IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A24 of 2014**

BETWEEN: **MICHAEL JOSEPH LINDSAY**
Appellant

and

THE QUEEN
Respondent

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APPELLANT'S SUBMISSIONS

PART I PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II CONCISE STATEMENT OF ISSUES PRESENTED BY APPEAL

2. In circumstances where the respondent did not contend that the learned trial judge erred in leaving provocation to the jury and where the respondent made no positive submission that the proviso should be applied, was it correct for the CCA to apply the proviso on the basis that, having regard to the objective limb of provocation, the judge erred in leaving provocation to the jury?

20 3. Did the CCA err in any event in its consideration of the objective limb of provocation, by having regard to academic literature not identified in the judgment or raised during argument, and in circumstances where the jury might have taken the real sting of the provocative conduct to be other than that (implicitly) identified by the CCA, namely a homosexual advance?

PART III SECTION 78B OF THE JUDICIARY ACT 1903 (Cth)

4. The appellant has considered whether a notice should be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

PART IV CITATION

5. The reasons are reported: *R v Lindsay* (2014) 119 SASR 320.

30 ### PART V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

The charge and the prosecution case

6. The appellant was charged together with Luke Hutchings with the murder of Andrew Roger Negre at the appellant's home at Hallett Cove on 1 April 2011.

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7. The prosecution case was that it was the appellant who administered all knife wounds other than the final cutting of Mr Negre's throat, which was undertaken by Mr Hutchings. The appellant's counsel suggested to prosecution witnesses in cross-examination that although the appellant had physically struck Mr Negre in response to sexual comments made by Mr Negre, he was absent when the appellant was stabbed, in effect implicating Mr Hutchings (CCA [121]).

8. The prosecution argued that there had been two "*incidents*" which occurred at the home shortly prior to the stabbing and which provided the appellant with the motive to attack Mr Negre and which were the catalyst for what unfolded (T828, CCA [122]).

9. Indeed, the prosecution submitted in closing (T813) that:

> [t]his trial has shown that life can end in a moment. People can make decisions that lead to that result in those same moments but because those decisions are made **in the heat of the moment**, without the time for any deep consideration, doesn't mean that those responsible should be held any less accountable.

10. Indeed, on appeal, Peek J said (CCA [123]) that the prosecutor faced something of a dilemma in that the more the incidents made it likely that it was the appellant who had stabbed Mr Negre and committed homicide, the more those very same incidents "*tended to raise the issue of provocation in a fairly classic form*".

Evidence relevant to provocation

11. The appellant (nick-named "*Sun Sun*") was a 28-29 year old aboriginal male. His sister had never seen him go to school or read (CCA [99]). The incidents in question occurred in his home, which he shared with his partner Melissa and their child Ethan, two boarders, Hutchings and Hutchings' partner Mildwaters (CCA [90]), each of whom paid a minimal rental to the appellant for food and utilities (T269).

12. The appellant and Mr Negre met by chance at the Hallett Cove Tavern in the early hours of the morning on 1 April 2011. Mr Negre had been drinking with his partner, Fiona Ninos, who stayed until 11.00 or 11.30 pm, but left following a heated discussion in which she asked Mr Negre to come home, and he declined (CCA [92]). At about 2.00 am, a group including Mr Negre and the appellant left together in a taxi for the appellant's home, to have further drinks (CCA [93]).

13. A number of people were present at the appellant's home. The group included Hutchings and Mildwaters, the appellant's sisters, Tahlia Clarke and Ashleigh Lindsay, and a friend, Nicholas Hayes. The group also included the appellant's partner, Melissa (CCA [8]).

14. Mr Negre's partner, Ms Ninos, awoke around 1.30 am – 2.00 am and decided to try to find him. After some time, the appellant answered Mr Negre's phone, and she was invited to the appellant's home. She attended at the home and was yelling and swearing at Mr Negre, asking why he had risked their relationship by going out with people he

didn't know (CCA [94]). She was subsequently shown around the house by the appellant and left in a taxi, leaving Mr Negre at the appellant's house.

15. After a period of socialising and drinking, the first relevant incident occurred, on the pergola or patio area[1]. Mr Negre made suggestive sexual gestures towards the appellant, and this upset the appellant and his partner, Melissa (CCA [103]).

15.1. Tahlia Clarke said the deceased had been sort of straddling the appellant and was sitting down with one leg either side of him. She said Melissa said "*Don't go doing stuff like that*" or "*Doing shit like that*" and after Mr Negre apologised, the appellant said "*That's okay, just don't go doing stuff like that*" and "*Don't going doing stuff like that because I'm not gay*" and "*or I'll hit you*" (CCA [104]).

15.2. Ashleigh Lindsay said the appellant said "*Lucky I don't hit you*" or something like that, or "*don't do that again*" or "*I'll hit you*", and said it was plain that the appellant's partner Melissa "*was not happy*" and was "*growling*" (CCA [105]).

15.3. Brigitte Mildwaters said that Melissa didn't like it and had said something like "*Get him out of here*" or "*do not do that*" and that the appellant was not gay (CCA [106]).

16. There was thus substantial evidence that the incident caused upset to the appellant and importantly to his partner, and that a firm warning had been issued about doing it again (CCA [107]).

17. The group moved inside, and according to Mildwaters, Mr Negre had been tired, and the appellant told him he could sleep in the spare room, but Mr Negre said he didn't want to sleep up there by himself and wanted Sun Sun in there with him (CCA [109]).

18. The descriptions of the second incident[2] included the following.

18.1. Mildwaters' account was that after the discussion just described, Mr Negre said "*I'll pay you for sex then*" (CCA [109]).

18.2. Nicholas Hayes said that Mr Negre said "*I'll pay you for sex*" or "*I'll pay you guys for sex*" (T556), to which the appellant responded "*What did you say cunt?*" (T557).

18.3. Hutchings gave evidence that Mr Negre asked the appellant for sex and said "*I'll pay you for sex*", to which the appellant responded saying: "*What did you say cunt?*", but Mr Negre asked him again and offered him two hundred dollars (CCA [110]).

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1 Marked "Covered Pergola" on Exhibit P2.

2 Which took place in the area marked "Family / Meals" on Exhibit P2.

19. Hutchings' evidence was that the appellant immediately punched Mr Negre and the attack which led to his death then occurred. All witnesses gave evidence consistent with an actual loss of self-control by the appellant. For example, Hayes referred to the appellant as having "*just gone off his head like a lunatic*". Hutchings said "*Sun Sun just lost it*" (CCA [113]). The ferocity of the attack, and the intoxication of the appellant, also supported the possibility of a subjective loss of control (CCA [116]-[118]).

Provocation is left to the jury

20. Prior to addresses, the trial judge indicated that his preliminary view was that he would leave provocation to the jury as an alternative verdict.

10 21. The prosecutor submitted (T804):

> As to provocation, I was going to put to your Honour it was borderline, but the High Court authority of *Green* [*Green v The Queen* (1997) 191 CLR 334] was brought to my attention this morning ...

to which the judge responded that having read *Green* he did not think there was anything in it which would incline him against the view that he should leave provocation but that he would give the prosecutor an opportunity to make further submissions once she had an opportunity to properly consider *Green*. The prosecutor did not make further submissions.

22. In light of the trial judge's indication that provocation would be left, the appellant's
20 counsel devoted a substantial portion of his address to provocation. As Peek J acknowledged in the CCA, this was "*directly contrary*" to the primary line of defence which impliedly suggested to the jury that they might concentrate on provocation (CCA [241]). The prosecutor also addressed on provocation, including by submitting, in respect of the objective limb (T830):

> That loss of self-control has to be to the extent that the ordinary person **would** form the intent to kill. It is my submission on the facts of this case any such suggestion is an **insult to your intelligence.** [Emphasis added]

23. The appellant was convicted of murder, and sentenced to imprisonment for life. A non-parole period of 23 years was fixed.

30 **Appeal against conviction**

24. The appeal against conviction related to the directions to the jury in relation to provocation (CCA [88]), and included complaints respecting the closing submissions of the prosecution (including, for example, that in the passage just cited, the test was materially misstated by the use of "*would*" rather than "*could*" or "*might*").

25. Peek J, with whom Kourakis CJ agreed, accepted that the directions relating to provocation were inadequate and that the appellant had established that he had not had a

trial according to law and that, in that sense, a miscarriage of justice had occurred (CCA [225]).

25.1. The first contention accepted by Peek J was that the directions had not adequately identified that for the purposes of the objective test, the gravity of the provocation was to be assessed from the perspective of the appellant (CCA [146], [158]).

25.2. The second contention accepted by Peek J was that the judge erred, in relation to the objective test, by directing the jurors to put themselves in the appellant's position (and by posing the relevant inquiry in terms of whether there "*would*" rather than "*could*" or "*might*" be a loss of self-control) (CCA [170], [172], [179]).

10 25.3. The third contention accepted by Peek J related to a range of complaints made by the appellant[3], the cumulative effect of which was that the appellant had not had a trial according to law and suffered a miscarriage of justice (CCA [225]).

The application of the proviso

26. As Peek J acknowledged, consideration of the proviso was "*initiated by the Court*" (CCA [227]). There was no positive submission by the prosecution (CCA [240]).

27. The question whether provocation should not have been left was mentioned by Kourakis CJ *arguendo* in the course of the appellant's submissions. The Chief Justice asked whether it would be open, by reference to the objective limb, to take the view that provocation should not have been left (T24), to which the appellant's counsel made
20 reference to *Green v The Queen* (1997) 191 CLR 334 (***Green***) and indicated that given that the subjective limb was clearly able to be resolved in the appellant's favour, it was then a matter for the jury.

28. At that point, Peek J said (T24-26):

> You say Mrs Shaw we simply don't know at which stage the accused failed, if I can put it that way, that to say it was the subjective or objective stage we don't know. Accordingly directions have to be correct in relation to those. ... In other words, in that rather unusual circumstance that the Crown did that, and one can see why they did it, one cannot discount the possibility there that the accused succeeded on the objective, and, therefore, hence the need for proper directions?

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3 Peek J accepted that in the context of the prosecution address, which sought to dismiss the importance of the first incident, and later the second incident, without adequate reference to their cumulative effect (CCA [198]), the judge's directions as to certain matters to which the jury should have regard in relation to subjective loss of control inappropriately confined the scope of the necessary inquiry by the jury (CCA [204]). Again, in the context of submissions made by the prosecutor, Peek J accepted the judge had not adequately directed that anger and an intention to kill were in no way inconsistent with the defence of provocation and could have been the very basis and reason for the loss of control (CCA [211]). Further, the trial judge had not identified the ferocity of the attack as relevant to the subjective test (CCA [212]-[215]), nor intoxication (CCA [216]-[222]).

29. Shortly thereafter, Gray J raised the issue of the proviso on a different footing[4], to which counsel responded that it was up to the prosecution to persuade the Court that the proviso should apply (T28). The respondent did not attempt to do so.

30. Instead, in the course of the respondent's oral submissions, the respondent submitted that "*given the paucity of evidence on the topic of provocation, the manner in which it was dealt with by the learned trial judge was appropriate in all the circumstances*" (T49).

31. Later, when the proviso was raised with the respondent by Gray J, it was put that if the CCA was satisfied there had been error and conducted an independent assessment, it would be "*open to this court to offer an alternative of manslaughter*" (T58), to which the respondent responded in the affirmative (T59). Subsequently, the following exchange occurred:

> PEEK J: Is your position that this court, if it found that there is an error of law and the proviso could not be applied, should substitute a verdict of manslaughter? Is that what you said, or meant to say?
>
> MR PEARCE: What I meant to say was if, on an independent review of the evidence, having found an error of law, the court could then make a determination, if it could dismiss, a verdict of manslaughter could be substituted, or if not inclined to apply the proviso, it goes back for a retrial, if the appeal is upheld.
>
> PEEK J: That is what I thought would be the normal way. Are you saying in there, in that answer to me just then, you are somehow suggesting this court, if it finds that there is an error of law, or miscarriage, or whatever, might substitute a verdict of manslaughter?
>
> MR PEARCE: I'm saying that's a theoretical possibility for the court, but it's not a position I urge upon the court.
>
> PEEK J: It has happened in the past. There is more recent High Court authority about that. I won't trouble you about that. Your main position is, if the appeal is allowed, there should be a retrial on the charge of murder?
>
> MR PEARCE: Yes.

32. The respondent never put the submission that the appeal should be dismissed on the basis that provocation ought not to have been left. The submissions were directed towards supporting the adequacy of the directions on provocation (as acknowledged in the CCA at [240]). The only submission put in relation to the proviso was one which identified the possible outcomes of the appeal, and which acknowledged the possibility of a substituted verdict for manslaughter.

33. It was not for the appellant to anticipate and resist the proviso being applied on the basis that the trial judge erred in leaving provocation to the jury at all, and the appellant was not afforded an opportunity to meet such a contention.

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4 That is, on the assumption that it was proper to leave provocation but that the proviso should be applied despite the defects in the way it was left.

Peek J's reasons for applying the proviso

34. Peek J considered there was ample evidence for the jury's consideration of the subjective limb, and noted that this was, in effect, conceded by the prosecutor in submissions in the absence of the jury (CCA [228]).

35. Further, in relation to the objective limb, he said that:

> ... one sympathises with the Judge's decision to leave the partial defence of provocation to the jury, for there are many appellate strictures to the effect that Judges should be cautious about withdrawing it from the jury.

36. After referring to observations in *Moffa v The Queen* (1977) 138 CLR 601 and *Stingel v The Queen* (1990) 171 CLR 312, he said that although he accepted those statements of general principle, the question remained whether the decision to leave the partial defence was correct (CCA [231]). That involved considering that the objective limb was designed to keep the partial defence within bounds acceptable to "*contemporary society*" (CCA [234]).

37. The critical reasoning of Peek J was then as follows (at CCA [235]-[237]).

> There is 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 here would have been seen as giving rise to a verdict of manslaughter** rather than murder. However, times have very much changed. As Gibbs J emphasised in *Moffa v The Queen*:
>
> > The question has to be decided in the light of contemporary conditions and attitudes, for what might be provocative in one age might be regarded with comparative equanimity in another, and a greater measure of self-control is expected as society develops.
>
> After careful consideration of the authorities, **and of some of the extensive academic literature,** I have come to the firm view that **in twenty–first century Australia,** the evidence taken at its highest in favour of the appellant in the present 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. [Emphasis added]

PART VI SUCCINCT STATEMENT OF ARGUMENT

Introduction

38. The appellant makes the following principal submissions.

38.1. First, where a judge has in fact left provocation to the jury (and the trial has been conducted on that basis), and where on appeal the respondent does not submit that the trial judge erred in leaving provocation to the jury, the CCA ought not to have invoked the proviso at its own initiative on the basis that the judge erred in leaving provocation to the jury.

38.2. Secondly, and in any event, in considering whether the objective limb of the partial defence of provocation was necessarily negatived by the prosecution so that provocation should not be left to the jury, the CCA:

(a) erred in relying upon academic literature which the parties were not given an opportunity to address, and which may well have been irrelevant to a proper application of the objective test; and

(b) erred in apparently focusing on the homosexual nature of the advance rather than acknowledging the real sting and insult implicit in the suggestion that for a few hundred dollars the appellant would back down from his threat of violence and have sex with a stranger person despite the presence of his family.

39. In considering those submissions, it is submitted that the following matters must be borne in mind in the context of any consideration of the 'partial defence' of provocation.

39.1. First, provocation is not a true defence but a basis for an alternative verdict. Central to the concept of provocation is the distinction that the law draws between intentional killing in an uncontrolled emotional state induced by the deceased's provocative conduct and an intentional killing (albeit possibly unplanned) induced by a desire for revenge: *Pollock v The Queen* (2010) 242 CLR 233 at [33]. The rationale for the development of the doctrine was the recognition that lesser moral responsibility attaches to an intentional killing done in a state of temporary loss of self-control caused by provocation than attaches to a deliberate killing "*in cold blood*" and the related ideas of suddenness and the absence of cooling time were concerned with the absence of premeditation: *Pollock* at [49], referring to *Parker v The Queen* (1963) 111 CLR 610 at 625-628 per Dixon CJ and at 650-652 per Windeyer J.

39.2. Secondly, where provocation is raised by the evidence, the prosecution carries the onus of negativing provocation and this means the prosecution must exclude the reasonable possibility that the appellant was acting under provocation: *Pollock* at [30], [32]. In every case where provocation is raised it is necessary for the trial judge to explain the concept and the ways in which the prosecution can eliminate it: *Pollock* at [32] and [67]. Indeed, where there is some evidence of provocation fit for the jury's consideration it should be left even if not relied on by the accused's counsel: *Van Den Hoek v The Queen* (1986) 161 CLR 158. Further, where there are differing accounts, the matter has to be considered on the version of events most favourable to the accused because unless the prosecution has excluded that version as reasonably possibly true, the prosecution might fail to negative provocation: *Pollock* at [33], see also *Stingel v The Queen* (1990) 171 CLR 312 at 318, 333-334, *Masciantonio The Queen* (1995) 183 CLR 58 at 67-68.

40. The location of the onus is significant when considering the circumstances in which a trial judge should withdraw provocation from the jury's consideration. In *Packett v The King* (1937) 58 CLR 190 at 213, Dixon J said:

> [U]pon the question whether a finding of manslaughter on the ground of provocation would in a given case be unreasonable, the ruling of the House of Lords in *Woolmington's Case* has, of course, an important bearing. For it may be open to entertain a reasonable doubt of provocation although it would be unreasonable to find affirmatively that provocation existed and was sufficient. These are all considerations showing the need of caution before a judge undertakes to direct a jury against finding manslaughter.[5]

41. That an accused may be acquitted of murder and convicted of manslaughter notwithstanding that, in the opinion of another, this may be a wrong verdict, is accepted in the authorities as an aspect of the division of responsibility between judge and jury and the location of the onus of proof. The chance of a lesser verdict in those circumstances is a chance "*fairly open*" to an accused, and where it cannot be said that a misdirection did not deprive the appellant of a chance fairly open to him to be acquitted of murder, there is no scope for the application of the proviso: *Pollock* at [70], *Parker* at 664 per Windeyer J.

42. In the present case, at an earlier point in his judgment, in the context of explaining why a challenge to the adequacy of directions concerning the subjective limb could not be ignored, and echoing remarks he had made *arguendo,* Peek J observed (CCA [181]) that:

> It is, of course, impossible to know whether the partial defence of provocation foundered at the objective or subjective stage of analysis and it is not appropriate to guess or speculate about that matter.

43. The observation appears to be an acknowledgment that if the jury were properly seized of the issue, it could not be concluded that the appellant failed to make out the objective limb (or more accurately, having regard to the onus, it could not be said there was no a chance that the prosecution failed to negative provocation as reasonably possible by reference to the objective limb). Nevertheless, Peek J applied the proviso seemingly on the footing that the appellant ought not to have had that chance.

44. Accordingly, the application of the proviso in the present case hinges upon the entitlement of the CCA to consider applying the proviso on the footing that it constituted an error to the judge to leave provocation to the jury, and if so, the correctness of their conclusion.

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5 See also the observations of Dixon CJ in *Parker v The Queen* (1963) 111 CLR 610 at 632.

The CCA erred in considering the proviso without an invitation to do so

45. Section 353(1) of the *Criminal Law Consolidation Act* 1935 (SA) is in the form considered by the Court in *Weiss v The Queen* (2005) 224 CLR 300, and invoking principles that have been considered in a number of recent authorities[6]. Amongst other things, it has been observed that there is a relevant distinction to be made between a case where a misdirection goes to the *offence* rather than a *defence*: *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [32], [55]. This case falls within the former camp; manslaughter is an alternative verdict. In provocation cases, the approach that has been adopted has been to ask whether the misdirection deprived the appellant of a chance fairly open to him[7], and it will not be possible to conclude that the appellant was not deprived of such a chance unless it was an error for the judge to have left provocation to the jury[8].

46. In the appellant's submission, however, an anterior question arises as to whether the proviso has been invoked by the respondent to the appeal.

47. In *Mraz v The Queen* (1955) 93 CLR 493 at 514, Fullagar J said that the proviso ought to be and always had been read in light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed, so that, if there is any failure in any of these respects, and the appellant may thereby have lost the a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice, it is then "*for the Crown to make it clear that there is no real possibility that justice has miscarried*"[9].

48. In *Darkan v The Queen* (2006) 227 CLR 373, the plurality's remarks (at [84]) respecting the manner in which the proviso should be approached were prefaced with the words:

> An appellate court **invited** to consider whether a substantial miscarriage of justice has actually occurred is to proceed ... [Emphasis added]

49. The language of invitation was also used by the Court in *Huynh v The Queen* (2013) 87 ALJR 434; [2013] HCA 6 at [30].

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6 The conclusion that the appellant's guilt was proved by evidence properly admitted at the trial is a necessary, but not sufficient, condition for the dismissal of an appeal by the application of the proviso: *Weiss* at [45]; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [29], *Reeves v The Queen* (2013) 88 ALJR 215; [2013] HCA 57 at [50]. In conducting its own assessment of the matter, the CCA has regard to the record of trial, including the fact of the verdict, but the significance if any to be attached to the verdict depends upon whether the misdirection could have led the jury to wrongly reason to guilt: *Reeves* at [50].

7 See paragraph [**41**] above.

8 See, eg, *R v Dutton* (1979) 21 SASR 356 at 358 per King CJ.

9 His Honour referred to the observation of Channel J in *Cohen and Bateman v The King* (1909) 2 Cr App R 197 that, where a ground of appeal is otherwise made out, "the Crown have to shew that, on a right, direction, the jury *must* have come to the same conclusion".

50. In *Baini v The Queen* (2012) 246 CLR 469, Gageler J observed (at [49]), with reference to *Mraz*, that:

> it has always been understood that it is for the respondent and not the appellant to establish to the satisfaction of the court of criminal appeal that the case is within the proviso.

51. The majority (at [22]) indicated that the common form criminal appeal provision cast some burden (whether evidentiary or persuasive) on the respondent. Although the majority considered that the location of the burden said nothing about the content to be given to the expression "*substantial miscarriage of justice*", they did not suggest that the location of the burden was irrelevant.

52. If the respondent carried the onus of demonstrating that despite the misdirections, no substantial miscarriage of justice actually occurred, how could it have discharged the onus without making a positive submission that the judge erred in leaving provocation to the jury (and without setting out the basis for that submission, including a submission as to why on any reasonably possible construction of the version of events which was most favourable to the appellant the jury could not reasonably find that the objective limb had not been negatived by the prosecution)?

53. Although the respondent submitted on appeal that the case on provocation was weak (with a view to demonstrating that the directions were adequate), as was recognised in *Antoun v The Queen* (2006) 80 ALJR 497; [2006] HCA 2 by Hayne J at [58]-[60], there is a distinction of substance between such a submission and a submission that the proviso was engaged. Or as Kirby J put it at [49]:

> if the respondent truly had wished to rely upon argument based on the proviso governing criminal appeals, its proper course was to make that statutory provision a specific issue in the appeal.

54. In the present case, the appeal to the CCA was advanced on the basis that the directions with respect to provocation were inadequate in a number of respects. That was the focus of the parties' submissions to the CCA.

55. Ultimately, the appeal was decided on a footing not submitted by the respondent on appeal, namely that the jury should not have been allowed to consider provocation at all and that since the prosecution case on murder was strong (CCA [244]), as confirmed by the jury's assessment (CCA [245]), the proviso should be applied.

56. With respect, that approach ignores the essentially accusatorial and adversarial nature of the criminal justice system[10] of which the appeal forms part, and the importance of the positions of the parties in defining the issues to which submissions will be directed. To attach weight to the jury's verdict in circumstances where there were misdirections on

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[10] See, eg, *James v The Queen* (2014) 88 ALJR 427; [2014] HCA 6 at [29]-[30] and the reference therein to *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ.

provocation and in circumstances where the trial judge's decision to leave provocation to the jury caused the appellant's counsel to address on inconsistent bases, ignores the realities of the trial, including a consideration of what the jury might have made of an accused who, on one hand, denied commission of the offence, and on the other hand, made a submission on provocation which the prosecution described as an insult to the jury's intelligence[11]. While the appellant is of course not privy to the respondent's deliberations, it is conceivable that considerations such as these might result in a conscious decision not to invite the CCA to consider the proviso. It is submitted that, particularly in case where provocation *has* been left, in a manner which undoubtedly affected the conduct of the trial[12], it is not appropriate[13] for the CCA to act of its own motion.

57. Had the respondent invited the CCA to apply the proviso in the present case, it would have laid out the basis upon which it could be concluded that on any reasonably possible construction of the version of events which was most favourable to the appellant the jury could not reasonably find that the objective limb had not been negatived by the prosecution. There would have been submissions about the way in which the jury might have been entitled to consider that the appellant would have received the provocative conduct and the nature of the possible responses of an ordinary person subjected to that provocation. When this issue *was* addressed by the respondent for the first time on the application for special leave[14], it submitted:

> A jury might well conclude that an ordinary person with ordinary powers of self-control having no special sensitivity to unwanted homosexual advances could react with upset, embarrassment or **even violence** to a stranger, who they had invited into their home, who challenged their sexual integrity in front of their partner and sisters through non-violent, non-physical, offers to pay them for homosexual sex. It could not be excluded beyond reasonable doubt, the jury might reason, that an ordinary person with ordinary powers of self-control **might punch or shove Mr Negre or throw him bodily from the house**. But no reasonable jury could fail to reach the view that no ordinary person could have so lost self-control as to form an intention to kill or do grievous bodily harm and to act upon it by beating and stabbing Mr Negre. [Emphasis added]

58. Had that submission been made, a number of responses would have been made, including to draw attention to the fact that, in *Green*, the position adopted by Priestley JA, with whom Ireland J agreed, had been in very similar terms ("*It is easy to see that many an*

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11 The situation is different where the defence admits the commission of the *actus reus* but advances a positive case of provocation, as in *Moffa v The Queen* (1977) 138 CLR 601 and *Lee Chun-Chuen v The Queen* [1963] AC 220.

12 As noted in *Lee v R* (2014) 308 ALR 252; [2014] HCA 20 at [41], that there may be circumstances in which an accused person may be prejudiced in his or her defence because he or she can no longer determine the course to take at trial according only to the strength of the prosecution case. It was also observed in *Lee* (at [44]) in the context of the proviso that that the prosecution has the responsibility of ensuring its case is presented properly and with fairness to the accused.

13 There may be a distinction between the power to apply the proviso and the appropriateness of doing so: see the observations of Kirby J in *Darkan v The Queen* (2006) 227 CLR 373 at [145], by reference to *Kelly v The Queen* (2004) 218 CLR 216.

14 Respondent's summary of argument at [21].

ordinary person in the position in which the appellant was ... would have reacted indignantly, with a physical throwing off of the deceased, and perhaps with blows. I do not think however that the ordinary person could have been induced ... so far to lose self-control as to have formed an intent to kill or inflict grievous bodily harm".) Of this Brennan CJ said (at 345):

> With respect, the conclusion arrived at by the majority was a finding of fact that might not have been arrived at by a jury. A jury would be entitled to evaluate the circumstances in a different way. [Reference omitted]

59. He went on to emphasise that the jury may have perceived the "*real sting*" differently, and the same submission can be made here.

60. Here, the respondent did not contend that the trial judge erred in leaving provocation to the jury, let alone make a submission as to the "*real sting*". The appeal therefore proceeded on the basis, as between the parties, that the trial judge was right to leave provocation, and in those circumstances it was not appropriate for the CCA to adopt a contrary view and apply the proviso.

The CCA erred in its consideration of the proviso by having regard to material not identified to the parties and in its assessment of the objective limb

61. It is submitted that the CCA erred in having regard to material not identified to the parties, and erred in its ultimate conclusion. In particular, the CCA erroneously considered that the provocation, properly understood in the light most favourable to the appellant, was in substance a "*homosexual advance*", notwithstanding the absence of such a contention by the respondent.

62. In order to develop those arguments, it is necessary first to set out the essential elements of provocation.

Provocation at common law

63. In *Masciantonio*, the plurality summarised the "*basic concepts*" at common law by reference to what had been said in *Stingel*, notwithstanding that *Stingel* involved the Tasmanian Criminal Code[15]:

> Homicide, which would otherwise be murder, is reduced to manslaughter if the accused causes death whilst acting under provocation. **The provocation must be such that it is capable of causing an ordinary person to lose self-control and to act in the way in which the accused did.** The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control before he has had the opportunity to regain his composure.

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15 The Court in *Stingel* confined itself to the Tasmanian Criminal Code but observed there was a large degree of conformity between common law and statutory provisions (at 320). In *Masciantonio*, the plurality considered that "*much of the reasoning in Stingel is that of the common law*" (at 66).

64. The passage in bold is referred to as the objective limb, but as the discussion in *Masciantonio* and *Stingel* illustrates, that is a misleadingly simple label. First, it is important not to confuse the role of the ordinary person in this aspect of the inquiry with the notion of a reasonable person (a point emphasised in *Stingel* at 326-329). And the question is not what the ordinary person would have done but what an ordinary person could have been induced to intend[16]. Secondly, and importantly for the purposes of this appeal, it is only the question of self-control which is judged objectively.

65. As the plurality said in *Masciantonio* (at 66-67):

> The test involving the hypothetical ordinary person is an objective test which lays down the minimum standard of self-control required by the law. ...
>
> However, the gravity of the conduct said to constitute the provocation must be assessed by reference to relevant characteristics of the accused. Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree of gravity could cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions.

66. The necessity to judge the gravity of the provocation in a purely subjective way was emphasised in *Stingel* (at 326). It was acknowledged (at 332) that this is not without difficulty because the jury are required to have regard to characteristics of the accused in so far as they are relevant to the identification of the content or gravity of the provocative conduct but are not permitted to have regard to any idiosyncratic lack of self-control in the next stage of the inquiry. Or as McHugh J put it in *Masciantonio* (at 72):

> Thus, a curious dichotomy exists. The personal characteristics and attributes of the accused are relevant in determining the effect of the provocative conduct but they are not relevant in determining the issue of the self-control. The distinction has been strongly criticised on the ground that "it runs counter to human reality"[17]. It has been argued that the dichotomy is "inconsistent with the opinion of behavioural scientists that the accused's personality must be taken as a whole and cannot be dissected into the way he or she would view some provocative conduct on the one hand and the way he or she would respond emotionally to that conduct on the other"[18]. No doubt there is inconsistency between taking the personal characteristics and attributes of the accused into account on the issue of provocation but not on the issue of self-control. But it is an inconsistency that could be abolished only by abolishing the "ordinary person" test itself[19].

67. In *Green*, Brennan CJ expressed the principle by saying (at 340) that the jury are to take full account of the sting of the provocation actually experienced by the accused, but

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16 *Green v The Queen* (1997) 191 CLR 334 at 340 per Brennan CJ.

17 Yeo, "Power of Self-Control in Provocation and Automatism", (1992) 14 *Sydney Law Review* 3, 6.

18 Yeo, "Power of Self-Control in Provocation and Automatism", (1992) 14 *Sydney Law Review* 3, 7.

19 Fisse, *Howard's Criminal Law* (1990) 5th ed, p 89; Yeo, "Power of Self-Control in Provocation and Automatism", (1992) 14 *Sydney Law Review* 3, 8.

eliminate any extra-ordinary response of the accused to the provocation actually experienced.

68. This distinction reinforces the care which is required when considering the proposition, made by the Court in *Stingel* (at 327), that the operation of the ordinary person test is affected by contemporary conditions and attitudes: the contemporary conditions and attitudes affect the range of self-control of an ordinary person, but they cannot influence the assessment of the gravity of the provocation, which must be undertaken from the viewpoint of the accused. With respect, it is the failure to appreciate (or accept) this distinction that underlies some of the criticism of the decision in *Green* and of the so-called homosexual advance defence[20].

Use of academic literature

69. In considering that the objective limb was negatived on the evidence by reference to the standards of "*contemporary society*", Peek J relied on "*some of the extensive academic literature*" (CCA [236]). The literature was not identified.

70. Because he preceded this reference with an observation that in former times, when acts of homosexuality constituted serious crime, a killing under the provocation here present would have been seen as giving rise to manslaughter (CCA [235]), and because he followed it with a firm view in relation to "*twenty-first century Australia*", it is reasonable to infer that the extensive academic literature upon which he relied related to contemporary attitudes to homosexuality. If so, it is submitted, this misunderstands the objective limb[21]. If, on the other hand, the material related to contemporary levels of self-control, divorced from the context of a homosexual advance, again, it is submitted, this is not a matter that can properly be informed by academic commentary. It is not a matter upon which the trial judge, when deciding whether to leave provocation to the jury, would receive evidence.

71. But in either case, if, as seems likely, the material related to a factual matter (contemporary standards as to either homosexuality or self-control) rather than the

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20 Some of the literature is referred to in De Pasquale, "Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy", (2002) 26 *Melbourne University Law Review* 110. It includes commentary describing the so-called defence as "*nothing less than legally sanctioned homophobia*" (Brown, "Provocation as a Defence to Murder: To Abolish or to Reform?" (1999) 12 *Australian Feminist Law Journal* 137 at 141) and to the effect that the decision in *Green* has endowed the ordinary person of provocation with homophobia (Howe, "*Green v The Queen*: The Provocation Defence: Finally Provoking Its Own Demise?" (1998) 22 *Melbourne University Law Review* 466 at 300.

21 As earlier submitted, material relating to the extent to which fear or insult might be caused to the ordinary person by an invitation to engage in homosexual conduct is not to the point. The relevant degree of fear or insult is that of the accused; it is the question of his reaction to those circumstances that is measured against the ordinary powers of self-control.

relevant legal test[22], because the parties were not given an opportunity to make submissions about the material, there was a failure to afford procedural fairness.

72. In *Cross on Evidence* (at [3159]), the learned editor endorsed, as "*forceful reasoning*", the proposition that a judge should not, when seeking to make himself better qualified to formulate a rational and policy-orientated proposition of law, be restricted in his relevant factual investigations to consideration of facts which are either notorious or readily ascertainable. However, he endorsed Callinan J's insistence, in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at [165] that courts were not free to make their own (in that case, historical) inquiries without giving the parties notice, and an opportunity to deal with what the court regards as material. *Cross* continues:

> Compliance with those duties would remove many of the difficulties in judicial reliance on unproved material. It would expose whether the parties do agree on the facts or the means by which they may be discovered or analysed; and if they do not agree, it enables each party to criticise or compensate for the useless, incomplete or erroneous character of the other's appeal to the facts. So far as the parties agree, the points of agreement are receivable as being in substance agreed facts. So far as they disagree, the nature of the disagreement may be useful to the court.

The CCA should not have held that trial judge was wrong to leave provocation to the jury

73. Although the precise articulation of the elements of the partial defence of provocation has developed over time, a convenient starting point for consideration of the question is the discussion by Dixon CJ in *Parker v The Queen* (1963) 111 CLR 610 at 616:

> But on the question of provocation there has been no decision of the jury and the question is whether they ought to have been allowed to decide it. Perhaps it may be said that the question is to be considered just as if the jury had decided it in favour of the prisoner and, by some freak of procedure, the question arose whether that decision could be sustained. The point is that the issue before the Court of Criminal Appeal 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. 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.

74. Windeyer J said (at 660):

> If there be any material on which a reasonable jury might find that there was such provocation as could in law extenuate the crime, the question whether it did so must be left to them under proper directions as to the conditions or elements that must exist in fact if it to have that effect. It is for them to consider whether those conditions in fact existed. Unless they are sure they did not, the accused is entitled to the benefit of the doubt. That is to say at common law, as now understood, it is for the prosecution to prove that the killing was unprovoked; and the question of provocation ought not to have been

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22 Academic commentary on the legal test could really add nothing to the Court's jurisprudence. Further, to the extent there is an ambiguity in the Court's reasons, it is not appropriate to make a benevolent assumption in favour of the Court: *Fleming v The Queen* (1998) 197 CLR 250 at 260 [22], 265 [37].

> withdrawn from them, the jury, if there be evidence which could create a reasonable doubt. [References omitted]

75. It was said in *Lee Chun-Chuen v The Queen* [1963] AC 220 at 230 that:

> [T]here is practical difference between the approach of a trial judge and that of an appellate court. A judge is naturally very reluctant to withdraw from a jury any issue that should properly be left to them and he is therefore likely to tilt the balance in favour of the defence. An appellate court must apply the test with as much exactitude as the circumstances permit. ...

76. In *Masciantonio*, the plurality spoke (at [68]) of the likelihood of a trial judge "*leaning*" towards leaving provocation "*where he or she can*", and McHugh J referred (at 79) to the "*grave responsibility*" assumed by a trial judge who withdraws provocation[23]. In *Stingel*, the Court said (at 334) that:

> A trial judge should be conscious of the limited scope of the preliminary "question of law" whether there is material in the evidence "capable of constituting provocation" and of the need to exercise caution before declining to leave provocation to the jury in a case such as the present where it is sought to rely on a defence of provocation or failing to do so in a case where, even though provocation is not raised by the accused, there is material in the evidence which might be thought to give rise to a defence of provocation. [References omitted].

77. The observations about the different role to be adopted by an appellate court in *Lee Chun-Chuen* need to be seen in context. In that case, their Lordships were addressing a scenario where provocation had not been left to the jury, and on appeal, it was contended that this amounted to error. The question in the present case, like in *Green*, arises in a different context. It is whether, provocation having actually been left to the jury, but there having been material misdirections, it can be said by the CCA that the judge erred in deciding to leave provocation at all. In effect, that involves the CCA taking a different view from the trial judge to the question 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[24].

78. Does the judge who is "*naturally very reluctant*" to withdraw provocation from a jury and acts on that reluctance, or who "*leans*" in favour of leaving provocation, or who exercises "*caution*", having regard to the "*limited scope*" of the preliminary question he or she faces, err? Simply because the CCA may come to a different view of the facts, ought the CCA to conclude that the judge erred? As the approach of the majority in *Green*, and as the remarks in *Moffa* of Barwick CJ (at 607) and Mason J (at 622), suggest, a CCA should

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23 In *R v Radford* (1985) 42 SASR 266 at 270, King CJ spoke of withdrawing the question from the jury as a "*serious step*".

24 *Stingel* at 334, *Masciantonio* at 68.

be very slow to prefer its own conclusion where the trial judge, who has heard the evidence[25], has concluded that provocation may not be negatived by the prosecution.

The present case

79. Plainly, there was evidence of a subjective loss of control; that was in effect part of the prosecution case. Next, there was evidence of conduct which could be described as "*provocative*"[26].

80. In coming to a different conclusion to the trial judge in respect of the objective limb, Peek J appears to have focused upon the way in which contemporary attitudes to homosexuality had changed. Not only did that involve a misapplication of the objective test[27], with respect, it distorted the required analysis of the perception by the appellant of the "*real sting*".

81. Although there was certainly evidence upon which the sexual advances might have been treated as serious and not a "*joke*" (CCA [197]), the "*real sting*" arising from the version of events most favourable to the appellant was not an imputation by Mr Negre of homosexuality against the appellant so much as a taunt and challenge to the appellant's integrity. That is, the real sting was not "*you are gay*", but "*notwithstanding what you have threatened, and what your partner might think, for a bit of money you would have sex with me*".

82. Despite his lack of education or employment[28], the appellant owned a home, where he lived with his partner and child. He had been hospitable to a stranger, inviting Mr Negre into his home. Mr Negre had straddled the appellant in front of the appellant's partner and sisters. The appellant reacted angrily and in effect said that if the conduct was repeated he would hit Mr Negre.

83. Mr Negre's later conduct was, in context, capable of being seen by the appellant in effect as an (aggressive) dare to do so.

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25 Even if a member of the CCA would not expect an ordinary person might behave in the manner alleged by the prosecution in response to the relevant conduct, where the trial judge has assessed that a jury *might* reach that conclusion, and has had the benefit of hearing the evidence, it is difficult for the CCA to reject the trial judge's assessment: *R v Singh* (2003) 86 SASR 473 at [108].

26 Indeed, in an earlier part of his reasons dealing with the errors in the trial judge's directions, Peek J referred to the fact that there was evidence which it was open to the jury to act on which he characterised as "*substantial evidence of provocative conduct*" (CCA [112]).

27 Peek J's reliance (CCA [233]-[234]) upon the observations of Wilson J in *R v Hill* [1986] 1 SCR 313 at 343, to support the proposition that the objective test is an instrument of policy employed to keep the partial defence within bounds acceptable to *contemporary* society, was misplaced if his Honour intended by that reference to suggest contemporary attitudes to homosexuality were relevant. Wilson J's judgment does not stand for that proposition. Her comments respecting the objective test were limited to the question of loss of self control.

28 Evidence of Ashleigh Lindsay at T484.

84. Importantly, on Hayes' and Hutchings' account, after making a subsequent advance of some sort inside the house, the appellant responded: "*What did you say cunt?*" It is not to the point that a reasonable or ordinary person might not have issued that warning[29]. A severe warning having been given, Mr Negre's subsequent (and, in context, brazen) offer of money for sex might be regarded by a juror as a highly provocative challenge to a person in the position of the appellant and a grave insult and taunt to be made to a man like the appellant by a stranger who had been invited into his home.

85. A juror might consider that, viewed from the perspective of a person, who, on the evidence, had little else than his home and his family, to be taunted in the presence of his partner about his inadequacies as a man and father with the suggestion that he would not follow through on his threats of violence but would capitulate to an offer for sex in his family home for a couple of hundred dollars, was to be exposed to conduct which *might* cause a person with ordinary powers of self-control to form an intention to inflict at least grievous bodily harm and act accordingly.

86. With respect, the present case illustrates the wisdom in the judge's decision to leaving the question to the jury, where the deliberations might expose the ways in which the appellant may have viewed the conduct.

87. The CCA's apparent focus upon the affront caused by a suggestion of homosexuality was misplaced and did not acknowledge the "*real sting*" (cf. *Green* at 345, *Pollock* at [34]). While each case must of course be assessed on its own facts, like in many other "*taunt*" cases[30], there was evidence fit for the jury's consideration, and this case was not in the exceptional category of *Stingel*, where it could be concluded that it involved error to leave provocation to the jury. As Brennan CJ observed in *Green* (at 346), Stingel sought out and allegedly came upon a scene of consensual sexual activity, a scene which inflamed his jealousy, whereas in *Green*, as here, the deceased was an aggressor.

88. The learned trial judge did not err by failing to withdraw provocation from the jury.

PART VII APPLICABLE STATUTORY PROVISIONS

89. The only relevant statutory provision is s 353 of the *Criminal Law Consolidation Act* 1935 (SA).

PART VIII THE ORDERS SOUGHT

90. The appellant seeks the following orders.

    1. That the appeal be allowed.

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29 Cf. *Stingel* at 336.

30 Eg, *R v Dutton* (1979) 21 SASR 356, *R v Romano* (1984) 36 SASR 283.

2. That the judgment of the Court of Criminal Appeal of the Supreme Court of South Australia be set aside and, in lieu thereof, it be ordered that:

   2.1. the appeal be allowed; and

   2.2. the appellant's conviction be quashed and there be an order for a new trial.

PART IX ESTIMATE OF THE HOURS REQUIRED TO PRESENT ARGUMENT

91. The appellant estimates that the presentation of his oral argument will require two hours.

Dated: 18 December 2014

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