LINDSAY v THE QUEEN (A24/2014)

Court appealed from:	Court of Criminal Appeal, Supreme Court of South Australia [2014] SASCFC 56
Date of judgment:	3 June 2014
Date special leave granted:	14 November 2014

On 15 August 2013 the appellant was convicted of the murder of Andrew Negre, and sentenced to life imprisonment with a 23 year non-parole period. The circumstances of the offence were that the appellant met Negre at a hotel on 31 March 2011 and invited him to his home for further drinks. There Negre made two homosexual advances toward the appellant. After the first advance, the appellant warned that violence would follow if he continued with such suggestions. The prosecution case was that the appellant attacked and killed Negre with a knife after he made a further advance. The primary line of defence was that it was the co-accused who committed the attack whilst the appellant was elsewhere in the house. The secondary line of defence was that the partial defence of provocation was not negated and that a verdict of manslaughter should have been returned.

In his appeal to the Court of Criminal Appeal (Kourakis CJ, Gray and Peek JJ) the appellant argued that the trial judge's directions on provocation were incorrect or inadequate. The Court found that the judge's directions were inadequate in that they did not address the distinction within the objective test as between the matter of the gravity of the provocation (where the traits of the accused must be taken into account) and the matter of loss of self-control (where the traits of the accused, apart from age, must not be taken into account).

The Court found that the judge also erred in suggesting that the jurors should proceed to consider the objective test by putting themselves in the appellant's position. This gave rise to a risk that the jurors might thereby substitute their own (potentially high) subjective standards for those of the objective "ordinary person". The judge also failed adequately to direct that if the jury rejected the primary defence, they could take the appellant's intoxication, the co-accused's evidence, and the ferocity and immediacy of the attack into account when determining whether he actually lost self-control, and that neither anger nor an intention to kill were inconsistent with the partial defence of provocation.

The Full Court then considered whether the issue of provocation should have been left to the jury, and whether it should apply the proviso even though the directions as to the partial defence of provocation were erroneous. The Court noted that there was no doubt that in former times, when acts of homosexuality constituted serious crime and men were accustomed to resort to weapons and violence to defend their honour, a killing under the provocation present in this case would have been seen as giving rise to a verdict of manslaughter rather than murder. However, after consideration of the authorities, and of some of the extensive academic literature, the Court concluded that in twenty–first century Australia, the evidence taken at its highest in favour of the appellant in this case was such that no reasonable jury could fail to find that an ordinary man could not have so far lost his self-control as to attack the

deceased in the manner that the appellant did. Accordingly, the judge was incorrect in his decision to leave the partial defence of provocation to the jury in this case.

The appellant was not prejudiced by the fact that prosecution counsel did not rely on the proviso in his outline of argument. Experienced criminal appellate counsel should be aware that it is not unlikely that the proviso will be raised in cases such as this. It was made clear during the hearing of this appeal that resort to the proviso was under consideration and no application for an adjournment or the opportunity to supply written submissions on the topic was made. Having regard to the great strength of the prosecution evidence on the charge of murder, and making full allowance in favour of the appellant for the fact that defence counsel, knowing manslaughter would not be left to the jury would entirely devote attention to the primary defence, the Court considered that a conviction of murder was inevitable. It therefore applied the proviso and dismissed the appeal.

The grounds of appeal include:

- The Court of Criminal Appeal ('CCA') erred in dismissing the appeal by applying the "proviso" to s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) on the footing that although the trial judge erred in his directions respecting provocation, he also erred in not withdrawing provocation from the jury's consideration, in that:

  (1) the judge was correct to leave provocation to the jury;

  (2) the CCA's reasons for concluding to the contrary relied in part upon academic literature relevant to contemporary standards which was irrelevant and which was not identified to the parties and upon which the appellant had no opportunity to make submissions.