HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No: A19 of 2020

BETWEEN:

MICHAEL JOHN MILLER
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Internet Publication

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Statement of Issues

2. Where an appellate court is asked to consider whether provocation ought to have been left to a jury as an alternative route to manslaughter on a charge of murder, the appellate court is to identify the provocation matrix most favourable to the accused – that is, the provocative conduct engaged in by the deceased and the sting of the provocation from the perspective of the appellant – and then consider whether the provocation matrix raised the partial defence.

3. It is not the task of the appellate court to engage in a selective fact finding exercise so as to control the provocation matrix or to make normative judgments about the sting of the provocative conduct or the objective limb more generally. The task of the appellate court is to examine the threshold question by reference to what the jury, as the constitutional tribunal of fact, *might have thought* was the relevant provocation matrix.

4. Consideration of the threshold question neither requires nor entitles the appellate court to dispose of the issue by reference to whether the partial defence may ultimately have left the jury with a doubt as to the accused's guilt. To do so would involve a conflation of the appellate court's role when considering the threshold question whether provocation should have been left with the ultimate fact finding task of the trier of fact. The question for the appellate court is not whether an accused has lost a chance of an acquittal of murder on the basis of provocation, but simply whether the evidence, taken at its highest

and most favourable to the accused, raised the issue of provocation, such that it ought to have been left to the jury.

5. It is the appellant's primary contention that the decision of the CCA demonstrates an erroneous approach to the multi-stepped assessment it was required to carry out. The CCA did not assess the provocation matrix through the lens of the lay jury or by reference to the scenario most favourable to the appellant; rather, the CCA engaged in a filtering and fact finding exercise that had the effect of watering down both the nature and extent of the provocative conduct engaged in by the deceased and, consequently, the sting of the provocation, before concluding, erroneously (CCA[144]), that the evidence "…could not have satisfied the jury beyond reasonable doubt…" of the objective limb.

6. In the specific context of this appeal, these issues arise in circumstances where the jury were instructed that statutory self defence pursuant to s 15 of the *Criminal Law Consolidation Act 1935* (SA) was open, the objective limb of which required the prosecution to negative the possibility that a reasonable person in the position of the appellant and subjected to the same threat or violent conduct to which he was subjected could have responded in the manner and to the extent that he did, and further, in the context of the CCA's conclusion that there was evidence raising the subjective limb of provocation (CCA[142]). In combination, these are persuasive indicators that provocation ought to have been left.

7. In that setting, the following questions may arise for consideration:

   7.1 When addressing the threshold question, is it the task of the appellate court to identify the provocation matrix by reference to what it considers to be the provocative conduct of the deceased, rather than to identify the complete body of evidence, taken at its highest, which *might have* been considered by a jury as going to provocation, had it been asked to consider the issue?

   7.2 Is the appellate court entitled to form its own view about the gravity of the provocation and then consider whether provocation of that gravity could have caused an ordinary person to lose self control, or is the appellate court required to evaluate the threshold question on the basis of what the jury *might have* thought was the sting of the provocation? Is it permissible for the appellate court to identify shortcomings in the evidence that would undermine or dilute the gravity of the provocation? To the extent that the objective limb of provocation involves

a question of opinion or evaluative fact (see, eg, *Lindsay v The Queen* (2015) 255 CLR 272 at [16]), did the CCA misunderstand this as authorising it to set the gravity of the provocation by reference to its own views of the case and without proper deference to what the jury *might have thought* was the sting of the provocation from the viewpoint of the accused?

7.3 Was the approach taken by the CCA to the threshold question correct or did it conflate the question whether there was evidence raising the objective limb with whether the jury might have ultimately had a doubt about the appellant's guilt on the basis of provocation?

10 **Part III: Notices under s 78B of the *Judiciary Act 1903* (Cth)**

8. The appellant does not consider that notice under s 78B of the *Judiciary Act 1903* (Cth) is required to be given.

Part IV: Citation for the reasons of the court below

9. *R v Miller* [2019] SASCFC 91.

Part V: Factual background

10. After a trial before Peek J ('**trial judge**'), the appellant was convicted of the murder of Danny Coombs ('**the deceased**') and sentenced to life imprisonment with a non parole period of 14 years and 4 months. The prosecution case was that the appellant unlawfully killed the deceased by stabbing him once to the chest on Nookamka Street,
20 Barmera at around 8:45pm on 1 February 2017.[1]

11. The defence case at trial raised two issues: whether the appellant deliberately inflicted the stab wound and, if so, was he acting in self defence (CCA[106]-[107], [111]-[112], [115]). The parties encouraged the trial judge not to leave provocation,[2] although the prosecution acknowledged that it was not "completely unarguable" that there may have been evidence going to the objective limb.[3] The trial judge noted the difficulty that arises when provocation and self defence are both left to the jury.[4] The jury were subsequently directed as to self defence but not provocation.

A. The events of 1 February 2017 and provocation

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[1] AFM116; AFM120 (Gilbert); CAB79-80. A moderate amount of force was required to cause the wound which was 12cm deep and passed through the left side costal cartilages of three of the deceased's ribs: AFM122 (Gilbert).
[2] AFM617-619; AFM376-377; AFM386.
[3] AFM376.30-38.

12. The appellant and the deceased were neighbours who had been known to each other for around 12 months at the time of the deceased's death. Throughout that period, the deceased had been in a relationship with a woman by the name of Jessica Bridgland.

13. The evidence established a history of animosity between the appellant and the deceased (CCA[8]-[16]). On the evening of 1 February 2017, the appellant, who was then considerably apprehensive of the deceased on account of that history and his concerns about the deceased's possession of weapons (CCA[98]), left his house to purchase cannabis. Knowing that the most efficient route to his destination would take him past the deceased's house (CCA[110]), the appellant collected a knife from his house and concealed it in a cooler bag which he planned on taking with him.

14. The appellant walked along the footpath adjacent to the deceased's house. He observed a silhouette in the doorway to the deceased's house. It was the deceased (CCA[101]). The deceased approached the fence of his property and became abusive towards the appellant.[5] The appellant retreated to the middle of the road to distance himself from the deceased and produced the knife in an attempt to warn the deceased off (CCA[101-102]).[6] Throughout the ensuing confrontation, the appellant and the deceased engaged in verbal abuse and physical posturing. The deceased taunted the appellant and attempted to goad the appellant into stabbing him. He belittled the appellant and conveyed by his words and conduct that the appellant was a coward who did not have the conviction to stab him.

15. At some point in the course of the confrontation, Bridgland encouraged the deceased to kill the appellant[7] and threw rocks at the appellant (CCA[48]). On two occasions the deceased armed himself with a weapon, one of which he ultimately used to strike the appellant two to three times in the moments before the deceased was stabbed.[8]

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[4] AFM619.

[5] The subsequent events could be overheard to an extent on a telephone call made by Bridgland to emergency services (CAB259-266). The evidence suggested that both men were intoxicated to varying degrees. The appellant's likely blood alcohol concentration was .125%. The deceased's was .19%: AFM303 (White); CAB64. Professor Jason White gave evidence that intoxication to this level can affect a person's movement; balance; mental state; cognition; decision making and levels of aggression (CAB62-63).

[6] AFM423-424; AFM436. There was evidence that both the appellant and the deceased were yelling, swearing and making derogatory comments: AFM308 (Hanna). The evidence at trial suggested that the deceased was a man who had a tendency to engage in acts of violence or threatening conduct and to carry knives (See, eg, AFM329-331; AFM346-347; AFM361-362; AFM364-365; AFM380 (Jessica Bridgland). See also CAB179-180). The appellant had been on the receiving end of such conduct.

[7] AFM431 (accused). The witness Goslin gave the same evidence: AFM177-178.

[8] AFM265 (Lillian Bridgland);AFM428-430 (accused). See also AFM640 (Q112).

16. After the deceased's attack upon the appellant with the metal pole, the appellant disarmed the deceased.[9] He described "lots of stumbling around" and putting the knife in front of him and trying to correct his balance by stepping forward.[10] The deceased grabbed his side and walked backwards.[11]

17. The appellant appealed his conviction on a number of grounds but his primary complaint in the CCA was the failure to leave provocation. In dismissing the appeal, the CCA held that although there was evidence raising a subjective loss of self control (CCA[142]) and conduct which might have caused the ordinary hypothetical 36 year old to retaliate physically, the evidence (CCA[144]):

> …could not have satisfied the jury beyond reasonable doubt that that conduct could have so provoked the ordinary hypothetical 36 year old to have formed an intention to inflict grievous bodily harm or kill the deceased and to act upon it.

18. This passage in the reasons of Stanley J, with whom Parker and Doyle JJ agreed, discloses two errors. The first is the misstatement of the burden of proof; the second error is latent – the conclusion that the evidence could not have failed to satisfy the jury beyond reasonable doubt that the killing of the deceased was unprovoked, was built upon three antecedent errors: (a) when purporting to identify the provocative conduct of the deceased, the CCA engaged in a selective analysis that discarded relevant features of the factual matrix and so minimised the nature and extent of the deceased's provocative conduct; (b) having minimised the provocative conduct of the deceased and having made a value judgment about what could, or could not be, considered insulting, the CCA thereafter substituted its own view as to the sting of the provocative conduct instead of considering what the lay jury *might have* thought was the degree of outrage experienced by the appellant; (c) taken with other passages in the reasons of Stanley J, the conclusion bespeaks of a misadventure into what would have been the ultimate fact finding task of the jury had provocation been left.

Part VI: Identifying the provocation matrix

19. The first task for the CCA when considering the threshold question was to document and consider, without discrimination, the full extent of the provocative conduct engaged in by the deceased. This required the identification of all of the evidence most favourable to the appellant, as the preliminary step in distilling the overall provocation matrix. It was neither necessary nor appropriate for the CCA to embark on a selective

[9] AFM435-437 (accused).
[10] AFM437-438 (accused).
[11] AFM439 (accused).

fact finding exercise or to set aside any aspects of the evidence that the CCA did not find convincing or persuasive. The role of the CCA was to identify the entirety of the evidence that *might have* been thought by the jury to be provocative.

20. This dimension of the provocation matrix therefore required an appreciation of a number of matters. Upon the appellant leaving his house and walking past Bridgland's property, the deceased became aware of and responded to the appellant's presence quickly. The deceased emerged from the house and the confrontation soon escalated (CCA[101]).

21. The appellant retreated to the middle of the road in a manner reflective of fear and panic (CCA[101]). The deceased goaded and taunted the appellant (CCA[54]-[55], [59]-[60], [81]-[86], [102]) with the apparent intention of trying to enrage, humiliate, belittle or embarrass the appellant.

22. Despite the appellant's possession of a knife, the deceased behaved in a belligerent and hyper-aggressive way, dancing around on the street as if ready to fight, removing his shirt and "tormenting" the appellant (CCA[47], [48], [50], [54]-[55], [59]-[60], [81], [85]). The appellant, although armed with a knife, was not able to dissuade the deceased from behaving in a manner suggestive of ridicule and disrespect (CCA[102]). Nor was the appellant allowed to pass and continue on to his destination.

23. The deceased - by both his conduct and words - clearly set about emasculating the appellant, mocking his unwillingness to fight "like a man" and do away with his weapon (CCA[54], [55], [59], [60], [81], [83], [102]). The deceased removed his shirt, tormented the appellant, "shaped up to him" and behaved in a way that could only have communicated that he considered the appellant's show of force to be pathetic (CCA[47]-[62], [81]-[86]). This all happened in the presence of others and on a public road in a small country community, and must have conveyed the deceased's confidence and brazenness, notwithstanding the appellant's possession of a knife.

24. Throughout the interaction, rocks and sticks were hurled at the appellant (CCA[48]). The deceased, no doubt spurred on by Jessica Bridgland's encouragement to him to kill the appellant, twice armed himself with a weapon. He threatened to to spear the appellant with the first weapon (CCS[39], [102]) and later attacked the appellant with the second weapon – a metal rod (CCA[38]-[39], [63]-[72], [85]-[88]) – having been unable to locate a shovel (CCA[63]-[64]).

25. The provocative conduct of the deceased on 1 February was essentially the "end point" of the relevant history between the protagonists. The history of aggressive and volatile

exchanges between the appellant and the deceased (summarised below) formed an important part of the relevant provocation matrix. The events occupying the critical 15 or so minutes on Nookamka Street were essentially the culmination of 12 months of hostilities between the two men.

A. The gravity of the provocative conduct from the perspective of the appellant

26. In light of the CCA's conclusion (CCA[142]) that there was evidence going to the subjective limb of provocation, it is convenient to pass attention to the objective limb. It is well established that an analysis of the objective limb of provocation requires some consideration to be given to an accused's age, sex, ethnicity, personal characteristics and physical features in determining the nature, extent and gravity of the provocative conduct of the deceased.[12] The gravity of provocative conduct is to be measured by reference to certain characteristics of the accused[13] and evaluated from the perspective of the accused. Having assessed such matters, the objective limb asks whether provocation of that degree could cause an ordinary person to lose self control and form the necessary intent,[14] remembering that for present purposes, the question for the CCA was simply whether there was evidence that *raised* the objective limb.

27. In the circumstances of this case, the gravity of the deceased's provocative conduct was to be evaluated by reference to a number of particular issues relating to the appellant's state of mind; the history of antipathy and confrontation between the appellant and the deceased, as well as the conduct of the deceased on the evening of 1 February 2017.

28. The appellant was a man who, in certain respects, was somewhat emotionally or psychologically vulnerable.[15] He suffered from anxiety and depression and had resorted to heavy use of alcohol following the death of his partner in 2011.[16]

29. The nature of the relationship[17] between the appellant and the deceased had been marred by a considerable degree of animus, escalating in the weeks leading up to the stabbing.[18] Verbal exchanges involving the use of foul language and disparaging names had been overheard or witnessed by other neighbours of the appellant and the

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[12] *Masciantonio v The Queen* (1995) 183 CLR 58, 67.
[13] *Masciantonio v The Queen* (1995) 183 CLR 58, 67.
[14] *Masciantonio v The Queen* (1995) 183 CLR 58, 67.
[15] See, eg, comments in *Stingel v The Queen* (1990) 171 CLR 312, 326.
[16] AFM400-401.
[17] *Masciantonio v The Queen* (1995) 183 CLR 58, 67; *Stingel v The Queen* (1990) 171 CLR 312, 326.
[18] This was the principal thesis of the prosecution case: AFM5-6 (opening); AFM529, 535, 537 (closing).

deceased.[19] Further, during a period in 2016 when the deceased was in custody, Bridgland told the appellant the deceased was going to murder him when released from prison which, as it happened, occurred not long before the fatal altercation.[20] The entrenched hostility and anger that the two men felt for each other was amply illustrated by the evidence.

30. On the evening of 1 February 2017 when the appellant retreated to the middle of the road in response to the deceased's emergence from his house, the appellant described himself as feeling panicked and fearful (CCA[101]-[102], [113])[21] - emotions which, in more recent times, have been recognised as relevant to the availability of the partial defence.[22] The deceased was jumping up and down on the road, ready to fight (CCA[60], [81]).[23] He removed his shirt. Lillian Bridgland described the deceased as "trying to start him [the appellant] off" by standing on the road "couple of inches to him".[24] She said the deceased was "tormenting the guy with the knife" (CCA[34]-[60].[25] The two were baiting and taunting each other.[26]

31. The appellant's description of the effects of the deceased's conduct on him were important to a proper assessment of the sting of the provocative conduct. He said he felt "glued" to the middle of the road; sick in the stomach when threatened by the deceased wielding the pole and scared the deceased would use it.[27] There was also evidence that the deceased, having removed his shirt, attempted to incite the appellant into stabbing him - he approached the appellant with his hands behind his back and encouraged the appellant to stab him (CCA[60]).[28]

32. The appellant's possession of the knife was derided by the deceased. He challenged the appellant to drop the knife and fight him like a man (CCA[54]-[60], [81]) - the clear

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[19] As to the prior exchanges between the appellant and the deceased see, eg, AFM136-138, 149, 408, 419.
[20] AFM417. The deceased was imprisoned on a number of occasions in 2016 (between 4 July 2016 and 5 October 2016 and then again between 17 November 2016 and 17 January 2017: AFM325). As to the appellant's subjective reaction to the deceased's release from custody, see AFM418 (accused); AFM583, 585 (defence closing).
[21] AFM424-425; AFM429-430 (accused). *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161-162, 166; *R v Rogers* [2016] SASCFC 38, [62]-[64].
[22] *Van Den Hoek v The Queen* (1986) 161 CLR 158, 167; *R v Rogers* [2016] SASCFC 38.
[23] AFM280 (Sneddon); AFM631 (Q65), 632 (Q70-71), 633 (Q74), 643 (Q80); AFM211, 215 (Lillian Bridgland).
[24] AFM638 (Q100).
[25] AFM638 (Q100-102). See also AFM222 (Lillian Bridgland).
[26] AFM523 (Hanna).
[27] AFM423-426; AFM429-430; AFM454; AFM493.
[28] AFM196; AFM251 (Lillian Bridgland); AFM431 (accused).

implication of which was that the appellant, in hiding behind a weapon, was behaving in an unmanly or weak way.[29]

33. Certain aspects of the confrontation were therefore clearly designed to emasculate the appellant[30] and convey that the deceased did not consider that the appellant had the conviction to stab him - that the appellant was a coward.

34. Accordingly, the relevant provocation matrix was that, over many months, the deceased had taunted the appellant; there had been feuding, venomous and aggressive verbal exchanges; on at least one occasion, the deceased had threatened the appellant with a knife and a shiv. The appellant had been told the deceased was going to murder him upon his release from jail. The deceased had attempted to draw the appellant out of his house to fight him on the street and vice versa.[31] On the night of the stabbing, the appellant was again abused by the deceased, who confronted him rapidly as he made his way down the street. The deceased moved towards the appellant in an aggressive way. His demeanour and presentation generally was aggressive and confronting. The deceased tormented the appellant and tried to goad him into fighting. He ridiculed the appellant for hiding behind a weapon. The deceased retrieved two weapons in the course of the interaction, taunted the appellant with them and ultimately struck the appellant more than once.[32]

35. The appellant's expression of his physical and psychological reaction to the deceased's conduct provided insight into the gravity of the provocation. Contextualised by the history between the two men,[33] the objective limb was raised on the evidence.

B. The duty to leave provocation

36. The inaptly described "partial defence" of provocation is comprised of two limbs, recently summarised by this Court in *Lindsay v The Queen* (2015) 255 CLR 272 at [15]:

> ...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 objective limb); and second, the provocation must actually cause the accused to lose self-control... 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. Where the evidence raises the issue, the prosecution must prove that the killing was not done under provocation...

37. The gravamen of the "partial defence" is that provocative conduct of the deceased was of such gravity that it caused the accused to lose self control and to kill the deceased whilst

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[29] AFM15 (opening); AFM142 (Goslin); AFM280 (Sneddon); AFM431 (accused); AFM544 (closing); AFM637 (Q95).
[30] See, eg, *Moffa v The Queen* (1977) 138 CLR 601, 606, 619, 622.
[31] AFM153-154 (Goslin)
[32] AFM428-429; AFM 629 (Q49); AFM630 (Q54, Q59).

not the "master of his mind",[34] in circumstances where the provocative conduct was *capable* of causing an ordinary person to lose self control and act in the way the accused did – although, not necessarily in the *precise* way that the accused did.[35]

38. The sting of the provocative conduct must be considered from the viewpoint of the particular accused, notwithstanding the primarily objective focus of the "ordinary person" limb – "age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult."[36] The test may be considered by asking: having regard to the extent that the accused was provoked by the deceased's conduct, could an ordinary person have lost self control and formed an intention to kill or cause grievous bodily harm?[37]

39. It has earlier been acknowledged that both counsel for the appellant and the prosecution encouraged the trial judge not to leave provocation to the jury. However, it is well settled that in recognition of the different roles fulfilled by counsel and a trial judge[38] and the transcendent duty of a trial judge,[39] a trial judge is obliged to leave the "partial defence" if the evidence before a jury gives rise to a question of provocation; that is, if there is material in the evidence which, taken at its most favourable to the accused,[40] is capable of constituting provocation,[41] irrespective of counsel's position[42] and the compatibility of

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[33] *Stingel v The Queen* (1990) 171 CLR 312, 325-326; *Masciantonio v The Queen* (1995) 183 CLR 58, 66-68.
[34] *The Queen v R* (1981) 28 SASR 321, 321-322 (King CJ).
[35] *Johnson v The Queen* (1976) 136 CLR 619, 639; *R v Machin (No 2)* (1997) 69 SASR 403, 404 (Doyle CJ); *Masciantonio v The Queen* (1995) 183 CLR 58, 66-67; *Green v The Queen* (1997) 191 CLR 334, 340 (Brennan CJ), 357-358 (Toohey J) – it is capacity of the provocative conduct to induce the intention to kill or cause grievous bodily that is to be considered as distinct from the capacity of the conduct to induce the ordinary person to act in the same way the accused did (by, for example, inflicting a certain number of stab wounds).
[36] *Stingel v The Queen* (1990) 171 CLR 312, 326; *Green v The Queen* (1997) 191 CLR 334, 339-340 (Brennan CJ), 356-357 (Toohey J), 369-369 (McHugh J)
[37] *Green v The Queen* (1997) 191 CLR 334, 342 (Brennan CJ), 355-356 (Toohey J); *Masciantonio v The Queen* (1995) 183 CLR 58, 66-67.
[38] *Pemble v The Queen* (1971) 124 CLR 107, 117 (Barwick CJ), 130, 133 (Menzies J); *Varley v The Queen* (1976) 51 ALJR 243; 12 ALR 347, 351 (Barwick CJ); *Van den Hoek* (1986) 161 CLR 158, 161; *Fingleton v The Queen* (2005) 227 CLR 166, 198-199, 206-207 (McHugh J); *R v Rogers* [2016] SASCFC 38; *CTM v The Queen* (2008) 236 CLR 440, [113] (Kirby J); *James v The Queen* (2014) 88 ALJR 427, [31].
[39] *CTM v The Queen* (2008) 236 CLR 440, [84], [112] (Kirby J).
[40] *Masciantonio v The Queen* (1995) 183 CLR 58, 68; *Lindsay v The Queen* (2015) 255 CLR 272, [26]; *Stingel v The Queen* (1990) 171 CLR 312, 318.
[41] *Lindsay v The Queen* (2015) 255 CLR 272, [16]; see also *Masciantonio v The Queen* (1995) 183 CLR 58, 67-68; *Stingel v The Queen* (1990) 171 CLR 312, 332-334.
[42] See, eg *Lindsay v The Queen* (2015) 255 CLR 272, [16]; see also *Masciantonio v The Queen* (1995) 183 CLR 58, 67; *Van den Hoek* (1986) 161 CLR 158, 161-162, 169; *Ziha v The Queen* [2013] NSWCCA 27, [37]; *R v Villalon* [2014] NSWSC 727.

provocation with the primary defence.[43] In *Masciantonio v The Queen* (1995) 183 CLR 58 at 67-68, the plurality explained:

> The answer to the question whether the trial judge should have left provocation to the jury at either stage of events in this case depends upon **whether there was evidence which was capable of constituting provocation**. However, because the onus of disproving provocation rests upon the prosecution once there is evidence to raise the question, the actual test must be expressed somewhat more precisely. It is "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".

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40. Similarly, in *Lindsay v The Queen* (2015) 255 CLR 272 at [16], this Court confirmed that the threshold question 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.

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41. If there was material in the evidence raising provocation, it was for the jury to determine through its own evaluation of the facts, including the gravity of the provocation viewed from the perspective of the appellant, whether the prosecution had disproved provocation.[44] The dispositive question for the CCA was simply whether on the version of events most favourable to the appellant, provocation was raised on the evidence - that a jury acting reasonably *might have* failed to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense.[45]

C. The CCA's reasoning and errors

42. In the CCA, Stanley J (with whom Parker and Doyle JJ agreed) correctly stated a number

30 of the principles considered above (CCA[123]-[133]). However, the CCA's application of the principles exposes a departure from the way in which the provocation matrix is to be identified by an appellate court for the purpose of considering the threshold question and a conflation of the threshold and ultimate questions.

43. To decide whether there was material raising provocation did not require the CCA to evaluate the persuasiveness or cogency of the evidence to leave the jury with a doubt as

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[43] *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161 (Gibbs CJ, Wilson, Brennan and Deane JJ), 169 (Mason J); *R v McCarthy* (2015) 124 SASR 190, [186], [203].
[44] *Parker v The Queen* (1963) 111 CLR 610, 616 (Dixon CJ), 660 (Windeyer J).
[45] See, *R v Rogers* [2016] SASCFC 38, [6], [58]; *Van den Hoek* (1986) 161 CLR 158, 161-162, 169; *Masciantonio v The Queen* (1995) 183 CLR 58, 67-68.

to the prosecution case.[46] It merely required the identification of evidence which, looked at through a lens most favourable to the appellant, was capable of constituting provocation. Equally, consideration of the threshold question did not permit the CCA to be selective as to the facts constituting the provocative conduct of the deceased, or to water down the sting of the provocation on the basis of evaluative judgments made by the Court.

D. Framing the provocative conduct

44. In addressing the first step of what has been described here as the provocation matrix in relation to the subjective limb, Stanley J framed the provocative conduct of the deceased in the following way (CCA[135]):

> A consideration of the evidence indicates that, at its most favourable to the appellant, the evidence of the deceased's conduct that could be characterised as provocative was his verbal abuse of the appellant on the street outside Jessica Bridgland's residence; his taunting of the appellant to put down the knife and 'fight like a man'; the removal of his shirt and his challenge to the appellant to stab him; his shaping up to fight; his arming himself with a rod and the threat to 'spear' the appellant with it; and his attack on the appellant with a pole which he used to strike the appellant up to three times immediately prior to the appellant disarming him and inflicting the fatal stab wound.

45. Whilst this abbreviated summary (which was further narrowed at CCA[140]) of the deceased's conduct might have touched upon some of the relevant features of the scenario, the conduct was presented in a sanitised way and omitted reference to some important matters. For example, it was not unimportant that the deceased eagerly came out of his house, clearly with the intention of engaging the appellant in some form of confrontation, as the appellant walked down the adjacent footpath. After the verbal confrontation commenced, the appellant retreated to the middle of the road (CCA[101]). The deceased approached him, having left his property to do so, on two separate occasions (CCA[34]-[45], [104]-[105]). The deceased was very angry and was walking up and down the footpath (CCA[34]).

46. After the deceased taunted the appellant with a metal rod, the appellant was too scared to turn his back on the deceased. The appellant produced the knife to warn the deceased off (CCA[102]). He told the deceased "you come at me, I will defend myself" (CCA[54]). Despite this, the deceased approached the appellant "trying to act big". The appellant was pointing the knife at the deceased telling him to keep away (CCA[55]). The deceased had been told to go inside but refused (CCA[82]-[84]).

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[46] *Stingel v The Queen* (1990) 171 CLR 312, 334.

47. The appellant could be heard to say "you pull knives on me" - an apparent reference to the earlier incident with the deceased during which the deceased confronted the appellant with a knife (CCA[58]) – an obvious indication that previous interactions were exercising the appellant's mind.

48. The deceased and Bridgland searched for a shovel but could not locate one (CCA[63]). The deceased armed himself with a pole (CCA[63]-[64]). The appellant was shouting in order to draw attention to himself as he wanted help (CCA[113]). He was scared the deceased could have had a knife with him and that he might be stabbed (CCA[113]).

49. The events unfolded quickly (CCA[74], [107]). Prior to the stabbing, the appellant held the knife defensively. He swung his bag at the deceased to get the deceased away from him (CCA[106]). Three minutes after the stabbing, the appellant told police he had acted in self defence (CCA[90]).

50. Curiously, at CCA[143] when Stanley J turned to the objective limb, it is apparent that the relevant facts were subjected both to further filtering and a process of qualitative analysis that involved a weighing of the cogency or persuasiveness of the evidence:

> At its highest the deceased verbally abused the appellant in foul language that substantially matched the foul language the appellant hurled at the deceased. Each challenged the other's manhood with taunts about fighting like a man. The deceased threatened to spear the appellant with a rod but abandoned the rod some minutes before the fatal wound was inflicted. The deceased struck the appellant with a pole, up to three times, but without the appellant suffering any injury. In any event, by the time the appellant stabbed the deceased the deceased had been disarmed.

51. It is not clear why the provocative conduct of the deceased was here expressed in even more confined terms than had been described at CCA[135]. The provocative conduct of the deceased, which ought to have been identified in its entirety, should not have been reshaped for the purpose of considering the objective limb. Perhaps equally importantly, the description of the relevant facts at CCA[143] stands in contrast to the summary of the appellant's evidence at CCA[95]-[114] and in the trial judge's summing up (AB163-179). The contrast demonstrates the CCA undertook a fact finding exercise.

52. When defining the provocation matrix within which the threshold question was to be answered, CCA[135], [140] and [143] reveal that Stanley J worked from what his Honour considered to be the relevant provocative conduct of the deceased – 5 diluted topics. Contrary to principle, the approach taken by Stanley J was not to identify *all of the evidence* which, taken at its highest and most favourable to the appellant, spoke to the nature and extent of the provocative conduct by the deceased. Rather, his Honour

embarked on a fact finding and evaluative exercise. By discarding a number of important facts, Stanley J's approach created an anodyne narrative of the provocative conduct which foreclosed the conclusion that he ultimately arrived at CCA[144] and [148].

53. That is to say, the premise of the conclusion that the objective limb did not arise was the adoption of an incorrect approach to identifying the provocative conduct of the deceased and the sting of the provocation – namely, a selective fact finding exercise. The task of the CCA was not to make a value judgment about what facts the jury would have acted on when considering provocation. The Court's task was to identify the "entirety" of the relevant situation.

10 54. Stanley J's approach resulted in a minimisation of the conduct of the deceased that *might have* been regarded by the jury as provocative. If, as the appellant contends, the relevant inquiry for the CCA was to identify what the jury *might* accept as to (1) the nature of the provocative conduct and (2) its gravity, there was no room for the CCA to discard ingredients of this first limb of the provocation matrix. The appellate court cannot control the relevant factual scenario in such a way. As Barwick CJ explained in *Moffa v The Queen* (1977) 138 CLR 601 at 606-607:

> I am of opinion that a jury would be entitled to view the situation in its entirety as I have briefly described it, including the implied taunt of the appellant's incapacity sexually to satisfy the deceased as she had found other men could. ***If they took that view,*** it was open
20 to them to conclude than an ordinary man, placed as was the appellant, would so far lose his self control as to form an intention at least to do grievous bodily harm to his wife. ***Whether they would or would not take such a view of the situation would essentially be a matter for them***. They are credited with a knowledge of how the ordinary man would react in such a situation. Many might think that they should not draw any such conclusion. But there are limits to the control of such a factual situation which the court can exercise.

55. This passage contains a number of important observations. The CCA had to look at the "situation in its entirety" in order to ascertain what the jury *might* have thought was the provocative conduct and its sting. It was not for the CCA to discard aspects of the facts
30 on the hypothesis that the jury would not have been moved by them. The relevant exercise was not a fact finding one. It required, as the first step, the identification of the *entirety* of the factual scenario relevant to the question of provocation. There was no scope for selectivity.

56. Observing the important distinction acknowledged by Barwick CJ, it becomes apparent that the CCA did in fact mistake its task in this respect. Indeed, a useful illustration of the extent to which Stanley J's appraisal of the provocative conduct involved a deviation

from the scenario most favourable to the appellant arising on the evidence can be found in the trial judge's remarks on sentence, in particular from AB219-233. The trial judge, who of course had the advantage of seeing and hearing the evidence unfold, provides a vivid recitation of the atmosphere and events of the evening of 1 February 2017, in terms which, the appellant respectfully submits, contrasts strikingly with the way in which the critical scenario was defined by the CCA at CCA[135] and [143].

E. Diluting the sting of the provocation

57. In the appellant's respectful submission, the same vice permeates the CCA's approach to identifying the sting of the provocation. The evaluation of the sting of the provocation is an important part of defining the provocation matrix as it will influence the extent to which the objective limb is raised on the evidence.[47] But that is not to say that the task of an appellate court considering the threshold question is to make a value judgment about what *it considers* to be the sting of the provocation. Rather, the task of the appellate court is to identify what *the jury might have* thought was the degree of outrage experienced by the accused in the face of the provocative conduct of the deceased, having regard to the scenario most favourable to the accused.

58. Stanley J examined the sting of the provocation at two points in his reasons. First, in the context of his discussion of the subjective limb, Stanley J said at CCA[137]-[141] that:

    58.1 Although there was a history of antagonism between the appellant and the deceased, "that had not resulted in the deceased stabbing, striking or inflicting any injury on the appellant" (CCA[137]).

    58.2 It was notable that much of the verbal abuse on 1 February 2017 emanated from the appellant (CCA[137]) and so "[t]here is *no* basis upon which the jury could consider that the verbal abuse hurled at the appellant by the deceased would occasion any great offence" (CCA[140]) (emphasis added).

    58.3 The appellant was on medication for his anxiety (CCA[137]) and outside of the events of 1 February, there was no "actual" violence between the appellant and the deceased (CCA[137]).

[47] *Lindssay v The Queen* (2015) 255 CLR 272, [79] (Nettle J).

58.4 There was nothing about the relationship between the appellant and the deceased, or their respective frailties or cultural sensitivities that reconciled with previous case (CCA[138]).

59. Stanley J's reasons suggest his Honour disregarded aspects of the deceased's provocative conduct and otherwise made a value judgment about what he considered to be the muted gravity of the provocation (CCA[137]-[140]). For example, Stanley J disregarded that:

59.1 Bridgland had told the appellant of the deceased's violence towards her (CCA[7], [95]).

59.2 The appellant was fearful of the deceased (CCA[98)] and was anxious (and on medication (CCA[110], [137]) and that Bridgland had told the appellant that the deceased was going to murder him when released from prison (CCA[98]) and that, from that point, the appellant did not feel safe.

59.3 The appellant had described *his* cognitive response to the deceased's behaviour in terms consistent with the provocation carrying a significant sting (see, eg, AB170-174, 176).

59.4 The *jury might have thought* that, from the perspective of the appellant, the insults, taunts, physical aggression, violence, emasculation and suggestion of cowardice, was significant to an assessment of the sting of the provocation notwithstanding that the appellant himself was said to have used distasteful language and insults.

60. That is to say, rather than taking the evidence at its highest, Stanley J's approach devalued the evidence, identifying competing arguments to undermine the interpretation that the jury *might* have given to these, and other, matters (CCA[137]-[140]).

61. Respectfully, this analysis reveals an unsanctioned approach. It was not the task of the CCA to form its own view about the sting of the provocation on the assumption that a jury would have undertaken a comparable process of deconstruction of, and sifting through, the evidence, as that which was or might be employed by the appellate court. To the contrary, the role of the CCA was to consider whether there was evidence raising the objective limb and that in turn required deference to what the jury *might have thought* was the degree of outrage experienced by the appellant, irrespective of the subjective view taken by the CCA of the sting of the provocation by reference to competing arguments that could be identified to subdue the gravity of the provocative conduct.

62. The starkest illustration of this departure from the correct approach manifests in CCA[140] in the conclusion that "There is *no* basis upon which the jury could consider that the verbal abuse hurled at the [appellant] by the deceased would occasion any great offence." With respect, there is no available interpretation of this analysis that is consistent with the correct approach to the threshold question.

63. Stanley J essentially surmised an "estimate of the degree of outrage which the [appellant] might have experienced..." when "[i]t was for the jury to make that assessment."[48] The CCA was to consider the threshold question on the basis of the degree of outrage that *the jury might have found* to have been experienced by the appellant on the scenario most favourable to him. Stanley J wrongly asked whether the response of the appellant was below the standard of powers of self control of an ordinary 36 year old man, in light of the sting of the provocation as determined by the CCA. He failed to address the critical, anterior question, of the degree of outrage that the *jury might have found* the appellant experienced. The correct question to ask was whether "by any possibility the jury might not unreasonably discover in the material before them enough to enable them to find a case of provocation"[49] in light of what the jury *might have* thought to be the degree of outrage experienced by the appellant. The task of interpreting the facts with a view to discerning the *actual* degree of outrage the appellant might have experienced was quintessentially a jury question.

64. The reasons of the CCA at [143] (and also at CCA[129]) also bespeak a misapprehension of what was meant by this Court in *Lindsay v The Queen* (2015) 255 CLR 272 at [16] where it was said that: "Where provocation is raised by the evidence, the determination of whether it has been negatived is for the jury…Whether the objective limb is satisfied is a question of opinion or…evaluative fact".

65. Stanley J appears to have treated this statement as authorising the CCA to form its own opinion as to whether the provocation was such that it could have provoked the ordinary person to form the necessary intent. Properly understood, however, this passage from the Court's reasons in *Lindsay* is not concerned with the threshold question and does not encourage a CCA to independently determine whether it considers the gravity of the provocation to have been sufficient to deprive the ordinary person of the powers of self control. Rather, it is a recognition that the trier of fact is reprised with the responsibility

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[48] *Lindsay v The Queen* (2015) 255 CLR 272, [39].
[49] *Parker v The Queen* (1963) 111 CLR 610, 616 (Dixon CJ).

to determine whether, on the facts as it finds them to be, the prosecution have excluded provocation beyond reasonable doubt. It is the trier of fact that is to form the opinion to which *Lindsay* refers; not a CCA.

66. Observations in the authorities concerning the responsibility of a "court" to fix the minimum powers of self control are not an invitation to an appellate court to filter out cases that it considers *should not* engage the principles of provocation. Rather, these observations are a reminder that the purpose of the ordinary person limb of provocation is to preclude peculiar or idiosyncratic sensitivities (whether manifesting in an uncompromisingly short temper or otherwise) from offering an excuse to murder. But the relevant task nonetheless requires the appellate court to identify the sting of the provocation from the perspective of the accused *as a jury might have found it to be*.

67. There are two further respects in which Stanley J's reasons depart from orthodoxy. First, his Honour discounted prior animosity between the appellant and the deceased as largely immaterial because the deceased had not stabbed, struck or otherwise inflicted injury on the appellant (CCA[137]). Yet many instances of provocation are not set against a background of prior violence. Not infrequently the provoked response of the accused is the first display of violence in answer to a history of non physical antagonism. Approaching the sting of the provocation in this way introduced a requirement for pre-existing violence that is not supported by the authorities.

68. Secondly, it is apparent that Stanley J reasoned that because the appellant himself used derogatory and foul language on the occasion of the stabbing and historically, any such conduct by the deceased could hardly have been of particular moment (CCA[140]). So reasoning involved the making of a judgment that was the province of the jury. A proper explication of the "threshold test" would have acknowledged the possibility the jury might well have considered the language used by the deceased as informing (together with other matters) the degree of outrage that the appellant might have experienced and hence the possible response of the ordinary person. This is a paradigm example of the CCA not taking the evidence at its highest and most favourable to the appellant.

69. These passages in Stanley J's reasons are reminiscent of what Brennan CJ described in *Green v The Queen* (1997) 191 CLR 334 at 345 as an appellate court making findings of fact that might not have been arrived at by the jury and in relation to circumstances which the jury would have been entitled to evaluate differently. Analysis of this kind is not the

province of an appellate court deciding whether an accused's trial miscarried because provocation was not left. The remarks of Brennan CJ in *Green* at 346 are apposite:

> A reasonable jury *might have* come to the conclusion that an ordinary person who was provoked to the degree that the appellant was provoked, could have formed an intent to kill or to inflict grievous bodily harm upon the deceased. It was essentially a jury question, a question the answer to which depended on the jury's evaluation of the degree of outrage which the appellant might have experienced. It was not for the Court to determine questions of that kind...

70. In this Court's earlier decision in *Parker v The Queen* (1963) 111 CLR 610 at 616, Dixon CJ had emphasised the importance of maintaining the distinction between the role of an appellate court considering whether provocation should have been left and the fact finding task of the jury:

> The selection and evaluation of the facts and factors upon which that conclusion would be based would be for the jury and it would not matter **what qualifying or opposing considerations the Court might see**: they would not matter because the question was, *ex hypothesi*, one for the jury and not for the Court.[50]

71. These comments are equally applicable to the demarcation of the appellate court's role when evaluating the sting of the provocation. It is not the function of the appellate court to substitute its appraisal of the gravity of the provocation for what the jury *might have* considered it to be on the scenario most favourable to the accused.

72. Moreover, the sting of the provocation from the viewpoint of the appellant could not logically be informed by reference to the type of relationships that have been considered in other cases involving provocation. It is problematic to treat the comments by this Court in *Stingel v The Queen* (1990) 171 CLR 312 at 332 concerning particular sensitivities of an accused as requiring such sensitivities or attributes as pre-conditions to provocation. Considerations such as power imbalance or peculiar attributes may assist in the evaluation of the gravity of the wrongful act or insult but their absence does not preclude a finding that provocation ought to have been left.

F. Conflation of the ultimate issue

73. The CCA's misadventure into the ultimate question that a trier of fact must address in cases where provocation *is* left, is evident from a number of passages in Stanley J's reasons. It emerges from CCA[135], [137]-[138], [140]-[141], [144], for example, that the Court did not confine its role to identifying the evidence most favourable to the appellant and asking the question: did that scenario *raise* provocation. Rather, the Court analysed and deconstructed the already incomplete summary of the provocative conduct

[50] See also *Parker v The Queen* (1963) 111 CLR 610, 660 (Windeyer J).

of the deceased in a manner reflective of the fact finding exercise to be expected of a trier of fact addressing the ultimate issue. These passages demonstrate that Stanley J considered it to be part of the Court's task when considering the threshold question to conduct a qualitative assessment of the evidence, including by reference to *what the evidence did not show*.

74. At CCA[144], Stanley J posed the "critical question", and answered it, in the following terms:

> whether the jury might have entertained a reasonable doubt about whether the objective test was not satisfied having regard to the evidence. In my view no jury could have entertained such a reasonable doubt. **While the evidence of the provocative conduct might have been sufficient to have caused the ordinary hypothetical 36-year-old momentarily to lose self-control such as to retaliate physically, I consider that it could not have satisfied the jury beyond reasonable doubt** that that conduct could have so provoked the ordinary hypothetical 36-year-old to have formed an intention to inflict grievous bodily harm or kill the deceased and to act upon it.

75. The vice in formulating the "critical question" in these terms is that it introduced the ultimate question of fact into an exercise that merely required the CCA to ask whether there was evidence raising the objective limb of provocation. Stanley J essentially posed and answered a factual question which, had provocation been left, was the sole responsibility of the jury to decide.[51]

76. The strength of the appellant's complaints are only fortified by the reversal of the onus of proof in CCA[144]. It was not for the appellant to point to evidence establishing beyond reasonable doubt that the deceased's conduct could have provoked the ordinary 36 year old to have formed an intention to murder. The ultimate question for the jury was, of course, whether the prosecution had excluded as a reasonable possibility that the killing was provoked in the relevant sense.[52] Although other passages in the Court's reasons express the burden of proof correctly, it is not immaterial that, in one of the dispositive paragraphs of the judgment, the burden is stated incorrectly and in a way that reveals a risk that the Court's attention was distracted from the limited inquiry to be carried out in assessing the threshold question.

77. Given the judgment required of a jury when considering the interrelationship between what it considers might have been the degree of outrage experienced by the particular accused *and* whether provocative conduct *of that gravity* could have caused an ordinary person to lose self control, it may be expected that in many cases where there is evidence

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[51] *Green v The Queen* (1997) 191 CLR 334, 345.

of a subjective loss of self control (as the CCA found here), the caution to be applied by trial judges before declining to leave provocation and the evaluative analysis required of a jury when addressing the objective limb, will ordinarily suggest that the partial defence should be left.[53] That is particularly so in cases where a trial judge has, as here, concluded that self defence ought to be left to a jury for, as King CJ said in *R v Earley*,[54] it would be a rare case in which the conduct of a deceased may provide a basis for self defence but not provocation. In a recent decision in *R v Penhall* [2020] SASCFC 58 at [3], Kourakis CJ made the following pertinent observations about the interrelationship between self defence and provocation which the appellant respectfully adopts:

> The underlying factual basis, common to both defences, is a serious and dangerous attack. An attack of that kind may prompt a proportionate defensive physical response or a genuine, but disproportionate one. The response may also be knowingly disproportionate. Such an attack is also likely to engender strong emotional responses, including fear or anger, of such intensity that self-control is overwhelmed. Moreover, just as the circumstances of an attack and associated defensive action are often dynamic, so too for the motivating states of mind of the participants. It is for these reasons that close attention should be paid to the remarks of King CJ in *R v Earley* and in their application to the particular circumstances of each case.

Part VII: Orders

78. The appeal be allowed. The order of the CCA dismissing the appellant's appeal against conviction is set aside. The matter be remitted for retrial.

Part VIII: Estimate of Appellant's Oral Argument

79. The appellant estimates that two (2) hours are required for the presentation of the appellant's oral argument.

DATED the 2nd of October 2020

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[52] *Pollock v The Queen* (2010) 242 CLR 233, [30], [32].
[53] *Lindsay v The Queen* (2015) 255 CLR 272, [38].
[54] (Unreported, Supreme Court of South Australia, King CJ, Millhouse and Olsson JJ, 6 April 1990).

ANNEXURE – LIST OF RELEVANT STATUTORY PROVISIONS

1. ***Criminal Procedure Act 1921*** **(SA), s 158 – Determination of Appeals in Ordinary Cases.**

2. ***Criminal Law Consolidation Act 1935*** **(SA), s 15 – Self Defence.**

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