whether the defence is excluded by reason of the sub-sections inserted by the 2011 amendments is a question of law.

3 The facts are set out in the joint reasons of Keane and Edelman JJ. In summary, the appellant killed his wife in circumstances in which it was open to find that he was angered by his belief that she had been unfaithful to him and that she may have been planning to leave him and take their four young children with her. The killing was carried out with sustained ferocity within the view of at least one of the children.

4 In the aftermath of the killing, while still at the scene and in an apparently emotional state, the appellant spoke to police officers and, by telephone, to his mother. He told his mother that "[s]he cheat too many time, mum. I try, I try, mum, to stop, but I can't stop, mum" and he complained that she had sworn at him and

1 *Criminal Code and Other Legislation Amendment Act 2011* (Qld), s 5.

2 *Criminal Code* (Qld), s 304(3).

3 *Criminal Code* (Qld), s 304(7).

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"my kid". He told the police that "I started first", that he was angry with the deceased, and that they argued and he hit her with his right hand. This caused her mouth to bleed and she walked into the bathroom. Next, he heard the sound of a drawer being opened in the kitchen. He went to the kitchen and found the deceased holding a knife. He grabbed the blade of the knife in an attempt to disarm her. She pulled the knife backwards and he sustained a deep and painful cut to the palm of his hand. He was angry before this, but the pain of the cut made him angrier and he admitted that at that time he had wanted to kill the deceased.

5 The appellant did not give evidence at the trial. His defence, that the killing was done under provocation, depended on his account given to Senior Constable Weare on the night of the killing and his description of the deceased's conduct with the knife given to an undercover police officer three days later. In particular, it depended on the following exchange with Senior Constable Weare:

[Appellant]: I, I, well, I don't know what she, she tried to do to me but I feel my hand really pain.

SCON WEARE: Yep?

[Appellant]: Just more angry and more angry, you know what I mean?

SCON WEARE: Mmhmm.

[Appellant]: I can't stop. *I can't stop that time.*" (emphasis added)

In his conversation with the undercover officer, the appellant claimed that the deceased had tried to kill him with the knife, and he indicated that she had made a downward stabbing motion towards his neck and chest area. He said that when he had grabbed the blade, she had drawn the knife backwards, cutting his hand.

6 It was the appellant's case that he had killed the deceased while in a state of loss of self-control excited by her conduct in "grabbing the knife, threatening [the appellant] with it and cutting his right palm" (the "conduct with the knife").

7 The members of the jury were directed that if they found, on the balance of probability, that the appellant killed the deceased while in a temporary state of loss of self-control induced by her conduct with the knife (the subjective limb of the defence), and if they were satisfied that an ordinary person in the appellant's position might have been induced to so lose self-control as to form the intention to kill or to do grievous bodily harm and to act upon that intention (the objective limb of the defence), it remained for the appellant to prove that his loss of self-control was not "based on" anything done (or believed to have been done) by the deceased to change the relationship ("the sub-s (3) limb"). In the latter respect, the jury was

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directed that it was open to find that the deceased's conduct with the knife was itself a thing done to change the relationship or that the appellant's loss of self-control may have been "based on" things she had done (or was believed to have done) to change the relationship preceding her conduct with the knife. In the event that the appellant failed to establish the sub-s (3) limb, the jury was instructed that a verdict of manslaughter might only be returned if the appellant proved, on the balance of probability, that the circumstances were of a most extreme and exceptional character.

8 The jury returned a verdict that the appellant was guilty of murder. The appellant appealed against his conviction to the Court of Appeal of the Supreme Court of Queensland (Morrison JA and Applegarth J; McMurdo JA dissenting) on the ground that the trial judge erred in directing the jury of the necessity that he prove the sub-s (3) limb in circumstances in which the defence case was that his loss of self-control was not "based on" anything done (or believed to have been done) by the deceased to change the relationship. By majority the appeal was dismissed⁴.

9 By grant of special leave⁵, the appellant appeals to this Court on the ground that the Court of Appeal erred in holding that the exclusion of the defence was not confined to the provocative conduct of the deceased which the defence relied upon as causative of the appellant's loss of self-control. As will appear, the elements of the defence are wholly stated in s 304(1) and consist of a subjective limb and an objective limb. Circumstances of a most extreme and exceptional character apart, under s 304(3) in a domestic killing, if the conduct that is relied upon as having induced the accused's loss of self-control is done (or believed to have been done) by the deceased to change the relationship the defence does not apply as a matter of law. Over the appellant's opposition, the exclusion of the defence under s 304(3) wrongly was left for the jury's determination. The defence case was that the deceased's conduct with the knife induced his loss of self-control. It was fanciful to suggest that the deceased's conduct in this respect was a thing done to change the relationship. The preclusion of the defence in the case of sudden provocation "based on" anything done by the deceased (or believed to have been done) to change the relationship was not engaged. It was an error to direct the jury of the

4 *R v Peniamina* (2019) 2 QR 658 at 672 [39] per Morrison JA, 706 [199] per Applegarth J.

5 [2020] HCATrans 075 (Bell and Gageler JJ).

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necessity for the appellant to prove the contrary. It follows that the appeal must be allowed.

10 The focus of the argument below, and in this Court, was on the meaning of the phrase "based on" in s 304(3). Section 304, as it stood at the date of the killing, should be set out in full⁶:

"Killing on provocation"

- (1) 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.
- (2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.
- (3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if –
 - (a) a domestic relationship exists between 2 persons; and
 - (b) one person unlawfully kills the other person (the *deceased*); and
 - (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done –
 - (i) to end the relationship; or
 - (ii) to change the nature of the relationship; or

6 Section 304 has been further amended by s 10 of the *Criminal Law Amendment Act 2017* (Qld). The requirement to show circumstances of "a most extreme and exceptional character" in sub-ss (2) and (3) is now a requirement to show circumstances of an "exceptional character" and under sub-s (4) the defence does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person.

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- (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.
- (4) For subsection (3)(a), despite the *Domestic and Family Violence Protection Act 2012*, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.
- (5) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.
- (6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.
- (7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.
- (8) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons."

11 The issue which divided the Court of Appeal, and the parties in this Court, is whether the words "based on" in sub-s (3) import a wider connection between the sudden provocation and the thing done by the deceased (or believed to have been done) to change the relationship than one of causation simpliciter. The Court of Appeal majority, in separate reasons, held that the use of the phrase "based on" in sub-s (3), in contrast with the use of the words "caused by" in sub-s (1), invites consideration of whether the sudden provocation is, in fact, founded upon something done by the deceased to change the relationship ("the wide construction"). On the wide construction, notwithstanding that the jury may have been satisfied that the deceased's conduct with the knife induced the appellant to lose his self-control, the trial judge was right to instruct the jury to go on to consider whether that conduct and the appellant's consequent loss of self-control was, in

fact, based on preceding conduct of the deceased done (or believed to have been done) to change the relationship⁷.

12 In his dissenting reasons, McMurdo JA focussed on the expression "sudden provocation", a term of art, which his Honour observed is concerned with, and related to, the accused's temporary loss of self-control, as distinct from the provocative conduct which caused that condition⁸. Given that the expression "sudden provocation" is to be understood as having a uniform meaning in each of sub-ss (1), (2), (3) and (5), McMurdo JA rejected that the connection in sub-s (3) between the sudden provocation and an act done to change the relationship is between the conduct of the deceased and a thing done to change the relationship. The relevant connection, in McMurdo JA's view, consistent with the content of the expression "sudden provocation", is between the conduct of the deceased and the accused's loss of self-control, and the necessary connection is that the former must have caused the latter⁹. For the reasons to be given, McMurdo JA's conclusion, that the words "based on" signify a relation of causation simpliciter between the sudden provocation and the thing done by the deceased to change the relationship, is the preferable construction.

13 The elements of the defence are in sub-s (1), which is expressed largely in the somewhat antiquated language of the Code at the date of its enactment¹⁰. It is settled that sub-s (1) can only be understood by reference to the common law: the provocation must involve conduct of the deceased and that conduct must have the capacity to provoke an ordinary person in the position of the accused to so far lose self-control as to form and act upon the intention to kill or to do grievous bodily harm¹¹. This is so notwithstanding that neither requirement is, in terms, found in sub-s (1). It is also accepted that the "sudden provocation" of which sub-s (1)

7 *R v Peniamina* (2019) 2 QR 658 at 668 [24], 672 [39] per Morrison JA, 669 [157], 703-704 [188] per Applegarth J.

8 *R v Peniamina* (2019) 2 QR 658 at 674 [46].

9 *R v Peniamina* (2019) 2 QR 658 at 684-685 [85].

10 The only amendment to s 304(1) of the *Criminal Code* (Qld) prior to the 2011 amendments was effected by the *Criminal Code and the Offenders Probation and Parole Act Amendment Act 1971* (Qld) and removed a reference to "wilful murder".

11 *Pollock v The Queen* (2010) 242 CLR 233 at 245-246 [46]-[47], citing *Kaporonovski v The Queen* (1973) 133 CLR 209 at 218-219 per McTiernan A-CJ and Menzies J.

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speaks is concerned with the accused's temporary loss of self-control excited by the provocative conduct of the deceased¹² albeit that there may be an interval between the conduct and the emotional response to it¹³.

14 It may be accepted that unlike the words "caused by" in sub-s (1), the words "based on" in sub-s (3) are capable of conveying a wider connection than one of causation simpliciter. There are, however, good reasons for not assigning that wider meaning to the phrase in this statutory setting. The statutory text is to be considered in its context, which includes the legislative history and extrinsic materials¹⁴. As will appear, the phrase "based on" in sub-s (3) may be traced to the recommendations of the Queensland Law Reform Commission ("the Commission") in its report on the defence of provocation ("the Report")¹⁵. The same phrase is used in sub-s (2), which was also inserted by the 2011 amendments. The phrase must have the same meaning in each sub-section. The evident intention in enacting sub-s (2) was to give statutory force to the common law principle that the defence does not apply where the accused's loss of self-control is excited by provocative words alone¹⁶. Sensibly, the connection in sub-s (2) can only be one of causation simpliciter: the accused's temporary loss of self-control was induced by the deceased's words alone.

15 As earlier explained, "sudden provocation" is a compendious expression which conveys the accused's loss of self-control induced by the deceased's conduct. The preclusion of the defence in a case in which the loss of self-control is "based on", in the sense of caused or induced by, anything done by the deceased to change the relationship gives workable and coherent operation to sub-s (3). The construction does not require reading the provision as if the words "based on" are taken to mean "*immediately* caused by": there may be an interval between the thing done by the deceased to change the relationship and the emotional response to that

12 *Pollock v The Queen* (2010) 242 CLR 233 at 247 [52].

13 *Pollock v The Queen* (2010) 242 CLR 233 at 247 [53]-[54].

14 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

15 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008) at 481 [21.88] ("QLRC Report").

16 See *Moffa v The Queen* (1977) 138 CLR 601 at 605 per Barwick CJ, 616 per Gibbs J, 619 per Stephen J; *Buttigieg* (1993) 69 A Crim R 21 at 37; *Holmes v Director of Public Prosecutions* [1946] AC 588 at 599-600 per Viscount Simon.

conduct. All that is required is that the thing done by the deceased to change the relationship induced the loss of self-control. It is a construction that coheres with the concept of "sudden provocation" that informs the defence. The defence reduces an accused person's liability for murder to manslaughter where the person kills in a state of lost self-control induced by the deceased's conduct. In the case of an accused who kills his or her domestic partner the defence is excluded where that conduct consists of anything done to change the relationship.

16 By contrast, the wide construction adopted by the Court of Appeal majority gives the words "based on" an uncertain operation. As McMurdo JA observed, if the connection required for the sudden provocation in s 304(3) is between the conduct of the deceased and something done to change the relationship (rather than between the conduct of the deceased and the accused's loss of self-control), it would be necessary to define, by reference to the words "based on", the extent and nature of the required connection¹⁷. Applegarth J, with whose reasons Morrison JA generally agreed, recognised this difficulty and held that the words "based on" in s 304(3)(c) connote a "substantial causal connection" between the thing done to change the relationship and the sudden provocation¹⁸. Proof of such a connection requires an "evaluation of the chain of events and the causative potency of the act of the deceased"¹⁹. His Honour went on to propose that a "mere connection between the act and the sudden provocation, in that the act made some contribution in terms of cause and effect", would be "unlikely to be sufficient to support a finding that the sudden provocation was 'based on' the act"²⁰.

17 On the trial of an accused for murder, s 304(3) operates to exclude the defence. A construction that engages the preclusion upon an evaluation of the "causative potency" of the deceased's conduct, being conduct that is not said by the accused to have in fact induced his or her loss of self-control, should only be adopted if the words "based on" admit of no other meaning. That is not this case, here the words "based on" in sub-s (3), as in sub-s (2), are apt to convey a relationship of causation simpliciter between the sudden provocation and the deceased's provocative conduct.

18 The respondent submits that construing the words "based on" as meaning "induced by" permits the accused to "dictate" whether sub-s (3) is engaged by the

17 *R v Peniamina* (2019) 2 QR 658 at 684-685 [85].

18 *R v Peniamina* (2019) 2 QR 658 at 700-701 [166], 703 [185].

19 *R v Peniamina* (2019) 2 QR 658 at 703 [184].

20 *R v Peniamina* (2019) 2 QR 658 at 703 [184].

nomination of the act relied upon as causative of the loss of self-control. This is an outcome that is suggested to be antithetical to the mischief that the enactment of s 304(3) was intended to remedy. The submission assumes that the mischief which the legislature sought to redress was the availability of the defence in cases in which the killing of a domestic partner occurs in the context of change to the relationship and not the availability of the defence in cases in which the accused's loss of self-control is induced by a thing done by the deceased to change the relationship. Neither the legislative history nor the extrinsic materials support such an assumption.

19 In 2008, the Commission was given a reference to review the defence of provocation and to report on whether it should be "abolished, or recast to reflect community expectations"²¹. The 2011 amendments implemented the Commission's three recommendations for recasting the defence, none of which involved any change to its elements²².

20 The Commission identified cases in which the deceased's provocative words, without more, had served to reduce murder to manslaughter²³. The Commission observed that the outcome in these cases appeared to be irreconcilable with the Court of Appeal's authoritative statement in *Buttigieg* that the use of words alone, save in "circumstances of a most extreme and exceptional character", do not suffice to sustain the defence²⁴. The Commission recommended²⁵:

"that section 304 of the Criminal Code (Qld) be amended to include a provision to the effect that, other than in circumstances of an extreme and

21 QLRC Report at 1-2 [1.2]-[1.3].

22 QLRC Report at 500-501 [21.178] (recommendations 21-2, 21-3 and 21-5).

23 QLRC Report at 467 [21.13], citing *R v Auberson* [1996] QCA 321; *R v Smith* [2000] QCA 169; *R v Perry*, Indictment No 312 of 2003; *R v Schubring*; *Ex parte Attorney-General* [2005] 1 Qd R 515; *R v Sebo*; *Ex parte Attorney-General (Qld)* (2007) 179 A Crim R 24; *R v Mills* [2008] QCA 146.

24 (1993) 69 A Crim R 21 at 37, citing *Moffa v The Queen* (1977) 138 CLR 601 at 605 per Barwick CJ, 616-617 per Gibbs J and *Holmes v Director of Public Prosecutions* [1946] AC 588.

25 QLRC Report at 479 [21.79].

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exceptional character, the defence of provocation cannot be *based on* words alone or conduct that consists substantially of words". (emphasis added)

21 The Commission also identified cases in which the defence had been successfully relied upon where "the only provocation by the deceased consisted of the choice to end his or her relationship with the defendant or to form a relationship with another person"²⁶. The Commission referred in this respect to Coldrey J's statement in *R v Yasso*²⁷:

"In our modern society persons frequently leave relationships and form new ones. Whilst this behaviour may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it.

What is abnormal is the reaction to this conduct in those small percentage of instances where that former partner (almost inevitably a male) loses self control and perpetuates fatal violence with an intention to kill or to cause serious bodily injury.

In my view, this will rarely, if ever, be a response which might be induced in an ordinary person in the twenty-first century. Significant additional provocative factors would normally be required before the ordinary person test could be met."

22 Reflecting its agreement with this statement, the Commission proposed a further limitation on the availability of the defence²⁸:

"[T]he Commission recommends a limitation on the circumstances in which the deceased's exercise of choice about a relationship may provide a sufficient foundation for the defence of provocation. The Commission recommends that section 304 of the Criminal Code (Qld) be amended to include a provision that has the effect that, other than in circumstances of

26 QLRC Report at 475 [21.53], citing *R v Auberson* [1996] QCA 321; *R v Schubring; Ex parte Attorney-General* [2005] 1 Qd R 515; *R v Sebo; Ex parte Attorney-General (Qld)* (2007) 179 A Crim R 24; *R v Mills* [2008] QCA 146; *R v Ramage* [2004] VSC 508; *Khan* (1996) 86 A Crim R 552.

27 QLRC Report at 480 [21.83], quoting *R v Yasso* (2002) 6 VR 239 at 243-244 [31]-[33].

28 QLRC Report at 481 [21.88].

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an extreme and exceptional character, provocation cannot be *based on* the deceased's choice about a relationship." (emphasis added)

23 More generally, the Commission identified cases in which provocation had been left for the jury's determination notwithstanding that the evidentiary support was acknowledged by the trial judge to be "minimal" or "barely arguable"²⁹. The Commission suggested that³⁰:

"[I]f the onus of formulating the claim of provocation is placed on the party who wishes to rely on the claim, the trial judge may have a greater capacity to act as a gatekeeper to prevent unmeritorious claims being advanced before juries."

The Commission's third recommendation for the amendment of s 304 was to place the onus of proof of the defence on the accused³¹.

24 The explanatory notes to the Act that inserted s 304(3) into the Code explained its object in these terms³²:

"The subsection deals with an unacceptable response by a party to a domestic relationship, to *an event* affecting the relationship, arising from a choice made by the deceased about the relationship." (emphasis added)

25 Nothing in the text, the statutory context, the exiguous legislative history or the Report³³ points to the conclusion that sub-s (3) was intended to exclude the defence in circumstances other than where the thing done by the deceased (or believed to have been done) that induced the accused's loss of self-control was done (or believed to have been done) to change the relationship.

29 QLRC Report at 467 [21.11], citing *R v Perry*, Indictment No 312 of 2003 and *R v Exposito*, Indictment No 340 of 2005.

30 QLRC Report at 492 [21.145].

31 QLRC Report at 501 (recommendation 21.5).

32 Queensland, Legislative Assembly, *Criminal Code and Other Legislation Amendment Bill 2010*, Explanatory Notes at 12.

33 *Acts Interpretation Act 1954* (Qld), s 14B.

26 The concern that an accused might circumvent the operation of sub-s (3) by choice of the conduct that is said to have triggered the fatal response fails to acknowledge that what is disappplied under the provision is a true defence. It no longer falls to the prosecution to negative, on a view of the evidence most favourable to the accused, that any conduct of the deceased might have induced the accused to lose self-control and to kill while in that state³⁴. Under the 2011 amendments it is incumbent on the accused to nominate the thing done (or believed to have been done) by the deceased that induced his or her loss of self-control. Unless the accused proves as a matter of probability not only that the killing was done in a state of loss of self-control but that that state was induced by the nominated conduct, and not by some preceding or other conduct, the defence fails. Self-evidently, if at the appellant's trial the jury thought it likely, or at least as likely, that the killing was carried out while the appellant was in an angry rage that had commenced with the argument earlier that evening, the defence would not have been established.

27 Correctly understood, sub-s (2) excludes the defence in the case of an unlawful killing in which the accused's loss of self-control is induced by words alone. And sub-s (3) excludes the defence in a case in which the accused was in a domestic relationship with the deceased and his or her loss of self-control was induced by anything done (or believed to have been done) by the deceased to change the relationship. In each instance whether the defence "does not apply" is a question of law. It is only if the trial judge determines that it is open to the jury to be satisfied that a case falling within sub-s (2) or sub-s (3) is attended by circumstances of a most extreme and exceptional character (or as s 304 presently stands, by circumstances of an exceptional character) that the defence is left for the jury's consideration.

28 It was the appellant's defence that the deceased's conduct with the knife induced his loss of self-control. McMurdo JA was right to say that there was no evidentiary foundation for the suggestion that the conduct with the knife was itself a thing done to change the relationship³⁵. It was not open to find that the defence was excluded under sub-s (3). It follows that the trial judge was wrong to direct the jury that, in addition to proving the elements of the defence, the appellant was required to prove that his loss of self-control was not based on anything done by the deceased to change the relationship.

34 cf *Pemle v The Queen* (1971) 124 CLR 107 at 117-118 per Barwick CJ.

35 *R v Peniamina* (2019) 2 QR 658 at 684 [82].

29 In the Court of Appeal the respondent invoked the proviso³⁶, submitting that the evidence, taken as a whole, made rejection of the defence case inevitable: the deceased's conduct with the knife, in all the circumstances, was not capable of sustaining the objective limb of the defence³⁷. In his dissenting reasons, McMurdo JA rejected the submission on the ground that, regardless of whether the appellate court was convinced that the appellant's guilt had been proved, the misdirection amounted to a substantial miscarriage of justice. His Honour reasoned that as it could not be known how the jury approached the defence, it is possible that the jury reasoned that the defence did not apply because the appellant had failed to demonstrate that the sudden provocation was not based on anything the deceased had done, preceding her conduct with the knife, to change the nature of the relationship. In the circumstances, McMurdo JA considered that dismissal under the proviso would amount to substitution of trial by an appellate court for trial by jury³⁸.

30 Allocation of the onus to the accused has evident bearing on the capacity of evidence to support the objective limb of the defence. Dixon J made the point in *Packett v The King*³⁹:

"[I]t may be open to entertain a reasonable doubt of provocation although it would be unreasonable to find affirmatively that provocation existed and was sufficient."

31 It is distinctly arguable, as Keane and Edelman JJ observe, that the evidence at the appellant's trial was incapable of establishing, on the balance of probability, that an ordinary person who had assaulted his wife could so far lose his self-control in response to her attempt to defend herself that he could form and act upon an intention to kill or to do grievous bodily harm to her⁴⁰. It may be that the appellant's description of the deceased's conduct with the knife that was given to the undercover police officer, if accepted, puts a different complexion on matters. In any event, it remains that the prosecution did not contend at the trial that the

36 *Criminal Code* (Qld), s 668E(1A).

37 *R v Peniamina* (2019) 2 QR 658 at 685 [88].

38 *R v Peniamina* (2019) 2 QR 658 at 686 [91]-[92], citing *Lane v The Queen* (2018) 265 CLR 196 at 210 [50] per Kiefel CJ, Bell, Keane and Edelman JJ.

39 (1937) 58 CLR 190 at 213-214.

40 Reasons of Keane and Edelman JJ at [56].

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defence should be withdrawn. And in this Court the respondent did not invoke the proviso.

32 For these reasons, the appeal must be allowed and a new trial ordered.

33 KEANE AND EDELMAN JJ. The appellant was charged with the murder of his wife ("the deceased"). At his trial, the appellant pleaded guilty to manslaughter but not guilty to murder on the basis that the killing of the deceased was the result of a loss of self-control caused by provocation by the deceased. As a result, the sole issue at the appellant's trial was whether he could establish the partial defence of provocation under s 304(1) of the *Criminal Code* (Qld) ("the Code"). This issue was resolved against him by the verdict of the jury. An appeal to the Court of Appeal of the Supreme Court of Queensland was dismissed.

34 The Court of Appeal (Morrison JA and Applegarth J, McMurdo JA dissenting) held that the trial judge (Sofronoff P) was entitled to direct the jury to consider whether s 304(3) excluded the availability of the partial defence under s 304(1). The effect of the direction upheld by the Court of Appeal is that the partial defence is not available where the jury concludes that the loss of self-control by the accused, in which the killing of the victim occurred, was based on anything done by the deceased, or anything the accused believes the deceased has done, to end or to change the nature of the relationship, or to indicate in any way that the relationship may, should or will end or change (collectively, "to change the relationship"). The Court of Appeal held that s 304(3) had this operation in this case even though the appellant contended, for the purpose of s 304(1), that his loss of self-control was caused only by the deceased brandishing a knife in his presence and cutting his hand with it.

35 Pursuant to a grant of special leave, the appellant now appeals to this Court. The sole question raised in the appeal is whether the Court of Appeal erred in holding that s 304(3) of the Code is not confined in its operation as a limitation on the availability of the partial defence in s 304(1) by reference to the particular act of provocation identified by the accused as having caused the loss of self-control in which the killing occurred. For the reasons that follow, the Court of Appeal did not err in this regard. Accordingly, the appeal to this Court should be dismissed.

The facts

36 The appellant and the deceased were married; they had four young children together. The appellant worked as a scaffolder, and the deceased looked after the children. Sometime in late 2015 or early 2016, the deceased went with the children to New Zealand for a holiday for a few months. She returned from the trip in February 2016. After the deceased's return, the appellant began to suspect that she had been having an affair in New Zealand. Two weeks prior to the killing, the appellant told his aunt, Talaitupu Niumata, that the deceased and he had been having marriage problems and the deceased had been sleeping in a different room.

37 On 29 March 2016, one of the children, who was ten years old at the time, heard the appellant and the deceased having an argument. This child heard the deceased demanding that the appellant return her phone. Later that day the

appellant told his aunt in a telephone call that he had taken the deceased's phone, and that he saw messages from another man to the deceased. After the appellant pressed her to tell him anything she knew about an affair, his aunt told the appellant that, based on what she had seen on Facebook, she thought the deceased had met someone in New Zealand, but that she did not know who it was. The appellant's aunt had seen Facebook posts containing pictures of the deceased with a man in New Zealand, and saw that the man had described the deceased as his girlfriend.

38 That evening the appellant went to see his cousin. He told his cousin about the Facebook posts his aunt had seen and showed her the Facebook profile of the man. He also said that the deceased had been hiding her phone from him and sleeping in a separate bedroom. He told her that he suspected that she was having an affair. The appellant's cousin described him in evidence as being frustrated and upset. He was worried about the deceased taking the children away from him.

39 On 30 March 2016, the appellant's cousin called him to discuss her research concerning his rights in relation to the children. Her evidence was that the appellant was quite "content" and "happy" on this occasion. The appellant told her that he and the deceased worked things out and that everything seemed to be okay.

40 On 31 March 2016, the appellant came home from work at around 4.30 pm, a few hours before the killing. He and the deceased went to Coles and bought food for dinner for the children. Shortly after the deceased and the appellant returned home, the appellant disappeared from the house, without his car. He came back angry and went to his room. Shortly after, the appellant snatched a second mobile phone from the deceased and left in his car.

41 The appellant subsequently called his aunt and told her that he had taken the deceased's phone and discovered some text messages. He said that he had rung the man who had been sending text messages to the deceased and that he told him to stop calling her. He told his aunt that the man did not know that the deceased was married.

42 The appellant also called his cousin. Her evidence was that the appellant's voice sounded distraught, upset and panicky. He was talking fast. She told the appellant to come to her house, which he did. While he was there, she observed that he was emotional and shaky. He told her that he had found the deceased's phone while she was in the shower. He called the number that was the last call in the phone and spoke to a male person who said "horrible things" to him. The appellant said that the deceased had been in the room during his conversation with the man. When he confronted the deceased about the man, she denied knowing who the man was. The appellant stayed at his cousin's house for two or three hours. While he was there, he began planning for the possibility that the deceased would leave him, by creating his own email address and Facebook account. The

appellant's cousin stated that the appellant left her house at around 10.30 pm, and that by the time he left he was very calm.

43 The appellant returned home and tried to talk to the deceased. He said that he thought that the deceased looked like she didn't care. He said that she told him to "stop talking shit". The appellant then hit the deceased with his right hand. The appellant saw that there was some bleeding in her mouth. The deceased then went to the bathroom, before going into the kitchen. The appellant heard the deceased opening a drawer. He went into the kitchen and saw that the deceased had a knife.

44 The appellant tried to grab the knife. The deceased then pulled it back, causing a deep cut on his right palm. The appellant then grabbed the knife. The deceased started to run away from the appellant. The appellant said that at that point, he was thinking that he wanted to kill her. He got a hold of the knife and began to stab the deceased while they were still in the kitchen.

45 The deceased fell to the floor. The appellant then kicked her in the head. At some point she lost a tooth. Their son saw the appellant stabbing the deceased in the head while she was on the floor, and heard the deceased calling for help. The deceased was able to get up and somehow ran to the front door and onto the driveway. The appellant ran after her.

46 The deceased hid behind the car. The appellant caught up to her and stabbed her more times to the head. The son watched the appellant do this. The deceased was stabbed over 20 times before she fell to the ground. The appellant said that, in addition to the stabbing, he also kicked the deceased.

47 The appellant then removed a concrete bollard from the garden bed and used it to hit the back of the deceased's head, fracturing her skull. The son said that he saw the appellant hit the deceased with the concrete bollard twice. Ultimately, it was the fractured skull that resulted in the death of the deceased.

48 After the appellant hit the deceased with the concrete bollard, he crouched next to the deceased, calling for someone to call the ambulance. A neighbour told the appellant to sit down until the police arrived, which he did.

49 Once the police arrived, the appellant called his mother. When speaking to his mother, he said "sorry" multiple times, and also said a number of times that the deceased had been cheating on him. At one point in the conversation he said:

"[Appellant]: She cheat too many time, mum. I try, I try, mum, to stop, but I can't stop, mum.

[Appellant's mother]: The anger?

[Appellant]: Oh, yes."

50 After the phone call, the appellant repeatedly apologised in the direction of the deceased. For instance, he said:

"Oh babe, I'm so sorry. Oh my God. Why? Why I do this? Why? I'm so sorry, babe. Oh oh my god. Oh my God. I'm so sorry oh."

51 When first asked "[w]hat happened", the appellant responded "she cheated on me ... [s]he cheated on, ah, ah her boyfriend's number on my phone. She cheat on me too many times. I can't stop when I'm angry." The appellant explained the knife incident immediately after, within that context. He then said that all he wanted was "the truth" from the deceased. When later asked "what started it all", the appellant stated that it had been going on for a "long time", and that the deceased had cheated on him. The police officers then asked what happened that night, and "[w]hat kicked it all off". In response, the appellant described his conversation with the man he thought the deceased was cheating on him with.

52 The appellant explained that he hit the deceased, she grabbed a knife, and he tried to pull it, which caused a cut. He said that he then got "more angry". He said that he was already "angry before that", but at that point he was thinking that he wanted to kill her. He explained the course of events from that point until and including hitting her with the concrete bollard.

The relevant provisions of the Code

53 The appellant was charged with murder under s 302 of the Code. It relevantly provides:

"(1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say –

(a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;

...

is guilty of *murder*."

54 At the relevant time, s 304 relevantly provided:

"(1) 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.

19.

- (2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.
- (3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if –
 - (a) a domestic relationship exists between 2 persons; and
 - (b) one person unlawfully kills the other person (the *deceased*); and
 - (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done –
 - (i) to end the relationship; or
 - (ii) to change the nature of the relationship; or
 - (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.
- (4) For subsection (3)(a), despite the *Domestic and Family Violence Protection Act 2012*, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.
- (5) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.
- (6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.
- (7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only."

Sub-sections (2)-(7) of s 304 were inserted into the Code by s 5 of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld). These amendments made two relevant changes in the law. First, the circumstances in which the partial defence of provocation to murder should henceforth be available were limited by sub-ss (2) and (3). Secondly, the burden of proving that an accused person is liable to be convicted of manslaughter only was placed on the accused

by sub-s (7). Previously, the prosecution bore the burden of negating the partial defence of provocation⁴¹.

The trial

56 Having regard to the evidence summarised above, it may be thought to be somewhat surprising, given that the onus of proof was on the defence, that the issue of provocation was allowed to go to the jury at all. It is, to say the least, distinctly arguable that no reasonable jury could have been satisfied on the balance of probabilities that an ordinary person who had assaulted his wife could so far lose his self-control by her attempt to defend herself that he could form and act upon an intention to kill her. But the prosecution did not make such a submission. Nor did the prosecution submit to the trial judge that no reasonable jury could have been satisfied on the balance of probabilities that the appellant had killed the deceased when he lost his self-control because she took up the knife rather than because of her perceived infidelity.

57 The prosecution presented to the jury a case that, in an important particular, made unnecessarily heavy weather of the application of s 304(3) in this case. The Crown Prosecutor told the jury in her closing address that the deceased's conduct with the knife was "done in the context of her trying to change the nature of the relationship and that this was known to him". The Crown Prosecutor said that the acts of the deceased in taking up and brandishing the knife after he had struck her "would have meant to [the appellant], I no longer want to be with you[.] You and I are over. Leave me alone."

58 This characterisation of the brandishing of the knife by the deceased as itself, in some way, an ending, or change in the nature, of the relationship between the deceased and the appellant was a distinctly awkward attempt to apply s 304(3) of the Code to the appellant's account of his killing of the deceased. The prosecution case may have been framed in this way in an endeavour to meet the argument put by the defence that the only relevant "sudden provocation" was the brandishing of the knife by the deceased; but it was an unnecessarily complicated, and, as it happens, erroneous, way of explaining the possible application of s 304(3) to the evidence.

59 The trial judge directed the jury that the accused bears the onus of proving provocation on the balance of probabilities. His Honour told the jury that, for the partial defence of provocation to apply, the jury was required to identify the alleged provocation, to find that the act of provocation actually caused the appellant to lose

41 Compare *Pollock v The Queen* (2010) 242 CLR 233 at 241 [30].

self-control, and to find that a person with ordinary powers of self-control in the same factual position would have also lost self-control and formed an intent to kill.

60 As to the identification of the alleged provocation, the trial judge said:

"The defence says that the provocation to which [the appellant] reacted was [the deceased's] grabbing of the knife, threatening the [appellant] with it, and then the cutting of his palm that followed. That was the provocative act or the provocative acts."

61 In relation to s 304(3) of the Code, the trial judge went on to tell the jury that, given the appellant and the deceased were in a domestic relationship, the partial defence of provocation does not apply if the jury were to find that the sudden provocation was based on anything the deceased did, or the appellant believed she had done, to change the relationship.

62 The trial judge directed the jury by reference to a document which set out questions for the jury's determination. Relevantly, that document was in the following terms:

"Has the defence satisfied you, on the balance of probabilities that:

5. The [appellant] killed [the deceased] in the **heat of passion caused** by sudden **provocation** and before there was time for his **passion to cool**.
6. In the **same situation** as the accused, **an ordinary person might have been provoked** into losing self-control to such an extent as to form an intent to kill [the deceased] and to kill her

If the defence fails to satisfy you of either one of these issues, or both, you would find the accused guilty of murder.

If the defence has satisfied you of both of these issues, go on to consider whether the situation is one in which the defence does not operate. Has the defence satisfied you that:

7. The sudden provocation was not based on **anything [the deceased] did to change the nature of the relationship** (as husband and wife)

If the defence has satisfied you of this, you will find the accused not guilty of murder but guilty of manslaughter

If the defence fails to satisfy you of this, go on to consider the final issue."

63 His Honour told the jury that the Crown case in relation to question 5 was that the appellant had not lost his self-control when he killed the deceased. His Honour said:

"The Crown invites you to conclude that the violence that led to [the deceased's] death was just a continuation of the earlier violence when he had hit her. The Crown points to his mood as angry on that night and says this was an angry man who could not tolerate his wife's change in attitude towards him. The Crown says this was not a loss of self-control, this is an anger-driven murder.

The Crown says that he was in a rage when he killed [the deceased] but invites you to conclude that he did not lose his self-control. He became angry, yes, says the Crown, and in his anger he punched her, he stabbed her and he finally bludgeoned her to death, but he never lost control of himself. The Crown invites you to conclude that after punching his wife in the mouth, after she fled to the kitchen and armed herself, after he pursued her and disarmed her, then, in great anger, in a rage, but not in a state of loss of control, he murdered her.

Those seem to be the two alternatives for you to consider. What you have to consider is whether you're satisfied on the balance of probabilities of the view of events that conform to the aspects of provocation as I have described them to you."

64 In relation to his question 7, the trial judge told the jury:

"The defence will not apply to excuse murder and result in a verdict of manslaughter, even if he was provoked and an ordinary person might have been provoked, if what she did, the provocation that he points to was based upon something she did to change the nature of the relationship. If he had killed her for sleeping in a different bedroom you would have it. She would have done that to change the nature of the relationship.

The Defence has to satisfy you on the balance of probabilities that the *provocation to which the [appellant] reacted* was not based upon something that [the deceased] did to change the nature of the relationship." (emphasis added)

65 His Honour went on to tell the jury that the Crown Prosecutor:

"points to several factors and invites you to conclude that this was a provocation based upon something [the deceased] did to change the nature of the relationship.

[The Crown Prosecutor] points to her return from New Zealand with a different attitude towards the marriage, her decision to sleep in a separate bedroom, the fact that she had had an affair or was beginning to have an affair, the fact that she was communicating with a lover, that she would not compromise with her husband, would not even discuss it it seems. She points to the fact that they were really no longer living as husband and wife. The Crown says that his anger – and even if it was a loss of control they say it does not matter, the defence does not apply, because his loss of control, his sudden provocation, was based upon his refusal to accept the change that his wife was making to the marriage."

66 The trial judge then referred to the response of the defence to this way of putting the Crown case in relation to question 7. His Honour said:

"The Defence says that is looking at it wrongly. The Defence says the provocation was the raising of the knife and the cutting of the hand. The provocation, those acts, were not acts done by [the deceased] to change the nature of the relationship. They were acts done in an attempt to stab her husband. Whether in self-defence or whether out of anger it does not matter, they were acts, says the Defence, that were not done – for whatever reason she had for doing it, they were not acts done in order to change the nature of the relationship.

She raised the knife in a motion as it was described, if you accept this, as though she were about to stab him, and then when he grabbed the knife, perhaps unintentionally, he cut himself drawing the knife back, or she drew the knife back. The Defence says that the knife, the cut, were not something that [the deceased] did to change the nature of the relationship."

67 His Honour then went on to complete his directions to the jury in respect of question 7, saying:

"If the Defence has failed to satisfy you of that aspect, if you are of the view that the act to which he reacted may have been something she had done to change the nature of the relationship, *whether it was something that preceded the stabbing or if for some reason you think that the stabbing itself was an act done to change the nature of the relationship*, then you have to go and consider one final matter." (emphasis added)

68 It can be seen in this passage that the trial judge adverted to the attempt by the Crown to characterise the cutting of the appellant's hand as an act done by the deceased to change the relationship. This way of putting the Crown case was flawed, both in fact and in law, but these flaws are not at the heart of the issue presented in the appeal to this Court.

The Court of Appeal

69 To focus upon the issue raised by the appeal to this Court, it is helpful to refer first to the dissenting reasons of McMurdo JA, who held that the trial judge erred in his directions to the jury in relation to s 304(3). McMurdo JA held that s 304(3) "is not engaged simply because the conduct of the deceased, upon which a defendant's case relies, occurred in the context of an end or a change to the relationship"⁴².

70 McMurdo JA observed⁴³ that the trial judge's direction to the effect that the jury might find that the acts done by the deceased with the knife were done in order to change the relationship was put by the Crown Prosecutor; but that the broader case adverted to by the trial judge, that the appellant was provoked by something which the deceased had done to change the relationship which preceded her acts with the knife, had not been argued by the Crown Prosecutor. Whether or not that is an accurate summary of the Crown case at trial may be put to one side because no complaint of a misdirection in this respect is a ground of appeal in this Court. In relation to the case said to have been put by the prosecution, McMurdo JA held that this case was unsustainable. McMurdo JA said⁴⁴:

"Any consideration of the operation of s 304(3) had to be made by reference to the act or acts of the deceased which caused the sudden provocation; that is to say, the appellant's loss of self-control. Therefore, in order for s 304(3) to be engaged, the jury had to find that, more probably than not, what was done by the deceased with the knife was done to end or change the nature of the relationship.

The trial judge left to the jury the question of whether 'the stabbing itself' was an act done to change the nature of the relationship. In my respectful opinion, his Honour ought not to have done so, because there was no evidentiary foundation for this argument by the prosecutor. An inference that the deceased did those things with the knife in order to end or change the relationship was not open. In the events which had occurred before the altercation which culminated in her death, she had done many things which had made it clear that the relationship had ended or changed. On the only realistic view of the evidence, her acts with the knife were a reaction to being punched by the appellant, and perhaps to other preceding events."

42 *R v Peniamina* (2019) 2 QR 658 at 675 [48].

43 *R v Peniamina* (2019) 2 QR 658 at 682 [73].

44 *R v Peniamina* (2019) 2 QR 658 at 684 [81]-[82].

71 It may be accepted that these criticisms of the prosecution argument by McMurdo JA are correct. The argument that the raising of the knife by the deceased was itself in some way a changing of the domestic relationship for the purposes of s 304(3) is plainly something of a stretch as a matter of the evidence. It is also true to say that one cannot glean from the language of s 304(3) an intention on the part of the legislature that the operation of s 304(3) should depend upon the result of an enquiry as to what may have motivated a deceased person to engage in conduct that might be said to have provoked the accused. Something more will be said in this regard in disposing of the appeal; but for the present, it is sufficient to observe that the prosecution case was not tied exclusively to its awkward and erroneous attempt to contend that the brandishing of the knife by the deceased and the cutting of the appellant's hand fell within s 304(3).

72 In relation to the relevance of the acts of the deceased that preceded her brandishing of the knife, McMurdo JA said⁴⁵:

"The jury were also directed to consider another basis for the application of s 304(3), namely that there was an act to which the appellant reacted that may have been something which the deceased had done to change the nature of the relationship, which 'preceded the stabbing' (meaning that it was something which preceded the altercation). In my respectful opinion, the jury were thereby misdirected, because any consideration of the application of s 304(3) had to be by reference to the conduct of the deceased upon which the defence sought to prove its case. Indeed, the judge suggested to the jury to consider question 7 if satisfied that question 5 (and question 6) should be answered in the appellant's favour. Upon that premise, the jury could have been considering whether the appellant had reacted to some 'preceding' act only by a misunderstanding of the effect of s 304(3). As I have said, the prosecutor had not argued that the sudden provocation (if any) was caused by preceding conduct of the deceased."

73 In developing his criticism of the legal basis of the directions of the trial judge in relation to question 7, McMurdo JA said⁴⁶:

"[T]he expression 'sudden provocation' in s 304(3) has the same meaning which it has in s 304(1), which is that the expression is concerned with, and related to, the temporary loss of self-control of the accused person. The sudden provocation was not 'the act that the Defence points to'. In s 304(3), the connection between the sudden provocation and an act by the

45 *R v Peniamina* (2019) 2 QR 658 at 684 [83].

46 *R v Peniamina* (2019) 2 QR 658 at 684-685 [85]-[86].

deceased to end or change the relationship, is not a connection between the provocative conduct of the deceased and something done to end the relationship. If that were the case, a meaning of the expression 'based upon' would have to be found, in order to define the nature and extent of such a connection. Instead, the relevant connection is between the conduct of the deceased and the accused's loss of self-control, and the necessary connection is that the former must have caused the latter.

For these reasons, the evidence did not raise the possible operation of s 304(3) and the argument that the jury should not have been asked to consider it, should be accepted. Further, in my respectful opinion, the jury was misdirected as to the operation of s 304(3)."

74 On this approach, the events which preceded the actions of the deceased with the knife were relevant only insofar as they tended to counter the appellant's case under s 304(1) that he killed the deceased in an uncontrolled rage because of sudden provocation caused by her actions in relation to the knife⁴⁷.

75 The majority took a different approach. On that approach, the possible application of s 304(3) is not confined by the identification of the act relied upon by the accused as having caused the sudden provocation. In this regard, Applegarth J, with whom Morrison JA generally agreed⁴⁸, said⁴⁹:

"s 304(3) should not be read as being confined to a case in which the defendant nominates the sudden provocation as a thing done by the deceased to change the relationship. It may apply to a case in which a more immediate act of the deceased is nominated by the defendant, but in which the evidence permits the conclusion to be reached that, in addition to that immediate claimed cause of the sudden provocation, it was based on a thing done by the deceased to change the relationship."

76 Applegarth J explained that in his Honour's view the expression "based on" in s 304(3) does not require a coincidence between the act of the deceased to change the relationship and the act nominated by the accused as the provocative conduct for the purpose of s 304(1)⁵⁰. Rather, those words suggest that the act of

47 *R v Peniamina* (2019) 2 QR 658 at 683 [77].

48 *R v Peniamina* (2019) 2 QR 658 at 664 [2].

49 *R v Peniamina* (2019) 2 QR 658 at 703 [182].

50 *R v Peniamina* (2019) 2 QR 658 at 703 [185]-[186].

the deceased must have been "a foundation" of the sudden provocation, and "connote a substantial causal connection"⁵¹. Whether, in a given case, the sudden provocation was "based on" an act by the deceased to change the relationship requires an "evaluation of the chain of events and the causative potency of the act of the deceased"⁵².

The arguments in this Court

77 The appellant argued that the majority in the Court of Appeal erred because the "sudden provocation" to which s 304(3) refers can be identified only by reference to the particular provocative conduct relied on by the accused for the purpose of raising the partial defence under s 304(1). Because the conduct of the deceased which the appellant identified as having caused the "sudden provocation" was the deceased brandishing a knife and then cutting the appellant's hand, s 304(3)(c) could not be engaged; and so no occasion arose for the trial judge to give a direction to the jury addressing s 304(3). It was said that the effect of the trial judge giving such a direction was wrongly to introduce an immaterial obstacle to the appellant's acquittal of murder. Importantly, the appellant argued that, as McMurdo JA reasoned, the expression "based on" in s 304(3)(c) means "caused by".

78 The respondent submitted that the language of s 304(1), which speaks of the act which caused death being "*caused by* sudden provocation", stands in stark contrast with the language of s 304(3), which contemplates that "the sudden provocation is *based on* anything done by the deceased" (emphasis added). The respondent submitted that the difference in language reflected a legislative intention to exclude the availability of the partial defence of provocation where, upon the factual inferences available on the evidence, the circumstances referred to in sub-s (3) cannot be excluded by the accused as having contributed to the killing of the deceased.

79 The contest between the parties in this Court is thus a contest as to the proper construction of s 304(3) of the Code. That contest is to be resolved by

51 *R v Peniamina* (2019) 2 QR 658 at 703 [184]-[185].

52 *R v Peniamina* (2019) 2 QR 658 at 703 [184].

reading s 304(3) in the context of the text and structure of s 304 as a whole, and in light of the purpose of s 304(3)⁵³.

Considerations of text: the meaning of "sudden provocation"

80 It may be acknowledged that the phrase "sudden provocation" is an awkward expression. Provocation as a partial defence to murder is, exceptionally, one respect in which the Code is not to be given effect according to the ordinary and natural meaning of its words without first having regard to the common law⁵⁴. Thus, in *Kaporonovski v The Queen*⁵⁵, McTiernan A-CJ and Menzies J noted that s 304 of the Code does not express the conditions upon which provocation is given legal effect. As their Honours went on to observe⁵⁶, and as French CJ, Hayne, Crennan, Kiefel and Bell JJ accepted in *Pollock v The Queen*⁵⁷:

"[I]t 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."

81 It is well settled that in what is now s 304(1), as it appeared before s 304 was amended in 2011, the composite expression "sudden provocation" had, as it still does, a dual aspect being concerned both with the provoking conduct of the deceased⁵⁸ and with "the temporary loss of self-control excited by the provocation"⁵⁹. In *Pollock v The Queen*⁶⁰, this Court considered the meaning of the

53 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39].

54 *cf Pickett v Western Australia* (2020) 94 ALJR 629 at 635-636 [22]-[23]; 379 ALR 471 at 477.

55 (1973) 133 CLR 209 at 219.

56 *Kaporonovski v The Queen* (1973) 133 CLR 209 at 219.

57 (2010) 242 CLR 233 at 245 [46] (footnote omitted).

58 *Pollock v The Queen* (2010) 242 CLR 233 at 251 [65].

59 *Pollock v The Queen* (2010) 242 CLR 233 at 247 [52]; see also at 244-245 [45], citing *R v Pollock* [2009] QCA 268 at [50].

60 (2010) 242 CLR 233.

expression "sudden provocation" in what is now s 304(1), before the amendments that introduced s 304(2) and (3) were made. The Court (French CJ, Hayne, Crennan, Kiefel and Bell JJ) said⁶¹:

"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. 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."

82 In particular, the Court said the word "sudden" does not qualify the deceased's conduct, so there is no need for immediacy between the induced state of mind of the accused and the provocative conduct by the deceased. Their Honours said⁶²:

"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."

83 In both s 304(1) and (3) of the Code, the expression "sudden provocation" bears the same meaning, as all members of the Court of Appeal agreed⁶³. It can and should be understood as referring to the conduct that excites the reaction in the accused and its causative potency in bringing about the temporary loss of self-control in the grip of which the accused kills his or her victim. In s 304(3)(c), the phrase "sudden provocation ... based on anything done by the deceased" refers not to the motivation of the victim that informs or explains his or her conduct toward the accused, but to the potency of the acts of the victim as a possible foundation of the temporary loss of self-control on the part of the accused. Section 304(3)(c) confirms the concern of s 304(3) with the emotional state of the accused in speaking of sudden provocation as something based on anything done by the deceased or "anything the person *believes* the deceased has done" (emphasis added).

61 *Pollock v The Queen* (2010) 242 CLR 233 at 245-246 [47] (footnote omitted).

62 *Pollock v The Queen* (2010) 242 CLR 233 at 247 [54] (emphasis in original, footnote omitted).

63 *R v Peniamina* (2019) 2 QR 658 at 665 [6], 673-674 [44]-[46], 695 [135].

Considerations of text and structure

84 As to the structure of s 304, it is readily apparent that if either of s 304(2) or (3) is satisfied, s 304(1) cannot apply at all. Sub-sections (2) and (3) are predicated upon the assumption that s 304(1) would apply to provide the accused with a partial defence for the killing because of the occurrence of sudden provocation that has caused the loss of self-control in which the killing occurred, were it not for the circumstance that the sudden provocation that caused the loss of self-control was "based on" words alone or anything done by the deceased, or which the accused believes the deceased has done, to change the relationship.

85 Section 304(1), in speaking of the "act which causes death in the heat of passion caused by sudden provocation", has in contemplation two relationships of cause and effect, one between the act of the accused and the death of the victim, and one between the uncontrolled emotional state of the accused and the provocation. On the other hand, s 304(3)(c) contemplates a third relationship of cause and effect, namely that the sudden provocation that caused the uncontrolled emotional state of the accused is "based on" something done by the deceased, or which the accused believes the deceased has done, to change the relationship. In other words, death is: (i) *caused* by an act; (ii) which act is, in the heat of passion, *caused* by sudden provocation; and, by s 304(3)(c), (iii) the sudden provocation is *based on* something done by the deceased or which the accused believes the deceased has done to change the relationship.

86 It is of critical importance to the reasoning of McMurdo JA, as it is to the appellant's argument in this Court, that "based on" in s 304(3) should be restricted to mean "caused by"⁶⁴. Even then, the conclusion reached by McMurdo JA requires a further restriction that the "anything done" by the deceased is something done by the deceased, or believed to have been done by the deceased, *immediately* before the act. In other words, "based on" must be taken to mean "immediately caused by". With all respect, both to elide the distinction between "caused by" and "based on", and to effectively add a requirement of "immediacy" or "directness", is impermissibly to depart from the text of the statute.

87 The deliberate contrast in the language used by the legislation points strongly against reading "based on" as "caused by". There is a clear contrast between the language of s 304(1) and that of s 304(3). The expression "based on" clearly casts a wider net of connections than "caused by". The phrase "based on" is broader in its scope than "caused by", in the sense that "based on" is apt to comprehend matters that have affected the accused's actions in relation to the

64 *R v Peniamina* (2019) 2 QR 658 at 684-685 [85].

deceased, in addition to the actions of the deceased said by the accused to have caused his or her loss of self-control for the purpose of s 304(1). In other words, the phrase "based on" avoids the usual causal enquiry into whether the "anything done" by the deceased was, by itself, necessary for his or her loss of self-control⁶⁵. The contrast in the language used in s 304(1) and s 304(3) is emphasised by the use of the same expression, "sudden provocation", in the two sub-sections. There is no reason why the legislature would not have also chosen to use the same "caused by" expression in the two sub-sections if it intended that the same causal connection was required. To fail to acknowledge these considerations is to ignore the legislature's deliberate choice.

88 It would not be permissible for the courts to ignore that deliberate choice of the phrase "based on" because of apprehended uncertainty or novelty in its operation: it is the duty of the courts to give effect to the intention of the legislature, however infelicitously that intention may be expressed. But the concept of something done being "based on" a loss of self-control is neither uncertain nor novel. In the law of torts it has long been recognised that there are some instances where liability can be imposed beyond cases where the plaintiff's loss was caused directly and immediately by the defendant's act; liability can be imposed where the plaintiff's loss was based on the defendant's act in the sense that the defendant's act either caused or materially contributed to the loss⁶⁶.

89 Moreover, there is no basis upon which to add a qualification that the "anything done", or believed to be done, by the deceased to change the relationship must have occurred immediately prior to the act of the accused. The text of s 304(3)(c) allows of the possibility that the "anything done" by the deceased might have occurred a considerable time before the act of the accused so long as it is one of the motivating factors which the sudden provocation is "based on".

Considerations of context

90 Reference to s 304(2) assists in understanding the correct construction of s 304(3). That s 304(2) is concerned to deny the availability of the partial defence in s 304(1) in cases where the state of "passion" in which the killing occurs is based on words alone can be seen more clearly when one reads s 304(2) epexegetically as:

65 *Swan v The Queen* (2020) 94 ALJR 385 at 390 [24]-[25]; 376 ALR 466 at 472-473.

66 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 514; *Amaca Pty Ltd v Booth* (2011) 246 CLR 36 at 62-63 [70]; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at 635 [45]; *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 at 775 [152]; 381 ALR 375 at 414.

"the sudden provocation that caused the heat of passion in which the person does the act which causes death is based on words alone".

91 Read in this way, s 304(2) can be seen to refer neither to the motivation of the deceased in provoking the accused, nor to the immediate trigger of the accused's loss of self-control, but instead to the immateriality of words alone as a basis or foundation of the accused's loss of self-control. That understanding is confirmed when one appreciates that the inspiration for s 304(2) was the unanimous decision of the Court of Appeal of the Supreme Court of Queensland in *Buttigieg*⁶⁷. In that case, the Court, referring to the then state of judicial authority in relation to the limits of the availability of provocation as a partial defence to murder, said⁶⁸:

"It seems now to be accepted in the cases that the use of words alone, no matter [how] insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in 'circumstances of a most extreme and exceptional character'."

92 So too, one may read the relevant part of s 304(3)(c) epexegetically as:

"the sudden provocation that caused the heat of passion in which the person does the act which causes death is based on anything done by the deceased or anything the person believes the deceased has done".

93 So understood, s 304(3) refers neither to the motivation of the deceased in provoking the accused, nor to the immediate trigger of the accused's loss of self-control, but rather to the potency of acts of the deceased as a basis or foundation of the accused's loss of self-control that excludes the application of s 304(1).

Considerations of statutory purpose

94 The mischief at which s 304(3) was aimed is sufficiently apparent from the text itself, but it was expressly identified in the Explanatory Notes to the *Criminal Code and Other Legislation Amendment Bill 2010* ("the Amending Bill"), which said of s 304(3)⁶⁹:

67 (1993) 69 A Crim R 21.

68 *Buttigieg* (1993) 69 A Crim R 21 at 37, citing *Moffa v The Queen* (1977) 138 CLR 601 at 605, 616-617 and *Holmes v Director of Public Prosecutions* [1946] AC 588.

69 Queensland, Legislative Assembly, *Criminal Code and Other Legislation Amendment Bill 2010*, Explanatory Notes at 12.

"The subsection deals with an unacceptable response by a party to a domestic relationship, to an event affecting the relationship, arising from a choice made by the deceased about the relationship."

95 The mischief at which s 304(3) was aimed was reliance by an accused upon a temporary loss of self-control that is a reaction on the part of the accused to the victim's attempts to change the relationship.

96 McMurdo JA reasoned that the construction of s 304(3) that he favoured was supported by the "evident policy" of the provision, that an ordinary person would not lose self-control and kill in response to something done by the deceased to change the relationship. His Honour said⁷⁰:

"The evident policy of s 304(3) is that, except in circumstances of a most extreme and exceptional character, something done by the deceased to end or change a domestic relationship should not provide a defence to a charge of murder, because an ordinary person would not lose self-control, and kill with murderous intent, in response to the other party to the relationship doing something to end or change it."

97 In this regard, McMurdo JA erred in his understanding of the purpose of s 304(3). In truth, s 304(3) is informed not by speculation as to what may or may not cause an ordinary person to lose self-control as a matter of fact; rather, it is informed by a policy choice made by the legislature that a loss of self-control founded upon a change, or the prospect of a change, in a domestic relationship is simply an unacceptable excuse for intentionally killing one's domestic partner. It is by reason of that legislative choice that if s 304(3) is satisfied, the jury need not be concerned with whether an ordinary person would have lost his or her self-control in such a case.

98 The difference in language between s 304(1) and s 304(3)(c) reflects a concern to ensure that less immediate or direct causes of loss of self-control on the part of the accused are considered for the purposes of s 304(3). That difference in language indicates that some of the grounds on which a lethal reaction by an accused may be based are not acceptable bases for the benefit of the partial defence.

99 So much is apparent from the Explanatory Notes to the Amending Bill, to which reference has been made. This is confirmed as well by reference to the report

70 *R v Peniamina* (2019) 2 QR 658 at 675 [50].

of the Queensland Law Reform Commission ("the QLRC") in relation to the law with respect to provocation. That report recommended that the legislature adopt⁷¹:

"a limitation on the circumstances in which the deceased's exercise of choice about a relationship may provide a sufficient foundation for the defence of provocation. The Commission recommends that section 304 of the Criminal Code (Qld) be amended to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based on the deceased's choice about a relationship."

100 The QLRC identified the mischief at which this recommendation was directed as the concern "that those who killed out of sexual possessiveness or jealousy had available to them the partial defence of provocation"⁷². The response to that mischief recommended by the QLRC was not directed to reform of the "ordinary person" test for the loss of self-control; rather, the recommendation was that sexual possessiveness or jealousy was henceforth not to be allowed as a basis or foundation for the partial defence to be available at all.

101 Having regard to the purpose of s 304(3), to accept the appellant's construction of s 304(3) would be to deprive it of any practical operation in any case where the accused is able to point to a plausible "trigger" for his or her loss of self-control that does not consist exclusively of the circumstances referred to in s 304(3). An accused could therefore dictate his or her case so that the limit imposed by s 304(3) on the availability of the partial defence of s 304(1) is avoided. Since a person's actions are almost always motivated by a multitude of factors, an accused person could almost always avoid the exclusion of the application of s 304(1) simply by relying on circumstances other than those described in s 304(3). Such an intention cannot be ascribed to the legislature.

Conclusion

102 Nothing in the structure of s 304, the text of s 304(3), or the context in which s 304(3) appears contemplates that only the conduct of the deceased which the accused says caused his or her loss of self-control can be regarded as the conduct on which "the sudden provocation is based". On the contrary, those considerations indicate that the partial defence in s 304(1) is not available to an

71 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008) at 481 [21.88].

72 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008) at 479 [21.80].

accused where on the evidence the accused's loss of self-control was based on the circumstances stated in s 304(3).

103 Hypothetical circumstances, akin to those in this case, illustrate how unlikely it is that Parliament could be taken to have intended that the operation of s 304(3) be a matter for the forensic choice of an accused, superintended by the judge, and removed from consideration by a jury. Suppose that in the course of a heated argument arising from accusations of infidelity by the accused against his partner, the partner picks up a knife to menace the accused and the accused responds by killing the partner. If the operation of s 304(3) were a matter for the forensic choice of the accused, he could frame a defence of provocation by relying only upon actions of the partner in picking up the weapon. And the jury would be left to consider provocation upon a fictional basis that required them to ignore the reality that the accused's actions were also based upon his belief about the infidelities of his partner.

104 In this case, the appellant's admissions of anger at the deceased's perceived infidelity and withdrawal from their relationship are compelling evidence that the appellant's attack upon the deceased was not, in truth, a reaction provoked by her production of the knife, but rather the release of smouldering resentment at her perceived infidelity. That evidence would tend to negative the partial defence in s 304(1). It was certainly open to the jury to conclude that the provocative conduct identified by the appellant as causative of his loss of self-control was not what, in fact, caused his loss of self-control. But the same evidence of the appellant's anger at the deceased's perceived infidelity and her withdrawal from their relationship was relevant as well in that it was apt to engage the operation of s 304(3) to render s 304(1) immaterial.

105 For the purposes of s 304, any adverse effect upon the emotional equilibrium of the appellant by the knife incident cannot be viewed in isolation from the other conduct of the deceased leading up to the killing, or the beliefs of the appellant in relation to that conduct. That this is so is apparent from the statements of the appellant to his mother on the phone and to the police immediately after the killing. These statements made it clear that his anger about the deceased cheating on him was very much on his mind. Further, the appellant stated that after the deceased cut his hand with the knife, he became "more angry", and that he was already "angry before that". He said at that point that "everything's on my mind, it's gonna happen", before stating "[t]he thing that's on my mind at the time, I wanna kill her". Because the burden of proof of the partial defence was on the appellant, if the jury were not able to exclude the hypothesis that the rage in which the appellant intentionally killed the deceased was, to some extent, a reaction to the deceased's attempts to distance herself from their relationship, the jury were entitled, and indeed obliged, to conclude that the partial defence of provocation under s 304(1) was not available to him.

106 It was certainly open to the jury to conclude that the initial punch of the appellant to the deceased, the deceased's conduct in relation to the knife and the reaction of the appellant to that conduct was the culmination of a number of events, all of which concerned the nature and continuation of the relationship between the appellant and the deceased. It was certainly open to the jury to infer from the evidence that whatever triggered the intention of the appellant to kill was based on conduct of the deceased to change the relationship; indeed no reasonable jury could have been satisfied to the contrary.

107 It has been noted that the trial judge's directions were erroneous insofar as they put to the jury the prosecution case that the brandishing of the knife by the deceased was itself an ending of, or change to the nature of, the domestic relationship between the appellant and the deceased. However, the only ground of appeal in this Court was whether the operation of s 304(3) is limited to the provocative conduct identified by the appellant as the cause of his loss of self-control. Special leave was not granted to agitate a complaint about the terms in which the trial judge directed the jury in relation to the prosecution case, and no attempt was made in this Court to expand the appellant's grounds of appeal in that regard.

108 That the appellant's counsel should have adopted that stance is entirely understandable. It is distinctly unlikely that leave would have been given to raise an issue as to the specific terms of the direction to the jury about the application of s 304(3) in the particular circumstances of the present case. That is because once the proper construction of s 304(3) is accepted, there was, on the unchallenged evidence of the appellant's own admissions, no occasion for the appellant to have the issue of provocation left for the jury at all. That being so, there was no issue as to the appellant's guilt on the charge of murder, and so the interests of the due administration of justice did not require the grant of special leave to challenge the terms of the directions. On the contrary, the interests of the due administration of justice would distinctly favour the refusal of leave to appeal in such a case.

Order

109 The appeal should be dismissed.

