



HIGH COURT OF AUSTRALIA

9 December 2020

PENIAMINA v THE QUEEN
[2020] HCA 47

Today, the High Court, by majority, allowed an appeal from the Court of Appeal of the Supreme Court of Queensland ("the QCA") concerning the partial defence of provocation, which, under s 304 of the *Criminal Code* (Qld), reduces what would otherwise be murder to manslaughter. Section 304(3) excludes the defence (save in extreme and exceptional circumstances) in the case of the unlawful killing of the accused's domestic partner where the sudden provocation is "based on" anything done, or believed to have been done, by the deceased to end or change the relationship or indicate such an end or change (collectively, "to change the relationship").

The appellant killed his wife with sustained ferocity in circumstances in which it was open to find that he was angered by a belief that she had been unfaithful to him and that she may have been planning to leave him and take their four children with her. In conversations with police the appellant said that during an argument the deceased threatened him with a knife and, in trying to disarm her, he sustained a deep cut to his hand (the "conduct with the knife"). The appellant's case was that he lost control because of the conduct with the knife. The jury was directed that in order to rely on provocation the appellant had to prove, on the balance of probabilities, that: (1) he killed the deceased while in a state of temporary loss of self-control induced by her conduct with the knife; (2) an ordinary person in his position might have been induced to so lose self-control as to form, and act upon, an intention to kill or do grievous bodily harm; and (3) the appellant's 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"). The jury found the appellant guilty of murder.

The appellant challenged his conviction in the QCA, arguing that the trial judge erred in directing the jury that he was required to prove the sub-s (3) limb when he had contended his loss of self-control was caused only by the conduct with the knife. By majority, the QCA dismissed his appeal, holding that the use of the words "based on" in s 304(3), in contrast with "caused by" elsewhere in s 304, invites consideration of whether the sudden provocation is, in fact, founded upon something done by the deceased to change the relationship. On this view, notwithstanding that the jury may have been satisfied that the conduct with the knife caused the appellant to lose his self-control, the trial judge was right to instruct the jury to go on to consider the sub-s (3) limb.

A majority of the High Court held that s 304 requires an accused first to nominate something done, or believed to have been done, by the deceased and secondly to prove not only that the killing was done in a state of loss of self-control but that the state was induced by the nominated conduct. Leaving aside extreme and exceptional circumstances, whether s 304(3) excludes the defence is a question of law requiring consideration only of whether the nominated conduct was something done to change the relationship. Here, it was fanciful to suggest that the conduct with the knife was itself such an act and the trial judge was wrong to direct the jury that the appellant was required to prove the sub-s (3) limb. The appeal was allowed and a new trial ordered.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*