



## HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. B32 of 2020

BETWEEN:

ARONA PENIAMINA  
Appellant

and

10 THE QUEEN  
Respondent

APPELLANT’S SUBMISSIONS

**Part I: Certification**

1.1 It is certified that this submission is in a form suitable for publication on the internet.

20 **Part II: Issue on appeal**

2.1 In circumstances where an accused person bears the onus of proving the provocative conduct which he relies on as having caused him to lose self-control does the proper construction of s 304(3) of the *Criminal Code* (Qld) permit a direction that the accused must also prove that the provocation was not based on conduct which the accused did not rely on as causative of the loss of self-control?

**Part III: Certification regarding s 78B of the *Judiciary Act 1903* (Cth)**

3.1 It is certified that notice is not required to be given pursuant to s 78B of the *Judiciary Act 1903* (Cth).

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Appellant’s Submissions

Legal Aid Queensland  
44 Herschel Street, Brisbane Qld 4000  
Ph: (07) 3917 0305 Fax: (07) 3229 7067  
Email: [megan.power@legalaid.com.au](mailto:megan.power@legalaid.com.au)  
Ref: Megan Power

**Part IV: Citation of earlier decision**

4.1 The judgment of the Court of Appeal has not been reported. The judgment has the internet citation *R v Peniamina* [2019] QCA 273.

**Part V: Relevant facts**

5.1 When arraigned on a count for that on 31 March 2016 he murdered his wife the appellant pleaded not guilty to murder but guilty to manslaughter. The plea of guilty was entered on the basis that provocation reduced his guilt to manslaughter<sup>1</sup>. The prosecution did not accept the plea of guilty in discharge of the count and a trial followed. The jury found the appellant guilty of murder.

10 5.2 The jury was instructed that the accused bore the burden of proving the defence of provocation<sup>2</sup>. The jury was also instructed that even if provocation had been established the defence would not avail the accused if what the deceased “*did, the provocation that he points to was based on something she did to change the nature of the relationship. ... The defence has to satisfy you on the balance of probabilities that the provocation to which the accused reacted was not based upon something that [the deceased] did to change the nature of the relationship*”<sup>3</sup>. The jury was told that in the event the defence failed to satisfy the jury of this then it would be necessary for the defence to show that the circumstances were of a most extreme and exceptional character before provocation could apply<sup>4</sup>.

20 5.3 Death was due to the aspiration of blood which could not be cleared from the airway due to the effects of a disabling application of blunt force trauma to the head combined with bleeding associated with stab wounds to the face. A concrete bollard bore traces of the deceased’s blood as did two knives. In excess of 20 wounds had been inflicted. Neighbours had heard screaming emanating from the matrimonial home. The only other people in the house were the couple’s four boys, the eldest aged only 10. The deceased and the four boys had returned to Australia on 28 February 2016.

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<sup>1</sup> *Criminal Code* (Qld) s 304(1).

<sup>2</sup> CAB at 38; Summing up at lines 17 – 33.

<sup>3</sup> CAB at 47; Summing up at lines 7 – 14.

<sup>4</sup> CAB at 48; Summing up at lines 4 – 16.

- 5.4 The appellant was at home when the police arrived. His hand was wrapped in fabric material. He was taken to the hospital. There was an 8cm laceration to the palmar aspect of his right hand, which required surgery. The wound was consistent with having been caused by the blade of a knife. The medical opinion was that it would have caused pain upon infliction.
- 5.5 The appellant told the police that he had argued with the deceased. He had tried to talk to her about a man and she had told him to “*stop talking shit*”. He hit her and she went into the kitchen where he heard her grab something. He followed her there and grabbed at the knife she held. She pulled the knife and it cut his hand. His hand was “*really bleeding*”<sup>5</sup>. He said, “*I feel my hand really pain. ... Just more angry and more angry... I can’t stop that time. I can’t stop that time*”<sup>6</sup>. He got the knife, she tried to run away and when asked what he had been thinking he said, “*Kill her, I not lie. Like, that’s the thing that’s going on my mind...I think I wanna kill her*”<sup>7</sup>.
- 5.6 There was no issue that at the time of the killing the appellant and the deceased were in a domestic relationship. There was no issue that the killing was unlawful.
- 5.7 The appeal below was brought on the ground that the learned trial judge erred in directing the jury that the defence had to prove provocation was not based on something that the deceased did to change the nature of the marital relationship because there was no evidential foundation for the engagement of s 304(3) of the Code. Morrison JA and Applegarth J held that the judge did not err. McMurdo JA dissented.
- 5.8 Applegarth J held<sup>8</sup> that the identification by the accused of the conduct relied on for the purpose of the defence in s 304(1) did not preclude a jury from inquiring into whether that conduct was based on something done to change the relationship. Applegarth J said<sup>9</sup> that “*based on*” suggested a substantial connection between the thing done to change a relationship and the sudden provocation. If there was evidence that the sudden provocation was “*closely related to*”<sup>10</sup> a thing done by the

<sup>5</sup> Appellant’s BOFM at 48.

<sup>6</sup> Appellant’s BOFM at 49.

<sup>7</sup> Appellant’s BOFM at 49 – 50.

<sup>8</sup> CAB at 101 and 105; Reasons in *R v Peniamina* [2019] QCA 273 at [159] and [187].

<sup>9</sup> CAB at 103; Reasons at [166].

<sup>10</sup> CAB at 104 – 105; Reasons at [182].

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deceased to change a relationship s 304(3) was engaged. Morrison JA agreed<sup>11</sup> with Applegarth J but was of the view that s 304(3) required a jury to inquire whether the provocative conduct an accused relied on was “*in fact*” based on something done by the deceased to end or change the relationship<sup>12</sup>. The phrase “*is based on*” meant s 304(3) was engaged if the deceased’s conduct was the “*foundation or basis for the sudden provocation*”<sup>13</sup>.

## Part VI: Argument

6.1 At the time the appellant killed his wife s 304 of the *Criminal Code* (Qld), as amended by s 5 of the *Criminal Code and Other Legislation Amendment Act 2011*, was in the form set out below:

### 304 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
    - (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.

<sup>11</sup> CAB at 68; Reasons at [2].

<sup>12</sup> CAB at 72 – 73; Reasons at [24].

<sup>13</sup> CAB at 71; Reasons at [16].

- (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.

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6.2 Section 304(7) changed the law regarding the burden of proof. Prior to the 2011 amendment the prosecution bore the burden of negating provocation under the *Code*<sup>14</sup> as it did under the common law<sup>15</sup>. Section 304(7) cast the burden onto the accused person. The standard of proof required to be met was on the balance of probabilities<sup>16</sup>.

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6.3 Section 304(3) is the provision of relevance to this appeal. That provision, like s 304(2), uses the expression “*the sudden provocation*” which means that s 304(3) proceeds from the premise that some conduct of the deceased was sufficient to induce a loss of self-control and was capable of causing an ordinary person to lose self-control and do as the accused person did. The repetition of the expression “*the sudden provocation*” in s 304(3) means that a consideration of the possible applicability of s 304(3) can only be by reference to the provocative conduct that an accused person undertakes to prove for the purpose of establishing the partial defence pursuant to s 304(1). This follows from the context in which s 304(3) appears. Context is important to determining the correct construction of the words “*is based on*”. It also follows from the position that when s 304(3) was inserted the expression “*sudden provocation*” had been the subject of judicial interpretation.

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<sup>14</sup> *Pollock v The Queen* (2010) 242 CLR 233 at 241 [30] and *Stingel v The Queen* (1990) 171 CLR 312 at 332 – 333.

<sup>15</sup> *Masciantonio v The Queen* (1995) 183 CLR 58 at 67.

<sup>16</sup> *Sodeman v The King* (1936) 55 CLR 192 at 216.

The words “*is based on*” simply mean caused by<sup>17</sup>. The consideration that an accused person’s belief is sufficient to enliven s 304(3) also assists to show that the provision is engaged or not depending upon what it is that the accused asserts was the provocative conduct. Section 304(3) is only engaged when the accused’s loss of self-control is caused by something done (or by something the accused believes was done) by the deceased to end or change their relationship. Such a construction fits comfortably with s 304(2) which is only to be engaged when the accused’s loss of self-control is attributed by the accused only to words said by the deceased. At the completion of the defence case it will be apparent to the trial judge whether the provocative conduct the accused relies on is conduct falling within s 304(3). If it is the judge will be obliged to direct the jury that the defence must also overcome the hurdle imposed by s 304(3). If it is not the judge will not be required to leave s 304(3) for the jury to consider.

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6.4 Section 304(3), like section 304(2), imposes some limitations on the availability of the defence provided for in s 304(1). Both s 304(2) and (3) operate if the “*sudden provocation is based on*” the circumstances set out in either provision. Like s 304(5), those provisions refer to “*sudden provocation*” which is an expression used in s 304(1). Section 304(1) was relevantly unaffected by the 2011 amendments which added sub-sections (2) – (8). Leaving aside minor and presently immaterial changes, s 304(1) “*is substantially in the form in which it was enacted*”<sup>18</sup> in 1900.

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6.5 Concerning the expression “*sudden provocation*” in s 304 (as s 304(1) then was) this Court said:<sup>19</sup>

*“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.”* (footnote references omitted)

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<sup>17</sup> As was held by McMurdo JA in dissent: CAB at 79; Reasons at [48].

<sup>18</sup> *Pollock* at 245 [46].

<sup>19</sup> *Pollock* at 245 – 246 [47].



6.6 The expression is concerned with the temporary loss of self-control “*excited by*”<sup>20</sup> or “*caused by the provocative conduct*”<sup>21</sup> of the deceased. The expression requires a connection between the conduct of the deceased and the accused’s loss of self-control. The connection is that the former caused the latter.

10 6.7 Section 304(1) will only be available to reduce murder to manslaughter if the provocative conduct actually caused an accused person to lose self-control and if the provocative conduct was such as was capable of causing an ordinary person to lose self-control and to form an intention to kill or to do grievous bodily harm<sup>22</sup>. Thus, it is important to identify for the jury the conduct the accused person points to as causing his loss of self-control. A court has to “*see what was the extent of the provocation as disclosed by the evidence*”<sup>23</sup>. The onus lies on the defence to identify that conduct.

6.8 The learned trial judge correctly identified the significance of that conduct and its relevance to the subjective and objective limbs of the test cited above from *Masciantonio* when he told the jury:<sup>24</sup>

20 “...you have to consider three things. What was the alleged provocation? Second – once you identify that, did that act of provocation actually cause the accused to lose his power of self-control? Third, ...might that act of provocation cause a person with ordinary powers of self-control in the factual position in which the accused found himself to have so far lost self-control as to form an intent to kill?”

6.9 The learned trial judge identified the provocative conduct as:<sup>25</sup>

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

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<sup>20</sup> *Pollock* at 247 [52].

<sup>21</sup> *Pollock* at 247 [54].

<sup>22</sup> *Masciantonio* at 66.

<sup>23</sup> *Mancini v Director of Public Prosecutions* [1942] AC 1 at 9.

<sup>24</sup> CAB at 39; Summing up at lines 12 – 17.

<sup>25</sup> CAB at 40; Summing up at lines 9 – 12.



6.10 With reference to the burden of proof concerning the provocative conduct, the jury was directed:<sup>26</sup>

*“The accused must first satisfy you that there was a provocative act or provocative acts, and, as I’ve said, the acts pointed to is – are the actions with the knife and the ensuing cut on his hand.”*

10 6.11 It was clear that the defence sought to prove more probably than not that the conduct relied on as causative of the appellant’s loss of self-control was the deceased’s brandishing a knife and the cutting of the appellant’s hand. The defence availed itself of evidence which raised a defence that was properly left for the jury to consider. The evidential burden was discharged<sup>27</sup>.

20 6.12 The expression “*sudden provocation*” must have the same meaning in s 304(2), (3) and (5) as it has in s 304(1)<sup>28</sup>. Applying the meaning ascribed by *Pollock* to s 304(2), for example, the position would be as follows. If an accused person asserts words spoken by the deceased caused him to lose self-control the onus will be on the defence to prove that the words were said and that their effect was as claimed. Assuming the jury is satisfied of these matters, as well as satisfied that the objective test is met, the defence will have a further hurdle to overcome before provocation will reduce murder to manslaughter. That hurdle will be proving that the circumstances were of a most extreme and exceptional character that a killing caused by words alone should be excused as amounting only to manslaughter. However, if an accused person asserts (and is required to prove) that the provocative conduct was a combination of words said by the deceased and actions of the deceased then, again assuming the defence has proven all the elements of the partial defence in s 304(1), the hurdle imposed by s 304(2) will not have to be overcome because the sudden provocation was not caused by words alone.

6.13 A domestic relationship could be changed by a participant’s behaviour and or things said by that person. If an accused person claimed that he lost his self-control when his wife announced that she regarded their marriage as ended and engaged in packing his belongings, the onus would be on the defence to prove the words were

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<sup>26</sup> CAB at 40; Summing up at lines 31 – 33.

<sup>27</sup> *Braysich v The Queen* (2011) 243 CLR 434 at 454 [35].

<sup>28</sup> *Registrar of Titles (WA) v Franzone* (1975) 132 CLR 611 at 618.

said and the conduct occurred and that this had the effect asserted. Assuming the jury is satisfied of these matters, as well as satisfied that the defence met the objective test, then the defence will have to overcome the hurdle imposed by s 304(3) of proving that the circumstances were of a most extreme and exceptional character such that a killing caused by something done by the wife to end the marriage should be excused as amounting only to manslaughter.

10 6.14 It can be accepted as McMurdo JA said<sup>29</sup> that the policy of s 304(3) is that, apart from circumstances of a most extreme or exceptional character, a spouse's conduct to end or change a domestic relationship with the accused will not provide a defence because an ordinary person would not lose self-control and kill their spouse in response to the spouse ending or changing their relationship.

6.15 It was no part of the case of the party who bore the onus of proving the facts from which provocation was to be established that the deceased did anything to end or change their relationship. It was no part of the defence case that the appellant believed that the deceased had so conducted herself with the knife that she was thereby ending or changing their relationship. Therefore, the occasion for giving the directions in the summing up at CAB 47 lines 1 – 43 did not arise and those directions wrongly introduced an obstacle to the appellant's acquittal on the count of murder.

20 6.16 The position that a jury should be directed to conduct an inquiry<sup>30</sup> about whether a deceased person's conduct is rather to be attributed to or is a reflection of an ending or a changing of a domestic relationship with their killer is to invite the jury to embark on a factual inquiry into the state of mind of the deceased absent, in this case, any evidence of what was in her mind at the time she wielded the knife. This can be seen in the directions that were given at the appellant's trial. The jury was permitted to consider an argument that this "*was a provocation based upon something [the deceased] did to change the nature of the relationship*"<sup>31</sup>. Absent any evidence from the deceased about what caused her to pick up the knife and cut the appellant, the jury was invited to consider whether this conduct was akin to

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<sup>29</sup> CAB at 79; Reasons at [50].

<sup>30</sup> CAB at 72 – 73 and 101; Reasons at [24] and [159].

<sup>31</sup> CAB at 47; Summing up at lines 15 – 16.

other conduct that the deceased had engaged in since returning from New Zealand, such as sleeping in a different room<sup>32</sup>. This speculation can be contrasted with obvious inferences available – that she was acting to defend herself against any further striking from the appellant or simply that she was angry she had been struck. These were the defence contentions<sup>33</sup>. As McMurdo JA observed, the only realistic view was that the deceased’s actions with the knife were a reaction to being punched<sup>34</sup>.

10 6.17 It is permissible to consider extrinsic material to assist on a question of construction<sup>35</sup>. That material<sup>36</sup> does not assist on the present question; it reveals that the amendment to add s 304(3) was concerned to place a limitation on the defence of provocation where a deceased person’s “*choice*” about a relationship was relied on to found the defence.

#### **Part VII: Orders sought**

8.1 Set aside the order of the Court of Appeal made on 29 November 2019.

8.2 Appeal allowed.

8.3 The conviction be quashed.

8.4 A new trial be had.

#### **Part VIII: Time estimate for presentation of the appellant’s case**

20 9.1 It is estimated that the appellant’s argument will take approximately one hour.

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<sup>32</sup> CAB at 47; Summing up at lines 18 – 19.

<sup>33</sup> CAB at 47; Summing up at lines 28 – 40.

<sup>34</sup> CAB at 87; Reasons at [82].

<sup>35</sup> *Acts Interpretation Act 1954* (Qld) s 14B.

<sup>36</sup> Explanatory Notes to the *Criminal Code and Other Legislation Amendment Bill 2010* at p 12 and Queensland Law Reform Commission: A review of the excuse of accident and the defence of provocation; Report No. 64 (2008) at p 481 para 21.88.



Dated: 22 July 2020

*m Copley*

.....  
Name: M. J. Copley

Telephone: (07) 3012 7921

Email: [copleyqc@qldbar.asn.au](mailto:copleyqc@qldbar.asn.au)

*K Prskalo*

.....  
Name: K. Prskalo

Telephone: (07) 3917 0439

Email: [katarina.prskalo@legalaid.qld.gov.au](mailto:katarina.prskalo@legalaid.qld.gov.au)

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IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. B32 of 2020

BETWEEN:

ARONA PENIAMINA  
Appellant

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10 THE QUEEN  
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ANNEXURE  
LIST OF STATUTES

1. *Criminal Code* (Qld) s 1 (definition of “domestic relationship”), s 291, s 293, s 300, s 302, s 303, s 304 (Reprint as at 5 May 2016)
2. *Domestic and Family Violence Protection Act 2012* (Qld) s 13 (Reprint as at 30 May 2017)
- 20 3. *Acts Interpretation Act 1954* (Qld) s 14B (Reprint as at 25 May 2020)

LIST OF EXTRINSIC MATERIAL

1. Explanatory Notes to *Criminal Code and Other Legislation Amendment Bill 2010*
2. Queensland Law Reform Commission; A review of the excuse of accident and the defence of provocation; Report No. 64 (2008) – Chapter 21