

SUPREME COURT OF QUEENSLAND

CITATION: *R v Peniamina* [2019] QCA 273

PARTIES: **R**
v
PENIAMINA, Arona
(appellant)

FILE NO/S: CA No 336 of 2018
SC No 679 of 2017

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane – Date of Conviction:
12 November 2018 (Sofronoff P)

DELIVERED ON: 29 November 2019

DELIVERED AT: Brisbane

HEARING DATE: 31 July 2019

JUDGES: Morrison and McMurdo JJA and Applegarth J

ORDER: **The appeal is dismissed.**

CATCHWORDS: CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – PROVOCATION – DIRECTIONS TO JURY – where the appellant was convicted of the murder of his wife, having pleaded guilty to manslaughter – where the issue at trial was whether the appellant had proven the partial defence of provocation in s 304(1) *Criminal Code* (Qld) – where the appellant suspected his wife of infidelity – where the appellant confronted his wife, she refused to talk to him and he punched her in the face – where the appellant’s wife grabbed a knife, presumably to defend herself – where the appellant grabbed the blade of the knife and received a deep cut to his hand – where the appellant then engaged in a protracted attack on his wife, stabbing her over twenty times and hitting her in the back of the head with a concrete bollard, which killed her – where s 304(3) of the *Criminal Code* (Qld) provided that the defence of provocation did not apply, other than “in circumstances of an extreme and exceptional character”, where a domestic relationship exists between two persons and the sudden provocation is based on anything done by the deceased to end or change the nature of the relationship – where the Crown case was that the sudden provocation was based on acts done by the appellant’s wife to change the nature of the relationship so that the appellant needed to prove circumstances of an “extreme and

exceptional character” – where the appellant submitted the exclusion did not apply because the brandishing of the knife, which led him to grab the blade and his hand to be cut, was the conduct that caused him to lose self-control, rather than acts done by his wife to change the nature of the relationship – whether the words “based on” in s 304(3)(c) permit the exclusion to be engaged where acts done by the deceased to change the nature of the relationship precede the act of sudden provocation nominated by the defendant – whether the exclusion in s 304(3) arose on the evidence – whether the trial judge erred in directing the jury that it was for the defence to prove on the balance of probabilities that the provocation was not based on acts done by the deceased to change the nature of the relationship

Criminal Code (Qld), s 304, s 728, s 739
Criminal Code and Other Legislation Amendment Act 2011 (Qld), s 5

Cosco Holdings Pty Ltd v Thu (1997) 79 FCR 566; [1997] FCA 1353, considered
Holmes v Director of Public Prosecutions [1946] AC 588; [1946] 2 All ER 124, cited
Lane v The Queen (2018) 92 ALJR 689; [2018] HCA 28, cited
Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission (1998) 91 FCR 8; [1998] FCA 1650, considered
Masciantonio v The Queen (1995) 183 CLR 58; [1995] HCA 67, cited
Moffa v The Queen (1977) 138 CLR 601; [1977] HCA 14, cited
Pollock v The Queen (2010) 242 CLR 233; [2010] HCA 35, cited
R v Buttigieg (1993) 69 A Crim R 21; [1993] QCA 214, cited
R v Pollock [2009] QCA 268, cited
R v Thompson [2019] QCA 29, cited
Stingel v The Queen (1990) 171 CLR 312; [1990] HCA 61, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: M J Copley QC for the appellant
T A Fuller QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MORRISON JA:** I have had the considerable advantage of reading the draft reasons of each of McMurdo JA and Applegarth J. In light of the difference between their conclusions I consider that I should state my own reasons for concluding that the appeal should be dismissed.
- [2] Subject to what follows I agree with the reasons of Applegarth J. I gratefully adopt the analysis of the factual matters set out in those reasons. The degree to which

each set of draft reasons has explored the factual and legal issues enables me to state my own in relatively short form.

- [3] Section 304 of the *Criminal Code* 1899 (Qld) relevantly provides:

“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.

....

- (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.”

- [4] Section 304(1) applies where the person who unlawfully kills another does the act which causes death “in the heat of passion caused by sudden provocation”. Here the death was admittedly unlawful. The act which caused death was hitting the deceased on the skull with a concrete bollard.

- [5] The defence case was that the sudden provocation was the deceased’s brandishing of the knife at the appellant, the appellant’s grabbing it and being cut on the hand by the deceased.¹ The defence had to prove that the defendant’s loss of control was

¹ Defence address, AB 44 lines 11-17; AB 49 lines 1-6; AB 55 lines 38-44; AB 60 lines 41-43.

caused by that event. Failure to prove that would mean that the defendant had not satisfied the onus on him, and that s 304(1) was not satisfied.

- [6] The phrase “sudden provocation” has an established meaning, and combines two aspects. The “provocation” is plainly a reference to the provoking conduct on the deceased’s part.² 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)”.³ The word “sudden” does not describe the deceased’s conduct, but is rather “connected with, and related to, the temporary loss of self-control exhibited by the provocation”.
- [7] The phrase “sudden provocation” bears the same meaning in each of s 304(1), (2) and (3). Nothing warrants a conclusion to the contrary.
- [8] Section 304(1) does not apply in two situations. One is that provided for in s 304(2), namely where the “sudden provocation is based on words alone”. However, even so s 304(1) can still apply if the circumstances are of “a most extreme and exceptional character”. There is no need to examine s 304(2) further as this case is not one where the sudden provocation is based on words alone.
- [9] The second is where s 304(3) applies. That subsection provides that: “... subsection (i) does not apply, other than in circumstances of a most extreme and exceptional character”, if three conditions are met. One is that a domestic relationship exists between two persons. The second is that one of them unlawfully kills the other. Each of those conditions are satisfied in this case.
- [10] The third condition is that 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, (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 in the nature to the relationship.
- [11] That compendium of possibilities needs to be separated out to understand the scope of the provision. Section 304 is concerned with “the temporary loss of self-control excited by the provocation”.⁴ Therefore s 304(3) deals with a series of possibilities related to loss of self-control excited by the conduct of the deceased, when that “is based on anything done by the deceased”:
- (a) to end the relationship;
 - (b) to change the nature of the relationship;
 - (c) to indicate in any way that the relationship:
 - (i) may end;
 - (ii) should end; or
 - (iii) will end;
 - (d) to indicate in any way that there:

² *Pollock v The Queen* (2010) 242 CLR 233 at 244-245 [45], [52], [54], [65]; *R v Pollock* [2009] QCA 268 at [50].

³ *Pollock v The Queen* (2010) 242 CLR 233 at 245-246 [47].

⁴ *Pollock v The Queen* (2010) 242 CLR 233 at 245-246 [52].

- (i) may be a change;
- (ii) should be a change; or
- (iii) will be a change;

to the nature of the relationship;

and, as well, anything the person **believes** the deceased has done:

- (e) to end the relationship;
- (f) to change the nature of the relationship;
- (g) to indicate in any way that there:
 - (i) may be a change;
 - (ii) should be a change; or
 - (iii) will be a change;

to the nature of the relationship.

- [12] Section 304(3) applies if the loss of self-control excited by the conduct of the deceased “is based on” any of these alternatives. And if that is so, then s 304(1) “does not apply”.
- [13] As is apparent, the first four deal with things actually done by the deceased. The last two do not. They depend upon the accused’s belief as to things done. That belief does not depend upon the deceased actually having done the thing in question.
- [14] Further, the legislature could have, but did not, use the phrase “caused by” in s 304(3)(c), so it read “the sudden provocation is caused by anything done by the deceased...” One reason for that may have been that the phrase “sudden provocation” already has an inherent causal connotation; it is the temporary loss of self-control excited by the provocation.
- [15] The phrase “is based on” is to be construed differently from phrases which utilise the word “cause”, for example in s 304(1).⁵ That word was not used in s 304(2) and (3). Instead the phrase “is based on” was used to indicate the relationship between the sudden provocation on the one hand, and on the other: (i) the deceased’s conduct; or (ii) the accused’s belief as to the deceased’s conduct. The phrase “is based on”, or similar phrases, are used elsewhere in the *Criminal Code*. For example, s 450EA contains a definition that “related charge” means “a charge based on the same act or omission as the act or omission that charge is based on”. Section 559(3) provides that an application to change the place of a trial for an indictable offence “shall be granted if based upon” certain facts. And s 590B(1) requires that if expert evidence is to be adduced then the other party must “be given a copy of the expert report on which the finding or opinion is based”. In none of those examples is the phrase “is based on” or “based on” used to indicate a causal connection simpliciter, but rather that the thing referred to is the foundation or basis for the subject.

⁵ The *Criminal Code* is replete with the use of “caused”. One need only refer to ss 12(3), 23(2), 28(1), 54A, 230, 284, 286(1), 290, 302, 305(4), 328, 359C(5), 414, 458(4).

- [16] In my view, the phrase “is based on” in s 304 should be construed as meaning that the relationship is one where the conduct (or believed conduct) is the foundation or basis for the sudden provocation.
- [17] As noted above, the phrase “sudden provocation” is not, however, confined to actual conduct on the part of the deceased. Section 304(3)(c) captures “anything the [accused] **believes** the deceased has done ... to end ... or ... to change the nature of the relationship...”, or to indicate the matters in s 304(3)(c)(iii). There are three possible ways to construe this aspect of s 304(3)(c). One is that the accused’s belief is simply as to whether an act has been done, provided that act has the requisite character. The second is that the requisite belief is as to the effect of an act actually done, i.e. that it was done to end or change the nature of the relationship, or to indicate the matters in s 304(3)(c)(iii). The third is that the belief must be as to both things.
- [18] In my view, the third construction is to be preferred. The accused must hold the belief that the deceased has done an act and that it had the requisite character, i.e. that it was done to end or change the nature of the relationship, or to indicate the matters in s 304(3)(c)(iii).
- [19] Accepting that to be so, on its face s 304(3)(c) would apply where the deceased had not actually done anything to end or change the nature of the relationship etc, but the deceased believed that to be so.⁶
- [20] In my view, that the section extends to circumstances where the deceased has not actually done anything, reinforces the proper construction of “is based on” as meaning the foundation or basis for the sudden provocation. In the example being discussed, one could not say the loss of control was caused by any conduct by the deceased. It was based on the accused’s belief as to a state of affairs which may or may not have been true.
- [21] The defence case nominated the cutting with the knife as the sudden provocation. The defence case did not contend that any act preceding the cutting was involved in the defendant’s loss of control, nor that any belief on his part as to what she had done or indicated was of relevance. Accordingly, if the defence did not prove that the loss of control was caused by the cutting then it would not attract the defence available under s 304(1).
- [22] However, in my view, that is not the end of the matter. Even if it was shown that the cutting was what caused the loss of control, one still needs to consider the operation of s 304(3). Section 304(3) provides that if its conditions are met, and the case is not one involving circumstances of a most extreme and exceptional character, then s 304(1) “does not apply”. It relevantly operates to deny s 304(1) any application if the sudden provocation “**is based** on anything done by the deceased ... to end the relationship or ... to change the nature of the relationship”. The use of the phrase “is based” directs attention to a factual issue, namely whether the sudden provocation is, in fact, based on things done by the deceased to end or change the nature of the relationship. If it is, and the other conditions are met, the defence under s 304(1) is not applicable. There is then no question as to whether or not s 304(1) has been met, as it “does not apply”.

⁶ For present purposes it is not necessary to explore whether that belief must be established objectively or subjectively.

- [23] That means that if the defence case nominates the conduct that it contends is the sudden provocation but s 304(3) applies, there is no longer any question of whether the accused has satisfied s 304(1).
- [24] I therefore respectfully disagree with McMurdo JA that in order for s 304(3) to be engaged the jury had to find that what was done by the deceased with the knife was done to end or change the nature of the relationship. Rather, in my view, the jury had to consider whether what was done with the knife and the consequent loss of control was, in fact, based on something done by the deceased to end or change the nature of the relationship.
- [25] The appellant knew or believed that the deceased had done acts to, at least, change the nature of the relationship:
- (a) she had an affair with a man in New Zealand;
 - (b) when she returned from New Zealand she moved into a separate bedroom;
 - (c) that and the fights between them made the appellant concerned that the deceased might take their children overseas and away from him;
 - (d) he used the last recorded number on the deceased's phone to call and confront a man about seeing the deceased; that man said some horrible things back; the deceased was present for that call, but denied that she knew the man;
 - (e) the appellant took steps to make arrangements, including setting up email and Facebook accounts, in preparation for the contingency that the deceased might leave him;
 - (f) he confronted her about the texts he had found on her phone, and the man he had called; her reaction caused him to think she did not care, so he hit her; and
 - (g) his subsequent comments to police and his mother were to the effect that the deceased had cheated on him too many times.
- [26] In a pre-trial hearing the prosecutor signalled an intention to argue that s 304(3) applied, and defence Counsel accepted that to be part of the prosecution case.⁷ Before addresses commenced, and before the learned trial judge gave a draft of his proposed summing up, defence Counsel accepted that the prosecution case included reliance on s 304(3).⁸ It is in that context that what was said in addresses must be seen.
- [27] The prosecution case put in address was that the relationship had already changed when the deceased returned from New Zealand, and the evidence thereafter confirmed that:
- (a) "... she's not the same wife. The person who knows and feels that about her is [the appellant]. His concern grows to such an extent over time that it seems he tells his aunt ... that his wife is sleeping in the spare bedroom, and there is no communication, or reduced communication."⁹

⁷ AB 124-128, 134-135.

⁸ AB 456 line 40 to AB 458 line 19.

⁹ AB 21 lines 41-45.

- (b) the risk that his children might no longer be with him pre-occupied the appellant; it was all he thought about;¹⁰
- (c) “Rightly or wrongly, true or not true, [the deceased’s] relationship was already in full change with her husband. She was, in fact, even prior to the killing, wanting it to change, and he knew that. There were physical changes by her such as not sleeping in the same bedroom.”¹¹
- (d) the change in the relationship was demonstrated by the fact that the deceased had not called or texted her husband for four days; there was hardly any contact between them and “Things were falling apart. Or perhaps they were already in pieces.”;¹² and
- (e) the appellant’s planning for the contingency that the deceased might leave him “tells you about the relationship that they were having. It was broken. ... The change in the relationship was not only on the horizon, it was now.”¹³

[28] After reviewing the evidence the prosecution returned to the question of sudden provocation. The jury were told one way they might think of dealing with that issue was:¹⁴

“And that this alleged provocation by her – this cutting incident that he talked about in the kitchen area is done in the context of her trying to change the nature of the relationship and that this was known to him. Did – could have thought that when she went like this or whatever it is that had had happened in the kitchen, that that would have meant to him, I no longer want to be with you? You and I are over. Leave me alone.”

[29] The prosecutor then applied that to the facts, which included this passage:¹⁵

“She returns from New Zealand. He’s sleeping in the spare bedroom. He thought she was being unfaithful. There is the first phone snatching, there is the second phone snatching. There is the appreciation by him that the relationship was changing, that the communication was not working between the two of them. That there’s appreciation by him that she possibly had another partner, that was his view at least. There is his utterance to [a cousin] that it was effectively time to move on. One wonders whether or not she was already separated from him in her mind. There is then an acceptance, when he returns to the house, that he is now discussing the third person in the relationship with her, which she is denying to him. She was not willing to discuss this aspect with him. There is no indication anywhere that she was willing to compromise or have a continuing relationship with this man.”

[30] And then concluded with:¹⁶

¹⁰ AB 22 lines 7-10.

¹¹ AB 22 lines 24-28.

¹² AB 22 line 41 to AB 23 line 3.

¹³ AB 24 lines 39-42.

¹⁴ AB 36 lines 28-33.

¹⁵ AB 36 lines 35-46.

¹⁶ AB 37 lines 7-14.

“A woman doesn’t have to wear a flashing sign at the time of the provocative act to say, okay, this is it now, to tell the male person, who’s clearly been dominant towards her that she no longer wants to be with him.

He had plenty of signs. He knew as much. By the time it came to the provocative act, the nature of the relationship was clearly changing. On the day of the killing – in fact, by that stage, contextually, you might think the relationship had already changed.”

- [31] Those passages raised the issue of whether the sudden provocation identified by the defence was, in fact, based on anything done by the deceased to change the relationship, or believed to have been done to change the relationship.
- [32] In the defence address it was admitted that the appellant intended to kill the deceased, and was therefore guilty of murder unless the defence of sudden provocation applied.¹⁷ Dealing with the contrasting cases (the prosecution saying the killing was as a result of a jealous rage, and the defence saying it was the brandishing of the knife that tipped the appellant into a rage), Counsel said:¹⁸

“We know that she went to New Zealand, she came back, and things seemed to have changed. But, members of the jury, don’t for a minute think that these two people were – that there’s evidence that these two people were living in some sort of, you know, they had their trenches and barbed wire, and nobody was allowed to come here or do anything like that. These people were living in the same house and if you needed a more clear sign that they were still getting along fine, is the fact that on the night that all this happened, they went off and did something completely mundane, something that we all do that suggests they weren’t at war with each other. They went off to Coles at Kippa-Ring to buy dinner for themselves and the kids.”

- [33] Defence Counsel then continued, acknowledging that the relationship had changed but addressing whether the deceased’s acts were such as to **end** the relationship:¹⁹

“But they were living together. He went off to work. [The appellant] was lucky that he had the benefit of two women. One, his aunty and [his cousin]. He confided in both of them and he did say that they were sleeping in – she was sleeping in the spare room and that he was upset about her hiding her phone. But these were not insurmountable problems. This was – there is – let’s put it this way, there is simply no evidence, no evidence at all that [the deceased] had said anything to anybody, including to [the appellant] that as far as she was concerned, the marriage was over, and she was out. There’s nothing like that. There’s no evidence that she, at any stage, made inquiries or made statements about taking the children and leaving or that there was any other change in the nature of the relationship.

¹⁷ AB 40-41.

¹⁸ AB 44 lines 33-41; emphasis added.

¹⁹ AB 45 lines 4-19.

The change in the nature of the relationship, had started when she got back from New Zealand. They'd been together for another four weeks after that and apart from that, nothing else seems to have changed. Unhappy? Well, they're probably both unhappy but that's not an unusual thing in a marriage or a relationship and people work through those things."

- [34] Finally, defence Counsel drew the distinction between the cases, having taken the jury through the appellant's statements about what happened:²⁰

"So, members of the jury, the provocation that the defence point to is not that [the deceased] said anything like, "Well, I'm out of this relationship," or, "I want this relationship to change," or, "I'm thinking of ending it," or, "I'm thinking of taking the kids to New Zealand." It's not that at all. What triggers this is her thrusting a knife towards him, him grabbing it and you might think that's just instinctive. After all, isn't that what the prosecution was saying [the deceased] did with those injuries on her hand?"

- [35] While that passage defines the defence case as limited to the deceased's brandishing the knife, his grabbing it and being cut, the prosecution case was directed at the issue of whether the sudden provocation was based on acts to end or change the relationship.

- [36] Defence Counsel directly turned to the issue raised by s 304(3) towards the end of his address:²¹

"His Honour will also explain to you that there are a couple of issues that you need to consider because this is a domestic relationship. So there's no dispute they were in a domestic relationship. And one of the things you'll need to ask yourself: if the sudden provocation was based on anything that [the deceased] did; to either end the relationship, change the nature of the relationship; to indicate in any way that the relationship may, should or will end; or to indicate that there may, should or will be a change to the nature of their relationship? And the simple answer to that is: there's no evidence that [the deceased] did any of those things. She – there's just no evidence she said anything to the defendant about ending the relationship or changing the nature of the relationship. In fact, she didn't accept, it would seem, that there was anything to this story that was being peddled around that she may have had some sort of affair.

The defence say that the provocation; it's not anything that [the deceased] says about the relationship. What it's all about is what happens with the knife and what flows from that."

- [37] In my view, the defence thereby addressed the issue raised by the prosecution case, namely whether the sudden provocation was based on acts done by the deceased to change or end the relationship.

²⁰ AB 55 lines 38-44.

²¹ AB 61 line 34 to AB 62 line 3.

- [38] As mentioned by Applegarth J, prior to directing on s 304 and in the course of discussion with Counsel on each side, the learned trial judge recognised that the prosecution case under s 304(3)(c) extended to the deceased's conduct prior to the knife incident "so that taking the knife is part of her action to repel her husband's desire to continue the relationship".²²
- [39] I agree with Applegarth J that it has not been demonstrated that the directions given to the jury were in error. The appeal should be dismissed.
- [40] **McMURDO JA:** The facts of this case are set out in the judgment of Applegarth J and I need not repeat them. The appellant's account to police raised the question of whether, in the terms of s 304 of the *Criminal Code* (Qld), he had killed his wife under sudden provocation. The only ground for this appeal is that the jury were misdirected as to the availability of that defence, such that the appellant was deprived of a chance of acquittal of murder. For the reasons that follow, that ground is established and the conviction should be quashed and the appellant should be re-tried for the offence.

Section 304

- [41] Before going to the directions which were given, it is necessary to consider the construction of s 304 and its application to the present case.
- [42] The starting point is s 304(1) which provides as follows:
- "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."
- [43] The expression "sudden provocation" in s 304(1) is undefined. It takes its meaning from the common law. In *Pollock v The Queen*²³ ("*Pollock*"), the High Court said:
- "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."
- [44] In *Pollock*, the High Court agreed with the statement by Keane JA, in this Court in that case, that the word "sudden" does not qualify the deceased's provocative conduct, but instead is "necessarily concerned with, and related to, the temporary loss of self-control excited by the provocation."²⁴ The High Court also held that what is said to have been the provocative conduct of the deceased must have *caused* that loss of self-control, although provocation need not be excluded in the event that there is

²² AB 84 lines 29-32.

²³ (2010) 242 CLR 233 at 245-246 [47]; [2010] HCA 35 at [47]. Footnote omitted.

²⁴ *R v Pollock* [2009] QCA 268 at [50], quoted in *Pollock* (2010) 242 CLR 233 at 244-245 [45] and endorsed at 247 [52].

any interval between the provocative conduct and the accused's emotional response to it.²⁵

[45] In this judgment, I will refer to s 304 as it was at the relevant time. It further provided as follows:

- “(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.
- (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.

...”

[46] Where the expression “sudden provocation” was employed in subsections (2), (3)(c) and (5), there is no reason to give those words a different meaning from their established meaning in sub-section (1). So, in each case, the expression is concerned with, and related to, the accused's temporary loss of self-control, rather than the provocative conduct which caused that condition. Consequently, in sub-section (2), the qualification to the availability of this defence

²⁵ Pollock at 247 [54].

is where the accused's loss of self-control was based on words alone, rather than because, in some way, whatever had been the provocative conduct of the deceased could be said to have been based on words alone.

- [47] The qualification to the availability of the partial defence of provocation, according to s 304(2), corresponds with the common law, as well as with the effect of s 304 even prior to the insertion of s 304(2), as this Court said in *R v Buttigieg* (“*Buttigieg*”).²⁶ The Court there cited *Moffa v The Queen*,²⁷ as well as *Holmes v Director of Public Prosecutions*,²⁸ where Viscount Simon said:

“It is not necessary in this appeal to decide whether there are any conceivable circumstances accompanying the use of words without actual violence, which would justify the leaving to a jury of the issue of manslaughter as against murder. It is enough to say that the duty of the judge at the trial, in relevant cases, is to tell the jury that a confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter, *and that in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime. When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violently provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly.*”²⁹

I have emphasised part of that passage for two reasons. The first is to identify the origin of the language of s 304(2). The second is to note that this qualification, to the availability of the defence, applied only to a case where words alone were relied upon “in extenuation”; that is to say, where the accused's loss of self-control was said to have been caused by words alone. Under s 304(2), the clear and relevant connection was between the deceased's words and the accused's loss of self-control. It was to that connection that the Court in *Buttigieg* referred, in saying:³⁰

“It seems now to be accepted in the cases that the use of words alone, no matter how insulting or upsetting, is not regarded as creating *a sufficient foundation* for this defence to apply to a killing, except perhaps in ‘circumstances of a most extreme and exceptional character’.”

(Emphasis added. Footnote omitted.)

- [48] In the same way, the qualification by s 304(3), to the availability of the defence, is where an accused's loss of self-control was caused by something done by the deceased (or something that the accused believed the deceased had done) to end or change the relationship, or to indicate an end or change to the relationship. Section 304(3) is engaged where an accused's loss of self-control is caused by something done (or believed to have been done) by the deceased, rather than by the fact that the relationship had ended or changed or that it might do so. Sub-section (3) is not engaged simply because the conduct of the deceased, upon which a defendant's case relies, occurred in the context of an end or a change to the relationship.

²⁶ (1993) 69 A Crim R 21 at 37.

²⁷ (1977) 138 CLR 601 at 605, 616-617; [1977] HCA 14.

²⁸ [1946] AC 588 at 600.

²⁹ Quoted in *Moffa v The Queen* at 616 per Gibbs J.

³⁰ (1993) 69 A Crim R 21 at 37.

- [49] As I have just said, s 304(3) may be engaged not only by what the deceased had done, but also by what the defendant believed the deceased had done. The operation of s 304 may be affected, in a given case, by the operation of s 24 of the *Code*.³¹ By that provision, the partial defence under s 304(1) (where it applies) may be available where the sudden provocation was caused by something which the defendant believed that the deceased had done. It can be seen that such a case is recognised in the terms of s 304(3).
- [50] The evident policy of s 304(3) is that, except in circumstances of a most extreme and exceptional character, something done by the deceased to end or change a domestic relationship should not provide a defence to a charge of murder, because an ordinary person would not lose self-control, and kill with murderous intent, in response to the other party to the relationship doing something to end or change it. In the explanatory note to the *Criminal Code and Other Legislation Amendment Bill 2010*, it was said that:
- “The subsection deals with an unacceptable response by a party to a domestic relationship, *to an event affecting the relationship*, arising from a choice made by the deceased about the relationship.”
- (Emphasis added.)
- [51] Section 304(5) provides that s 304(3)(c)(i) applies even if the relationship had ended before the sudden provocation and killing happens. This does not suggest a different meaning of “based on” in s 304(3)(c). For example, the deceased may have ended the relationship, by moving from the house in which the two had lived, before the accused, upon discovering that this had occurred, lost their self-control. And more generally, there may be an interval of time between the deceased’s provocative conduct and the accused’s loss of self-control.³²

The respective cases at the trial

- [52] When arraigned, the appellant pleaded not guilty to murder, but guilty to manslaughter. The only issue at the trial was whether he had killed his wife whilst provoked, such that he was guilty of only manslaughter, by the operation of s 304(1). By s 304(7), it was for the appellant to prove that he was liable to be convicted of manslaughter only.
- [53] The evidentiary basis for his case was in his answers when interviewed by police. He there said that, after he had hit his wife in the mouth, he heard her in the kitchen grabbing something, before he encountered her holding a knife. He said that he tried to get the knife from her but “she pulled the knife”, after which he could feel that his hands were “really bleeding” and he could “feel my hand really pain”. He said he then felt “just more angry and more angry, you know what I mean?”, and that “I can’t stop. I can’t stop that time”, so that he then grabbed the knife and she tried to get away. He told police that he was thinking that he then wanted to kill her. He began stabbing her, apparently using two knives, inflicting over 20 cuts and stabs, before she fell to the ground on a driveway, face down. He then removed a concrete bollard and hit the back of her head with it twice, fracturing her skull, which killed her.
- [54] In the summing up, the trial judge correctly described the defence case as being that he reacted to her grabbing the knife, threatening him with it and cutting his right

³¹ *R v Lafaele* [2018] 3 Qd R 609; [2018] QCA 42.

³² *Pollock* at 247 [54].

palm. It was not the appellant's case that his loss of self-control was the result of some act or acts of the deceased, preceding her cutting of him with the knife, which was done by her to end or change the nature of their relationship. Nor was it part of his case that it was the result of a belief that she had done either of those things. His case was that he had lost self-control as the result of what she had done with the knife. Unless he proved, on the balance of probabilities, that he had lost self-control as a result of that conduct, the defence case would fail, not because s 304(1) did not apply, but because he would not have proved all which he was required to prove under s 304(1). If he failed to prove that her acts with the knife caused him to lose his self-control, there was no evidence which provided an alternative path to an acquittal of murder under s 304(1).

- [55] Under s 304(1), the appellant had to prove that the provocation alleged by him had the capacity to provoke an ordinary person to form an intention to kill or to do grievous bodily harm and to act as he did. For this question, the gravity of the provocative conduct could be assessed in the context of what had previously occurred between the couple, to the extent that the appellant relied upon preceding events for this purpose. Importantly, it was not the appellant's case that the provocative conduct, if viewed in isolation, might be insignificant, but was provocative when viewed in the context of preceding events.³³ If the appellant failed to prove that her acts with the knife could have provoked an ordinary person to act as he did, without reliance upon any preceding conduct, then he would be guilty of murder because he would have failed to prove the case required by s 304(1).
- [56] In response to that case, the prosecution argued that his conduct by which the deceased was killed was not the result of a loss of self-control, but instead was the result of his anger about earlier events, in which she had signalled the end of, or at least a change to, their relationship. Again, if the jury was persuaded by that argument for the prosecution, the defence case failed because the requirements of s 304(1) were not satisfied.
- [57] However, in the prosecutor's final address to the jury, it was also argued that this was a case which engaged s 304(3), so that the defence could not succeed unless the circumstances were of a "most extreme and exceptional character". The prosecutor suggested that one way in which the jury might consider the defence case was by first considering the circumstances that the couple were husband and wife (and therefore in a domestic relationship) and that "this alleged provocation by her – this cutting incident that he talked about ... is done in the context of her trying to change the nature of the relationship ...". The prosecutor reminded the jury of events which had preceded the incident upon which the defence case relied. The prosecutor then said:

"He had plenty of signs. He knew as much. By the time it came to the provocative act [the deceased's acts with the knife], the nature of the relationship was clearly changing. On the day of the killing – in fact, by that stage, contextually, you might think the relationship had already changed. So when he punched her and she picked up the knife, on his version, it's equally consistent that although she was physically defending herself, that this was designed – or just about to be.

³³ *Stingel v The Queen* (1990) 171 CLR 312 at 325; [1990] HCA 61.

If you're satisfied of that, then provocation doesn't apply. He's guilty of murder."

(It appears likely that the prosecutor said "a sign", which was transcribed as "designed".)

[58] The prosecutor then argued that the circumstances were not of the most extreme and exceptional kind, because there was nothing extreme and exceptional in a woman picking up a knife to defend herself.

[59] After the prosecutor had addressed other matters (which were relevant if s 304(1) did apply), she appeared to return to her reliance upon s 304(3), in saying this about the deceased picking up the knife:

"She was defending herself and she had every right to be concerned. She no longer wanted this in her life. She needed to get out. This was her sign."

The effect of that argument, in reliance upon s 304(3), appears to have been that, if and when the deceased was brandishing the knife, thrusting it towards the appellant, and cutting his right hand with it, she was meaning to not only defend herself, but also to signify the end of their relationship.

The summing up

[60] The trial judge began his directions about the defence of provocation by explaining the burden and standard of proof. He then gave the jurors a document which set out what he said were the questions for their determination. Questions 1 to 4 did not relate to the defence.³⁴ Relevantly, the document was in these terms:

"Has the defence satisfied you, on the balance of probabilities that:

5. The accused killed Sandra Peniamina in the **heat of passion caused** by sudden **provocation** and before there was time for his **passion to cool**.
6. In the **same situation** as the accused, **an ordinary person might have been provoked** into losing self-control to such an extent as to form an intent to kill Sandra Peniamina and to kill her

If the defence fails to satisfy you of either one of these issues, or both, you would find the accused guilty of murder.

If the defence has satisfied you of both of these issues, go on to consider whether the situation is one in which the defence does not operate. Has the defence satisfied you that:

7. The sudden provocation was not based on **anything Sandra Peniamina did to change the nature of the relationship** (as husband and wife)

If the defence has satisfied you of this, you will find the accused not guilty of murder but guilty of manslaughter

³⁴ They were whether the prosecution had proved Sandra Peniamina was dead, the accused had killed her, he intended to kill her and the killing was unlawful.

If the defence fails to satisfy you of this, go on to consider the final issue.

Has the defence satisfied you that:

8. The circumstances were of a **most extreme and exceptional character**.

If the defence has satisfied you of this, you will find the accused not guilty of murder and guilty of manslaughter

If the defence has failed to satisfy you of this, you will find the accused guilty of murder.”

[61] The document did not, of itself, identify the conduct of the deceased which had to be considered, nor did it explain what was meant by “based on” in question 7. It remained necessary for those things to be explained in the summing up.

[62] After distributing the document to the jury, the judge went on to direct them about his question 5. He began by saying:

“In asking the question whether he has killed in the heat of passion caused by sudden provocation, and before there was time for his patient to cool, 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, and this is important, 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.”

(Emphasis added.)

[63] The judge then correctly identified the alleged provocation, saying:

“The defence says that the provocation to which Mr Peniamina reacted was Sandra Peniamina’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.”

The judge continued:

“You’re inquiring into the relationship between the acts pointed to by [defence counsel] and the state of mind of Mr Peniamina, and you’re making a judgment. In the circumstances in which he was placed that night, was he suddenly provoked so he lost self-control and acted in the heat of passion? ...

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 cutting on his hand. The accused must satisfy you, on the balance of probabilities, that he so lost control that he formed an intention to kill his wife and that he killed her while in that state of loss of control.”

[64] The trial judge then discussed evidence of events leading up to this altercation between the couple, which culminated in the death of the deceased, before reading

to the jury the relevant parts of the evidence of the deceased's handling of the knife upon which the defence case relied. His Honour then repeated the relevant decisions for the jury to make within his question 5, saying:

“So do you accept at the end of your deliberations that she raised a knife in the way that was described? Do you accept that he might have tried to disarm her or to grab the knife? Do you accept that in doing that his hand was cut? Do you accept that this all made him lose his self-control to such an extent that he formed an intent to kill his wife? That is what he said in his statement to police. You have to consider whether you accept that what he said to police was candid and truthful.”

- [65] The trial judge then summarised the prosecution argument, which was relevant to his question 5, as follows:

“The Crown invites you to conclude that the violence that led to Sandra's death was just a continuation of the earlier violence when he had hit her. The Crown points to his mood as angry on that night and says this was an angry man who could not tolerate his wife's change in attitude towards him. The Crown says that this was not a loss of self-control, this is an anger-driven murder.

The Crown says that he was in a rage when he killed Sandra but invites you to conclude that he did not lose his self-control. He became angry, yes, says the Crown, and in his anger he punched her, he stabbed her and he finally bludgeoned her to death, but he never lost control of himself. The Crown invites you to conclude that after punching his wife in the mouth, after she fled to the kitchen and armed herself, after he pursued her and disarmed her, then great anger, in a rage, but not in a state of loss of control, he murdered her.

Those seem to be the two alternatives for you to consider. What you have to consider is whether you're satisfied on the balance of probabilities of the view of events that conform to the aspects of provocation as I have described them to you.”

- [66] The judge gave further directions as to the question, under s 304(1), of whether an ordinary person might have reacted to the alleged provocation, as the appellant said he did in his statement to police (question 6).

- [67] The trial judge then turned to his question number 7. His Honour said:

“The defence does not apply at all, irrespective of those matters that you will have found by this point, if you do find them - the defence does not apply if two things are found by you to exist. The first of these is that the deceased person and the accused person are in a domestic relationship. Well, that is a given here so you need not trouble over that; they are married.

The second point is the one that you have to consider: was *the sudden provocation, the act that the Defence points to*, or the acts - was the sudden provocation based on anything that Sandra did, or that the accused believed she had done, to change the nature of their relationship. I will say that again. They are in a marital relationship.

The defence will not apply to excuse murder and result in a verdict of manslaughter, even if he was provoked and an ordinary person might have been provoked, if what she did, the provocation that he points to was based upon something she did to change the nature of the relationship. If he had killed her for sleeping in a different bedroom you would have it. She would have done that 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 Sandra did to change the nature of the relationship.”

(Emphasis added.)

[68] At that point, the trial judge said this about the prosecution case:

“Ms Balic [(the prosecutor)] points to several factors and invites you to conclude that this was a provocation based upon something Sandra Peniamina did to change the nature of the relationship.

Ms Balic points to her return from New Zealand with a different attitude towards the marriage, her decision to sleep in a separate bedroom, the fact that she had had an affair or was beginning to have an affair, the fact that she was communicating with a lover, that she would not compromise with her husband, would not even discuss it it seems. She points to the fact that they were really no longer living as husband and wife. The Crown says that his anger - and even if it was a loss control they say it does not matter, the defence does not apply, because his loss of control, his sudden provocation, was based upon his refusal to accept the change that his wife was making to the marriage.”

[69] The trial judge then described the defence case in these terms:

“The Defence says that is looking at it wrongly. The Defence says the provocation was the raising of the knife and the cutting of the hand. The provocation, those acts, were not acts done by Sandra to change the nature of the relationship. They were acts done in an attempt to stab her husband. Whether in self-defence or whether out of anger it does not matter, they were acts, says the Defence, that were not done – for whatever reason she had for doing it, they were not acts done in order to change the nature of the relationship.

She raised the knife in a motion as it was described, if you accept this, as though she were about to stab him, and then when he grabbed the knife, perhaps unintentionally, he cut himself drawing the knife back, or she drew the knife back. The Defence says that the knife, the cut, were not something that Sandra did to change the nature of the relationship.

[70] The trial judge continued:

“If you are satisfied that the provocation is not based upon an act on Sandra’s part to change the nature of their relationship that is the end of that Crown argument. You would then acquit the accused of

murder and find him guilty of manslaughter because you will have found that there was a provocative act, you will have found that he was in fact provoked to the relevant degree, and you will have found that an ordinary person might have been provoked, and you will have found that this is not a situation in which the defence is excluded in the way I have described. So you would acquit him of murder and find him guilty of manslaughter.”

[71] His Honour then completed his directions, as to his question 7, in these terms:

“If the Defence has failed to satisfy you of that aspect, if you are of the view that the act to which he reacted may have been something she had done to change the nature of the relationship, *whether it was something that preceded the stabbing or if for some reason you think that the stabbing itself was an act done to change the nature of the relationship*, then you have to go and consider one final matter.”

(Emphasis added.)

[72] His Honour then introduced his question 8 as follows:

“I have said that in a domestic relationship, even if you find provocation, it is no good as a defence if the act to which you - that provokes you is an act to the change the nature of the relationship. Even so, the defence of provocation will apply if one further thing is established to your satisfaction, and that is that the circumstances in which the provocation arose and in which the killing was done, the circumstances in which the provocation arose and the killing was done, were circumstances of a most extreme and exceptional character.”

[73] The trial judge thereby directed the jury that the defence case might fail, at the point of his question 7, in one of two ways. The jury might find that the appellant was suddenly provoked by something which the deceased had done to change the nature of the relationship, which preceded her acts with the knife, or the jury might find that her acts with the knife were done in order to end or change the nature of the relationship. As I have said, the second of those possibilities was argued by the prosecutor, but the first of them was not argued.

The arguments in this Court

[74] It is accepted by the appellant that he had to prove not only that all of the elements of provocation were made out, but also that any limitation on the application of s 304(1), if it arose on the evidence, did not apply. The appellant’s complaint is that no such limitation arose on the evidence, so that the directions introduced an additional obstacle to an acquittal, by which the appellant was wrongly required to prove more than he was obliged to prove to be acquitted of murder.

[75] The submissions for the respondent proceed upon an interpretation of s 304(3) which cannot be accepted, consistently with what I have said earlier in this judgment. It is submitted that it was open on the evidence to conclude that the nature of the domestic relationship was changing, in the light of the deceased’s recent absence in New Zealand and the changed sleeping arrangements. It is then submitted that “[i]t is the clear legislative intent to limit the application of the partial defence in circumstances involving a domestic relationship”, and that, in this case, “the fatal acts of violence were the culmination of marital discord that had

developed over a relatively short period of time upon the deceased's return from New Zealand." It is argued that "[t]he jury were required to consider whether the provocative act relied upon by the appellant occurred within a changed relationship in determining the test that they were required to apply." And it is argued that the defence case was grounded upon an impermissibly "narrow interpretation of the act" which provoked the appellant, when the question of provocation, and the further question of whether s 304(1) applied at all, was to be decided upon the whole of the evidence.

- [76] The effect of the respondent's argument is that s 304(3) will be engaged when there is some connection between the accused's loss of self-control, and the end or change of a domestic relationship, beyond the causal relationship which I have described as necessary for this purpose. As I have explained, s 304(3) will apply only where it is *an act* to end or change the relationship,³⁵ and which itself causes the accused to lose their self-control.
- [77] Of course, the events which preceded the actions of the deceased with the knife were relevant. But they were relevant in another way. They were relevant because the jury might consider that it was not the acts of the deceased with the knife, but instead events which had preceded them, which had made the appellant intent upon killing his wife. If that argument was accepted, the appellant would fail under s 304(1). And as I have discussed, neither party had argued that the appellant's loss of self-control (if any) was caused by the events which had preceded the acts of the deceased with a knife.
- [78] It is not submitted for the respondent in this Court that the evidence raised a basis for the operation of s 304(3), in that the jury could have concluded that the deceased's acts, of brandishing the knife, thrusting it towards the appellant, and cutting him with it, were acts which were done by her to end or change the nature of the relationship. That is unsurprising. Although that argument was left for the jury's consideration, it was not one which, in my respectful view, the jury could have accepted, if properly instructed. On the whole of the evidence, the deceased had already indicated that the relationship was at an end, and it is unrealistic to suppose that, when she acted in that way with the knife, she was doing so in order to indicate the end of the relationship (or change its nature).
- [79] It is argued for the respondent that, if this Court is of the view that the evidential threshold to give the directions about s 304(3) was not reached, the Court should find that there was no substantial miscarriage of justice which has occurred, and apply the proviso under s 668E(1A) of the *Code*. In that respect, it is said that the trial judge's directions correctly identified the law to be applied, the factual basis upon which the jury had to make their determination and the arguments of the appellant. It is argued that this Court would be persuaded that, upon the whole of the evidence, the production and use of the knife by the deceased "was not such an act that an ordinary person would have lost control and acted on the sudden". At least one problem with that submission is that, according to what is described as the objective test in the application of s 304(1), the question is whether an ordinary person *could* have lost their self-control and acted as they did.³⁶

Consideration

³⁵ Or one of the other acts as described in s 304(3)(c).

³⁶ *Stingel v The Queen* (1990) 171 CLR 312 at 329, 331; [1990] HCA 61.

- [80] The trial judge correctly described the act of the deceased upon which the defence case relied. As his Honour told the jury, if they were not satisfied that the appellant lost his self-control, and as a reaction to what the deceased did with the knife, the defence case would fail under the judge's question 5.
- [81] The jury were directed to consider s 304(3) in the event that they were satisfied of the facts which the appellant had to prove under s 304(1). Any consideration of the operation of s 304(3) had to be made by reference to the act or acts of the deceased which caused the sudden provocation; that is to say, the appellant's loss of self-control. Therefore, in order for s 304(3) to be engaged, the jury had to find that, more probably than not, what was done by the deceased with the knife was done to end or change the nature of the relationship.
- [82] The trial judge left to the jury the question of whether "the stabbing itself" was an act done to change the nature of the relationship. In my respectful opinion, his Honour ought not to have done so, because there was no evidentiary foundation for this argument by the prosecutor. An inference that the deceased did those things with the knife in order to end or change the relationship was not open. In the events which had occurred before the altercation which culminated in her death, she had done many things which had made it clear that the relationship had ended or changed. On the only realistic view of the evidence, her acts with the knife were a reaction to being punched by the appellant, and perhaps to other preceding events.
- [83] The jury were also directed to consider another basis for the application of s 304(3), namely that there was an act to which the appellant reacted that may have been something which the deceased had done to change the nature of the relationship, which "preceded the stabbing" (meaning that it was something which preceded the altercation). In my respectful opinion, the jury were thereby misdirected, because any consideration of the application of s 304(3) had to be by reference to the conduct of the deceased upon which the defence sought to prove its case. Indeed, the judge suggested to the jury to consider question 7 if satisfied that question 5 (and question 6) should be answered in the appellant's favour. Upon that premise, the jury could have been considering whether the appellant had reacted to some "preceding" act only by a misunderstanding of the effect of s 304(3). As I have said, the prosecutor had not argued that the sudden provocation (if any) was caused by preceding conduct of the deceased.
- [84] In my respectful opinion, another thing which was said by the trial judge is likely to have contributed to such a misunderstanding. As I have set out above, in discussing his question 7, his Honour said:

"The second point is the one that you have to consider: was *the sudden provocation, the act that the Defence points to*, or the acts – was the sudden provocation based on anything that Sandra did, or the accused believed she had done, to change the nature of their relationship. ...The defence will not apply to excuse murder and result in a verdict of manslaughter, even if he was provoked and an ordinary person might have been provoked, *if what she did, the provocation that he points to was based upon something she did to change the nature of the relationship.*"

(Emphasis added.)

- [85] Again, the expression “sudden provocation” in s 304(3) has the same meaning which it has in s 304(1), which is that the expression is concerned with, and related to, the temporary loss of self-control of the accused person. The sudden provocation was not “the act that the Defence points to”. In s 304(3), the connection between the sudden provocation and an act by the deceased to end or change the relationship, is not a connection between the provocative conduct of the deceased and something done to end the relationship. If that were the case, a meaning of the expression “based upon” would have to be found, in order to define the nature and extent of such a connection. Instead, the relevant connection is between the conduct of the deceased and the accused’s loss of self-control, and the necessary connection is that the former must have caused the latter.
- [86] For these reasons, the evidence did not raise the possible operation of s 304(3) and the argument that the jury should not have been asked to consider it, should be accepted. Further, in my respectful opinion, the jury was misdirected as to the operation of s 304(3). The appeal should be allowed and the conviction of murder set aside, if these misdirections may have deprived the appellant of an acquittal.
- [87] As I have noted, the respondent argues for the application of the proviso. However, that submission is made upon the premises that the trial judge’s directions correctly identified the law to be applied and the factual basis upon which the jury had to make that determination. And I have concluded that the jury was misdirected in each of those respects.
- [88] It is submitted that the evidence, taken as a whole, made the rejection of the defence case inevitable because the production of the knife by the deceased, in all the circumstances, was not such an act that an ordinary person would have lost control. Assuming that this submission was intended to suggest that an ordinary person could not have lost self-control in reaction to the production and use of the knife by the deceased, the submission invites this Court to conclude that the evidence at the trial proved, beyond reasonable doubt, the accused’s guilt of murder.³⁷ In effect, the submission is that the evidence did not prove, on the balance of probabilities, that the appellant killed under sudden provocation.
- [89] The application of the proviso, in a case of a misdirection as to whether s 304(1) applied in a case in which one partner to a domestic relationship has killed the other, was considered by this Court in *R v Thompson* [2019] QCA 29. The error in that case was to direct the jury as to the possible application of s 304(3), when that provision had been enacted only after the commission of the offence. This Court likened the case to *Lane v The Queen*,³⁸ and held that the proviso was not to be applied, whether or not the Court was convinced that the appellant’s guilt had been proven, because of the possibility that the jury had not considered the questions to be answered under s 304.³⁹ The respondent’s argument seeks to distinguish this case from *R v Thompson*, in that, in this trial, the jury was not prevented from performing its function by considering the case under s 304(1).
- [90] In my opinion, it was not inevitable that the jury would reject the defence by rejecting any part of the case which had to be proved under s 304(1). It is possible that, if the jury followed the sequence suggested by the document which the judge

³⁷ *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]; [2005] HCA 81 at [44].

³⁸ (2018) 92 ALJR 689; [2018] HCA 28.

³⁹ [2019] QCA 29 at [24].

provided to them, they could have answered questions 5 and 6 in the appellant's favour.

- [91] But the jury, or at least some of them, may not have followed the sequence suggested by the judge's document. They may have considered that the defence case could be rejected simply because *the deceased's conduct* was "based upon" what she had done to end or change the nature of the relationship. If there was a case to be considered by reference to s 304(3), the jury would not have been wrong to have started with that provision, before going, if at all, to the requirements of s 304(1). Indeed, the prosecutor suggested to the jury that they could do so.
- [92] Therefore, this is a case where the jury may not have considered the application of s 304(1), because the jury may have thought that it had no application. If so, then to apply the proviso in this case would be to substitute trial by an appeal court for trial by jury.⁴⁰ This is not a case where the proviso should be applied, regardless of whether this Court is of the opinion that the appellant was guilty of murder, and an opinion on that question need not, and should not, be expressed.

Conclusion and orders

- [93] The jury was misdirected and, in consequence, the appellant may have lost a verdict of acquittal of murder. I would order as follows:
1. The appeal be allowed.
 2. The conviction of murder be quashed.
 3. The appellant be re-tried on the charge of murder.
- [94] **APPLEGARTH J:** The appellant brutally killed his wife and was convicted of murder. The issue at his trial was whether he had proven the partial defence of provocation.
- [95] The conduct of the deceased which the appellant claimed caused his loss of self-control was the cutting of his hand with a knife, which the deceased had obtained to defend herself.
- [96] Shortly before her death, the relationship between the appellant and the deceased had deteriorated. He suspected her of infidelity. She took to sleeping in a separate room. He was concerned that she might take their children and leave him.
- [97] On the night she was killed, the appellant tried to talk to her about a mobile phone of hers on which he had discovered text messages from a man who he believed was his wife's boyfriend. According to the appellant, the deceased refused to talk to him and looked like she did not care. He hit her, causing her mouth to bleed. She went into a bathroom, and then into the kitchen where she obtained a knife, presumably to defend herself against a further attack. The appellant grabbed the blade of the knife and tried to take it off her. He received a deep cut on his hand. The appellant was in pain and became "more angry and more angry". He then inflicted horrific and sustained violence on his wife, using two knives and a concrete bollard.
- [98] It was not sufficient for the appellant to prove that the cutting of his hand in the circumstances provided a partial defence of provocation in terms of s 304(1) of the *Criminal Code*. This is because the appellant had to prove that the exclusion

⁴⁰ Lane (2018) 92 ALJR 689 at 698 [50]; [2018] HCA 28 at [50].

contained in s 304(3) did not apply. At the relevant time, s 304(3) provided that subsection 304(1) did 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.” (emphasis added)

For ease of reference I will refer to the various matters stated in s 304(3)(c)(i), (ii) and (iii) as “to change the relationship”.

[99] The learned trial judge directed the jury in terms of s 304(3). The appellant complains that the statutory limitations in s 304(3) did not arise on the evidence and so the trial judge’s directions “introduced an obstacle to acquittal that the appellant was not lawfully obliged to meet.”

[100] His appeal raises an issue of statutory interpretation about the scope of the exclusion in s 304(3), particularly the meaning of the words “is based on” in s 304(3)(c).

[101] It also raises the factual issue of whether there was evidence which might support the conclusion that the sudden provocation was “based on” anything done by the deceased, or anything the appellant believed the deceased had done, to change the relationship.

[102] If there was any such evidence, then the appellant was obliged to prove on the balance of probabilities either:

- that despite that evidence, the “sudden provocation” was not “based on” any of the things referred to in s 304(3)(c)(i), (ii) and (iii); or
- circumstances of a “most extreme and exceptional character”

and the trial judge was obliged to direct the jury on s 304(3).

[103] In that event, the trial judge would not have introduced an additional hurdle that the appellant was not required to clear. It would be a hurdle (in addition to the hurdle in s 304(1)), introduced by the legislature in 2011, which, on the state of the evidence, the appellant was required to clear.

Factual background

[104] The appellant and his wife, Sandra Peniamina, lived with their four young sons. The appellant worked as a scaffolder and Sandra looked after the children. In late 2015 or early 2016, Sandra went to New Zealand with the children for a holiday. After she returned home in February 2016, the appellant perceived that Sandra was

behaving differently. He believed he had discovered that she had been having an affair in New Zealand.

- [105] The appellant confided in and received advice from two women: his aunt, Talaitupu Niumata (Tala) and his cousin, Natasha Leapai. About two weeks before Sandra was killed, the appellant told Tala that since Sandra had returned from New Zealand, they had been having marriage problems and Sandra was sleeping in the spare room. Two days before Sandra was killed, the appellant called Tala to discuss his suspicions. Tala had seen pictures of Sandra with a man named Stallan Ioane on Facebook. She had seen that Ioane was describing Sandra as his girlfriend. After being pressed by the appellant, Tala disclosed that based on what she had seen on Facebook, she thought Sandra had met somebody in New Zealand, but she did not know who it was. That evening, the appellant and Sandra had an argument over her mobile phone. Their ten-year-old son and his nine-year-old friend overheard Sandra demanding the return of her phone. The appellant went out the back door and left. Their son later told police “they fight a lot.”
- [106] The appellant visited Natasha that evening and told her that his aunty had seen on Facebook that Sandra was having an affair. He showed her the man’s Facebook profile. The appellant was frustrated and “concerned for his kids, mostly” because he was worried about Sandra taking the children overseas. Natasha told him she would ring “a couple of places” to find out the steps he could take if Sandra took the children without his authorisation.
- [107] On Wednesday 30 March 2016, Natasha telephoned the appellant to advise him of the results of her research, and found him to be “quite content and quite happy.” He said that he and Sandra had worked things out and that everything seemed to be okay.

The events of 31 March 2016

- [108] On Thursday 31 March 2016, the appellant came home from work at about 4.30 pm. He had a shower, then he and Sandra went to Coles to do some shopping and to buy food for the children’s dinner. After they returned home, they brought in the groceries. While Sandra prepared the children’s meal, the appellant “went missing for a little while”. He returned when the children were about to eat and was angry, then went into his room. After dinner, Sandra and the children were folding washing in the toy room. At around 7.30 pm, the appellant took another mobile phone from Sandra. He “jumped in the car”. His family did not know where he was going.
- [109] He telephoned Natasha. He was “distraught” and “upset”, “talking fast” and “sounded like he was panicking.” Natasha told him to go to her house, and he stayed with her for about two or three hours. He said he had found another phone in Sandra’s room when she was in the shower. He rang the number of the last phone call and spoke to a man. He asked the man whether he knew that Sandra was his wife, and why he was seeing her, and the man said some horrible things back. Sandra was in the room while he talked to the man on the phone, and when he confronted her, she denied knowing who it was. The appellant was worried about his children and very upset, clenching his fists. Natasha tried to calm him down. Just before he left, she helped him set up an email and Facebook account. He wanted to get himself organised so that if Sandra left “he was independent” and organised with his bills.

Natasha described the appellant as being “very calm” when he left her place for home at about 10.30 pm.⁴¹

- [110] Earlier on that Thursday evening, the appellant had also telephoned Tala and told her that he had discovered text messages on Sandra’s phone. He said that he had called the other person and told him to stop calling Sandra. The appellant made several calls to that same number over a period of almost two hours. At about 8 or 9 pm, the appellant telephoned Tala again and asked her to call somebody in Samoa and speak to them. Tala could not, as she did not have any international credit.
- [111] After arriving home, the appellant asked Sandra to come into his room. The children were in the sitting room. He tried to talk to her about the mobile phone. Sandra told him to “stop talking shit.” The appellant thought she looked like she didn’t care. He hit her, causing her mouth to bleed. She went into the bathroom. The appellant then heard somebody opening a drawer and went into the kitchen. Sandra was there and had a knife. The appellant grabbed the blade of the knife and tried to take it off her. As she pulled it backwards, he received a deep cut on his hand. The appellant was in pain and became “more angry and more angry.” He told police soon after he was detained: “I do it to her.” Three days later, the appellant told an undercover policeman that Sandra had tried to kill him with a knife and indicated a downward stabbing motion towards his neck and chest area. He said that that was when he had grabbed the knife, she had pulled back and his hand was cut. He claimed he had acted in self-defence.
- [112] Sandra tried to run away, but the appellant stabbed her several times in her back and head. The appellant was thinking “I wanna kill her.” She fell down and he kicked her in the head. Their ten-year-old son saw the appellant stabbing Sandra while she was on the floor. One knife wound to her face measured 12 centimetres in length and caused her nasal septum to be exposed, and she lost a tooth. The knife was later found by police on the kitchen floor, bent. Sandra was able to stand up and run down the hallway out the front door. She hid behind their car. The appellant followed her outside. He stabbed her several more times. In total, she suffered over twenty cuts and stab wounds to her head and body before the appellant pushed her down on the driveway. He kicked her again. The appellant went over to a garden bed and removed a concrete bollard. He hit Sandra in the back of the head with it, and may have hit her again. Sandra suffered a fractured skull, which killed her. A second knife was found outside. Its tip was broken off and was found to be embedded in Sandra’s skull.
- [113] A neighbour went to investigate and located the appellant on the driveway, crouching beside a motionless Sandra. He called out to the appellant. The appellant did not reply and moved a couple of metres towards the house. The neighbour moved forward and the appellant yelled at him to “fuck off.” The neighbour ran off, fearing for his safety. Other neighbours then went to the driveway. The appellant was asking for someone to help his wife and to call an ambulance. He kept saying sorry. He had a shirt of some description wrapped around one of his hands. The appellant was told to sit down and obliged until police arrived.
- [114] Police helped the appellant telephone his mother. He apologised to her and told her “She cheat too many time, Mum. I try, I try, Mum, to stop, but I can’t stop, Mum.”

⁴¹ This time was disputed.

He asked her to look after his children. The appellant had a conversation with police at the scene about what had happened to his wife. He told them that Sandra had cheated on him “too many times”, that he had tried to talk to her, and that she was swearing at him in front of his children. He said that he could not stop being angry, and that he had punched her. He said that Sandra had grabbed a knife, that he had grabbed the blade and she had pulled it. He received a big cut on his hand. He recalled that he was “more angry” after feeling the pain in his hand, but that he had been angry before that. He recalled stabbing Sandra several times inside the house and then throwing the knife down. Sandra fell, and he kicked her in the head. She ran outside and he followed her. He pushed Sandra down on the ground and kicked her. He could not recall if he had brought the same knife outside. He then grabbed “a rock outside ... like a round one for the front of the house” and hit Sandra in the head with it, probably twice.

The trial

- [115] The issue at the trial, at which the appellant pleaded not guilty to murder but guilty to manslaughter, was whether the appellant could prove, on the balance of probabilities, the partial defence of provocation provided for by s 304 of the *Criminal Code*, as amended by s 5 of the *Criminal Code and Other Legislation Amendment Act 2011*. To succeed, the appellant had to prove that the elements of s 304(1) were made out, and also had to prove that any statutory exclusions, if they arose on the evidence, did not apply.
- [116] As to proof of the elements of subsection 304(1), the conduct of the deceased that the appellant relied upon as the conduct that caused him to lose self-control was the cutting of his hand with the knife. The appellant described this in different ways at different times to different people. The appellant relies particularly on the answers he gave to police late on the evening of 31 March 2016 or in the early morning of 1 April 2016 in which he described how the deceased’s mouth was bleeding after he hit her, she went inside the bathroom and then he heard something in the kitchen and that the deceased obtained a knife from the drawer in the kitchen. He told police:
- “I tried, I tried to get it. Then she pulled the knife, I feel my hands, you know, really bleeding.”
- He went on to describe the pain he felt and how he was just “more angry and more angry”.
- [117] In one part of his address, defence counsel at the trial referred to “having your partner come at you with a knife”. The evidence did not make clear whether the deceased thrust the knife towards the appellant or held it in self-defence, whereupon the appellant tried to take it from her and cut his hand badly in the process.
- [118] The defence case, as put to the jury, acknowledged that the appellant was “in a rage, he was angry before he even got near the kitchen”. It acknowledged that he punched his wife. However, it was said that “something tipped him over into a rage”, and the defence case was that the “brandishing of the knife”, as demonstrated to the undercover officer, was the act which led the appellant to instinctively grab the knife and that after being cut with the knife he lost his self-control. The jury was told that the appellant grabbed hold of the blade of the knife in an attempt to stop the

deceased from using it, got a “very nasty cut on his hand and it’s that that tipped him into this rage”.

- [119] The prosecution case in connection with s 304(1) was that the appellant had not established the sudden provocation and loss of control contended by him. It invited the jury to conclude that the violence which led to Sandra’s death was a continuation of the earlier violence in which he had hit her, that he arrived home angry, thinking that his wife was being unfaithful, was about to move on and would take their four children with her. The prosecution case was that he was angry about that and the fact that the relationship had changed and was changing, could not tolerate his wife’s change in attitude towards him, punched her and then took from her the knife that she was defending herself with. According to the prosecution, there was not a loss of self-control, but an anger-driven murder.
- [120] As to the parties’ respective cases at trial on s 304(3), the prosecution case was that the exclusion under s 304(3) applied. In the absence of the jury, defence counsel indicated to the trial judge that he would say in response that there were circumstances of an exceptional character that would “exclude the exclusion” being the deceased coming towards the appellant with a knife. In addition, defence counsel indicated that the defence case was that the exclusion in s 304(3) did not apply because the sudden provocation was “centred on the knife” and not based on the matters in s 304(3)(c).
- [121] Prior to directing the jury on s 304, and in the absence of the jury, the trial judge discussed, with the assistance of trial counsel, his proposed directions and summation of their cases, including defence counsel’s contention that the only sudden provocation the jury needed to consider was being armed with a knife and that there was not any s 304(3)(c) issue for them to consider. The trial judge recognised in that discussion that the prosecution case in relation to s 304(3)(c) embraced “all of Sandra’s conduct up to that point so that taking the knife is part of her action to repel her husband’s desire to continue the relationship.” The trial judge canvassed defence counsel’s arguments to the effect that the provocative act had nothing to do with ending the relationship. The draft directions were revised with the assistance of counsel, and included defence counsel’s argument that the deceased’s act with the knife was not an act trying to change the nature of the relationship.

The summing up

- [122] It is unnecessary to canvass the parts of the summing up which addressed the elements of s 304(1), relevant evidence in that regard and the parties’ respective contentions. The jury was assisted with a document which identified the matters about which the defence was required to satisfy it, on the balance of probabilities.
- [123] Having addressed matters in relation to the defence under s 304(1), the trial judge explained that the defence did not apply if the sudden provocation was based on anything that Sandra did, or that the appellant believed she had done, to change the nature of their relationship. His Honour explained that the defence had to satisfy them on the balance of probabilities that the provocation to which the appellant reacted was not based upon something that Sandra did to change the nature of the relationship. The parties’ respective cases were outlined. These included some of the factors which the prosecution relied upon to invite the jury to conclude that the provocation was based upon something Sandra did to change the nature of the relationship. These included her return from New Zealand with a different attitude,

her decision to sleep in a separate bedroom, that she was having or beginning to have an affair, was communicating with a lover, would not even discuss the matter with the appellant that night, that he lost his control as a result, punched her, and this resulted in the knife being produced and the appellant cutting his hand.

- [124] The trial judge then outlined the defence case to the effect that the provocation was the raising of the knife and the cutting of the hand and those acts were not acts done by Sandra to change the nature of the relationship. They were acts done in an attempt to stab her husband, whether in self-defence or out of anger. The defence case, as explained by the trial judge, was that the knife and the cut “were not something that Sandra did to change the nature of the relationship”. The trial judge went on to explain that if the jury was satisfied that the provocation was not based upon an act on Sandra’s part to change the nature of their relationship, the appellant would be acquitted of murder and found guilty of manslaughter. His Honour continued:

“If the Defence has failed to satisfy you of that aspect, if you are of the view that the act to which he reacted may have been something she had done to change the nature of the relationship, whether it was something that preceded the stabbing or if for some reason you think that the stabbing itself was an act done to change the nature of the relationship, then you have to go and consider one final matter.”

The trial judge then summed up to the jury in relation to the exception contained in s 304(3) to the effect that if the defence satisfied them that the circumstances were of a most extreme and exceptional character, the appellant would be not guilty of murder and guilty of manslaughter.

The issue of statutory construction

- [125] The appellant relied upon the act of stabbing as the conduct that caused him to lose self-control. The prosecution argued in connection with s 304(3) that the deceased’s actions with the knife were things done by her to change the nature of the relationship or to indicate that there would be a change to it. As the Crown prosecutor said to the jury, the cutting incident occurred in the context of her trying to change the nature of the relationship and when she did whatever she did with the knife in the kitchen “that would have meant to him, I no longer want to be with you. You and I are over. Leave me alone.”
- [126] That argument, based upon the deceased’s conduct with the knife, which the appellant relied upon as the conduct that caused him to lose self-control, raised an issue for the jury, namely whether the “sudden provocation” was based on anything done by the deceased *with the knife* to change the relationship. The evidence left open this possibility and so the defence was required to satisfy the jury, on the balance of probabilities, that this was not the case or, if it could not do so, satisfy it that the actions of the deceased with the knife were circumstances of a most extreme and exceptional character.
- [127] The critical issue in the appeal does not concern the prosecution’s argument, based on the evidence, that, in context, the deceased’s actions with the knife might be said to have been things done by her to change the nature of the relationship. That was an issue for the jury. The relevant issue is whether s 304(3)(c) permitted reliance on things done before the alleged stabbing of the appellant, such that the sudden provocation might be said to have been “based on” those things.

- [128] Before the jury the Crown prosecutor pointed to aspects of the changing relationship and also to actions on the night in question that occurred shortly before the stabbing, including when the appellant punched his wife and she picked up the knife. This was said by the prosecution to be consistent with her physically defending herself in the context of a relationship that was clearly changing. As the prosecutor submitted to the jury, “this cutting incident that he talked about in the kitchen area is done in the context of her trying to change the nature of the relationship and that this was known to him”.
- [129] The prosecution’s reliance upon matters that preceded the stabbing, particularly the verbal exchanges that occurred followed by the appellant punching the deceased and her picking up the knife, were reflected in the trial judge’s direction, quoted in [124] above. This left it open to the jury to find that something that “preceded the stabbing” was an act done to change the relationship and that the defence had to satisfy the jury, on the balance of probabilities, that the provocation to which the accused reacted was not “based on” such a thing.
- [130] This gives rise to an issue of statutory interpretation concerning the meaning of “is based on” in s 304(3).
- [131] The particular issue is whether it is open to conclude that the defence in s 304(1) does not apply when the sudden provocation “is based on” something done by the deceased that precedes the act relied upon by the defendant as having caused him to lose self-control.

The statute

- [132] It is convenient to set out s 304 as it applied at the relevant time.⁴²

“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—

⁴² *Criminal Code and Other Legislation Amendment Act 2011 (Qld)*, s 5; *Criminal Code*, ss 728, 739 and *R v Thompson* [2019] QCA 29 at [4]. Amendments in 2017 simplified the opening words of s 304(3) to read “circumstances of an exceptional character.”

- (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.
- (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.”

The statutory context of s 304(3)

- [133] Section 304(3) is to the effect that a defendant who proves the elements of s 304(1) is not entitled to that defence if the “sudden provocation is based on” anything done by the deceased or anything the defendant believes the deceased has done to change the relationship.
- [134] The words “sudden provocation” have an established meaning. 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.”⁴³ In addition to this subjective aspect, there is an objective requirement. The conduct of the deceased must have been capable of causing an ordinary person to lose self-control and to act in the way the accused acted.⁴⁴
- [135] The word “sudden” does not describe the deceased’s conduct. Instead, it is “necessarily concerned with, and related to, the temporary loss of self-control excited by the provocation”.⁴⁵ The loss of self-control must be caused by the provocative conduct, but the defence is not necessarily excluded in the event that there is an interval between the deceased’s conduct and the defendant’s response to it.⁴⁶

⁴³ *Masciantonio v The Queen* (1995) 183 CLR 58 at 66.

⁴⁴ *Ibid*; *Pollock v The Queen* (2010) 242 CLR 233 at 245 [47] (“*Pollock*”).

⁴⁵ *Pollock* at 244-245 [45] citing *R v Pollock* [2009] QCA 268 at [50].

⁴⁶ *Pollock* at 247 [54].

- [136] In recent years the onus has been placed upon the defendant to prove the elements of the partial defence: that the deceased's conduct actually caused him to lose self-control and could cause an ordinary person to lose self-control as he did. Therefore the sensible operation of s 304(1) requires the defendant to nominate the conduct of the deceased which is alleged to have caused him to lose self-control. It is not for the jury to seek out some other conduct somewhere in the evidence which might qualify.
- [137] Having nominated X as the deceased's provocative conduct, a defendant may wish to rely on the context in which X arose and in which he responded to it. For example, X may be a single punch which occurred in the context of a series of altercations to which the defendant had been subjected. Requiring the jury to view the punch in isolation would risk a finding that an ordinary person would not respond to a single punch in the way the defendant did. The defendant therefore may seek to characterise the punch in context as "the straw that broke the camel's back". In this case, there was a similar approach by defence counsel at the trial of arguing that being cut with the knife tipped an already angry man into a rage in which he lost self-control.
- [138] In responding to such a case, the prosecution might argue one or more things. It might argue that there was no loss of self-control, and that the killing was the result of rage. It might argue that any loss of self-control was not caused by X, but by something else. It might argue that, viewed in its proper context, X contributed little to the loss of self-control and that the real cause of the defendant's loss of self-control was Y. Such an approach may appear to present the jury with a binary choice: was the provocative conduct X or Y? However, the s 304(1) issue remains whether X caused the loss of self-control. If the jury is not satisfied, on balance, that this was the case, it does not proceed to consider whether Y (or some other conduct by the deceased) caused an actual loss of self-control and could have caused an ordinary person to do so and act as the defendant did.
- [139] The defendant must prove, among other things, that he killed the deceased whilst deprived of self-control and that the loss of self-control was actually *caused* by the conduct of the deceased nominated by him. Proof that the identified provocation caused a loss of self-control is not precluded because other factors played a role in the outcome. The defendant, in explaining the context in which the conduct in question caused a loss of self-control, or in responding to a prosecution argument, may accept that preceding events played a part, contributed to and, in that sense, also caused his loss of self-control.
- [140] In summary, s 304(1) requires a defendant to prove that certain conduct of the deceased, which he claims caused him to lose self-control, could cause an ordinary person to act as he did. In proving his case, the defendant may rely upon other conduct of the deceased as providing the context in which the nominated conduct caused him to lose self-control, or accept that the other conduct played a part in the events. Still, he must prove that the nominated conduct of the deceased actually caused his loss of self-control.
- [141] The term "sudden provocation" in s 304(3)(c) (and in s 304(2)) should be given the same meaning as that term in s 304(1).

What does "based on" in s 304(3)(c) mean in its statutory context?

The meaning of “based on”

- [142] The words “based on” denote a relationship, possibly a causal one. The word “base” may describe a foundation or a starting point.⁴⁷
- [143] The words “based on” in s 304(3)(c) suggest some relationship. They differ from words suggesting a constituent element. The sub-section does not say something like “the sudden provocation *consists of* anything done by the deceased...” It does not simply say “the sudden provocation *is* anything done by the deceased...”
- [144] While the words “based on” in s 304(3)(c) suggest a relationship, or even an underlying cause, they import a stronger relationship than a connection. The legislature used the words “based on”, not “related to” or “connected to”.
- [145] The words “based on” differ in substance from some loose connection, such as where the sudden provocation occurs in the context of anything done to end the relationship. They do not connote “related to” in the weak sense of having some indirect relationship with a thing done to change the relationship.
- [146] Interpretations of the words “based on” in other statutory contexts must be approached with caution, but confirm what emerges from the dictionary definitions, namely that, depending on their context, the words denote a relationship between a matter which is a starting point or foundation for something else.
- [147] The phrase “based on” has primarily been considered in the context of anti-discrimination legislation.⁴⁸ In *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission*,⁴⁹ Weinberg J reviewed authorities that had considered the phrase and concluded that, in the context of s 9(1) of the *Racial Discrimination Act 1975* (Cth), it is not confined to a relationship of cause and effect.⁵⁰ His Honour noted that:

“The phrase “based on” where it appears in a statute is obviously capable of bearing different shades of meaning. It can, of course, be understood as denoting a relationship of cause and effect, either in

⁴⁷ Some dictionary definitions include:
 Australian Oxford Dictionary (2nd ed.)
 “base”
 a. A part that supports from beneath or serves as a foundation for an object or structure
 b. A principle or starting point; a basis
 Macquarie Dictionary Online
 “Base”
 2. a fundamental principle or groundwork; foundation; basis.
 5. the principal element or ingredient of anything, considered as its fundamental part.
 “based”
 20. to make or form a base or foundation for
 21. to place or establish on a base or basis; ground; found; establish
 “base on”
 a. to arrive at as a result of: *I based my conclusion on the facts available.*
 b. to create after the pattern of: *the character of Viola is based on his mother.*

⁴⁸ See, eg, *Commonwealth of Australia v Human Rights & Equal Opportunity Commission* (1998) 158 ALR 468; *Australian Medical Council v Wilson* (1996) 68 FCR 46.

⁴⁹ (1998) 91 FCR 8.

⁵⁰ *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8 at 8.

the traditional “but for” sense, or perhaps in a narrower “substantial and operating cause” sense.”⁵¹

[148] Weinberg J acknowledged that anti-discrimination legislation should be regarded as beneficial and remedial legislation and should be given a liberal construction.⁵² However, the legislature, having chosen to use the expression “based on” as an alternative to the expression “by reason of”, was presumed to have done so in order to signify that these two expressions mean different things.⁵³

[149] In *Cosco Holdings Pty Ltd v Thu*⁵⁴, Northrop J considered the proper construction of s 170DE(1) of the *Industrial Relations Act 1988* (Cth) which provided:

“An employer must not terminate an employee's employment unless there is a valid reason, or valid reasons, connected with the employee's capacity or conduct or *based on* the operational requirements of the undertaking, establishment or service.”
(emphasis added)

[150] His Honour stated in that context:

“...the word “based” is used as a verb. In the *Shorter Oxford English Dictionary*, the verb “base” is given the meaning: “1. To make a foundation for; 2. To place on or upon a foundation or logical basis.” In the *Macquarie Dictionary* the verb “base” is given the meaning: “19. to make or form a base or foundation for. 20. to establish, as a fact or conclusion (fol. by on or upon).” The word “on” is a preposition expressing a relationship with some other fact, matter or opinion. Here, the phrase “based on” is used as describing a connection between a subject matter, the reason for termination, and an object, the operational requirements of the employer. The operational requirements of the employer constitute the foundation upon which the termination of employment must be based.”⁵⁵

[151] The dictionary definitions, the authorities interpreting “based on” in a different statutory context, and the present context of a criminal statute which excludes a partial defence, suggest that the words “based on” in s 304(3)(c) denote a close relationship. They suggest a causal relationship, and probably that the thing is a substantial cause of the sudden provocation.

The defendant’s nomination of the “sudden provocation”

[152] Subsection 304(3) clearly is engaged when the sudden provocation relied upon by the defendant for the purpose of a s 304(1) defence consists of, or is constituted by, anything done by the deceased to change the relationship. An example would be the announcement “I’m leaving you, and nothing you can say or do will stop me”, in response to which the deceased is killed. In such a case the “sudden provocation” would have been a thing done to change the relationship and (assuming the elements of s 304(1) were proven) the defendant would be required to prove

⁵¹ At 24-25.

⁵² At 29.

⁵³ At 31.

⁵⁴ (1997) 79 FCR 566.

⁵⁵ At 576.

“circumstances of a most extreme and exceptional character”⁵⁶ to establish the defence.

- [153] Is s 304(3) confined to such a case? In other words, might its operation extend to a case in which some matters intervene between the thing done by the deceased to change the relationship and the “sudden provocation”?
- [154] Suppose in the hypothetical case that after the deceased’s announcement “I’m leaving you and nothing you can say or do will stop me”, the defendant punches the deceased in the face, the deceased grabs a knife to defend herself and in the ensuing struggle the defendant’s hand is badly cut. The cutting of the hand (which the defendant nominates for the purpose of a s 304(1) defence), in the context of what has gone before it, causes the defendant to kill the deceased. In such a case, a person might say that the “sudden provocation” from the knife cut was “based on” the deceased’s act in trying to leave the relationship, in that it was the foundation for what immediately followed.
- [155] If such a use of “is based on” is reasonable according to the natural and ordinary meaning of the words, is there anything in the text or context of s 304(3)(c) which indicates that they should have a different and narrower meaning?
- [156] The appellant argues that to adopt the ordinary meaning of “is based on” is to broaden out s 304(3) so as to allow the jury to consider conduct of the deceased other than that relied upon by the defendant as being causative. However, I am not persuaded that s 304(3)(c) precludes this. One may accept that it is for the defendant to nominate the conduct of the deceased which he claims caused him to lose self-control and, in that sense, define the “sudden provocation” relied upon for the purpose of s 304, including s 304(3).
- [157] To give the words “based on” their ordinary meaning in s 304(3)(c) is not to allow the prosecution to define the “sudden provocation” at issue in the case, or to encourage the jury to find that there was “sudden provocation” due to conduct other than that relied upon by the defendant for the purpose of his defence. Instead, it assumes, for the purpose of argument, that the defendant has proven the “sudden provocation” relied upon by him, and asks whether it was based on anything done by the deceased to change the relationship.
- [158] In my view, the fact that the defendant gets to nominate the deceased’s conduct which is said to be the “sudden provocation” does not mean that the operation of s 304(3) is confined to a case in which the defendant nominates the relevant conduct as being a thing which falls in s 304(3)(c).
- [159] One can imagine a case, such as the hypothetical example given above, in which a defendant would not wish to nominate such a thing (and thereby automatically set himself the burden of proving “circumstances of a most extreme and exceptional character”) and, instead, would nominate the cutting of his hand. In my view, the defendant’s nomination of conduct for the purpose of making out a defence under s 304(1) does not preclude a factual inquiry about whether the sudden provocation was “based on” something done to change the relationship. In the example given, it might be argued that the cutting of the hand was “based on” the deceased’s announcement that the relationship was at an end, since this was the basis of the fight that soon followed in which the appellant’s hand was cut.

⁵⁶ Or under the current law “circumstances of an exceptional character”.

A purposive interpretation

- [160] If the ordinary meaning of “based on” supports such a conclusion, and the operation of s 304(3) is not precluded by the defendant’s nomination of the deceased’s conduct for the purpose of a s 304(1) defence, then one considers the interpretation of “based on” which best achieves the legislative purpose.
- [161] Was Parliament’s purpose in enacting s 304(3) in 2011 to exclude reliance on a s 304(1) defence only when the killing simply followed a thing done by the deceased to change the relationship? Might, instead, Parliament have intended s 304(3) also to be engaged when something, such as a brief physical fight, occurs between the thing done by the deceased to change the relationship and the act nominated by the defendant as the “sudden provocation”?
- [162] If the brief physical fight (in which the defendant is injured) is the direct result of the defendant’s reaction to the deceased’s act in changing the relationship, then the “sudden provocation” might be said to have been “based on” the thing done by the deceased to change the relationship. This would be so even if the “sudden provocation” could be said also to have been prompted or caused by more immediate things, such as an assault that occurred in the course of a fight.
- [163] This clearly would be the case where the fight was something which was an unfortunate, but predictable, consequence of the deceased’s act in trying to leave or change the relationship.
- [164] It would be a matter of evaluation in the circumstances of a particular case whether the sudden provocation was “based on” anything done by the deceased to change the relationship. The statutory requirement of “based on” would not be satisfied where a thing done by the deceased (or anything the defendant believed she had done) to change the relationship was simply a background fact, or provided a context, or had some connection or other to the “sudden provocation”.
- [165] Neither party suggested that extrinsic materials, such as the Queensland Law Reform Commission’s 2008 report or the Explanatory Notes to the 2010 Bill illuminate the meaning of the words “based on”. The QLRC’s report recommended:

“a limitation on the circumstances in which the deceased’s exercise of choice about a relationship may provide a sufficient foundation for the defence of provocation. The Commission recommends that section 304 of the Criminal Code (Qld) be amended to include a provision that has the effect that, other than in circumstances of an extreme and exceptional character, provocation cannot be based on the deceased’s choice about a relationship.”⁵⁷

The Explanatory Notes to the Criminal Code and Other Legislation Amendment Bill 2010 state that s 304(3):

“deals with an unacceptable response by a party to a domestic relationship, to an event affecting the relationship, arising from a choice made by the deceased about the relationship.”

⁵⁷ Queensland Law Reform Commission, *A review of the excuse of accident and the defence of provocation*, Report No 64 (2008) at [21.88].

- [166] The actual words chosen by Parliament do not indicate that s 304(3) was intended to operate so as to exclude a s 304(1) defence only where the sudden provocation consists of, or is constituted solely by, the thing done by the deceased to change the relationship. The words “based on” suggest a substantial connection between the thing done to change the relationship and the sudden provocation. Such a substantial connection might exist where something occurs between the two things, especially where the intervening matter is a likely or not unexpected consequence of a thing done to end or change a relationship. The scope for something to intervene arises from the use of words “based on” which point to the foundation of what followed.
- [167] It also arises from the use of the words “based on” rather than words such as “based only on” or “based alone on”.
- [168] In preferring a purposive interpretation of s 304(3), one may consider the kind of example given above in which the deceased’s conduct in trying to leave the relationship prompts an immediate and violent reaction by the defendant during which the deceased uses an object in her self-defence and injures the defendant. He claims that the injury he received is the “sudden provocation” which caused a loss of self-control. Why should it be supposed that the Parliament did not intend s 304(3) to possibly apply in such a case? In such a case the act of trying to leave the relationship is the factual basis of what immediately followed, and without it, the “sudden provocation” would not have occurred.
- [169] In my view, it would be an odd, and seemingly unintended, result if a defendant could effectively avoid the practical operation of s 304(3) by nominating the most immediate act of the deceased (eg a blow struck in self-defence during a fight that quickly followed her act in trying to leave the relationship) as the provocative act. To do so would be to ignore the fact that the blow which immediately preceded the killing was the direct result of the deceased’s act in trying to change the relationship, and that the claimed provocation arguably was “based on” that act.
- [170] An unduly narrow interpretation of “based on” would deprive s 304(3) of any operation where the deceased’s act to change the relationship is the basis of escalating violence inflicted by the defendant, during which he is injured, then loses self-control and kills.

Should a narrow interpretation be adopted?

- [171] It might be said (although it is not specifically submitted by the appellant) that a narrow interpretation of “based on” should be adopted in such a case because this is a criminal statute. In my view there are reasons not to do so.
- [172] First, the ordinary meaning of “based on” should be given effect to where the Parliament did not choose a narrower expression, such as “consists of”.
- [173] Second, the narrow interpretation tends to interpret s 304(3)(c) as if it began “the sudden provocation is *claimed to be* based on...”, whereas the words of the section envisage an inquiry into whether the sudden provocation was in fact based on anything done by the deceased to change the relationship.
- [174] Third, the ordinary meaning of “based on” gives s 304(3) work to do in a case of the kind hypothesised.

- [175] Fourth, it is hard to discern a legislative purpose in distinguishing between a case in which nothing intervenes between the act of the deceased done to change the relationship and the defendant's loss of self-control, and a case in which something foreseeable, like violence initiated by the defendant in response to that act, does. The resolution of the factual issue of whether the sudden provocation was based on anything done to change the relationship may depend on an evaluation of what occurred between the two things. However, intervening matters, such as a physical fight, should not automatically lead to the conclusion that the sudden provocation was not based on anything done to change the relationship.
- [176] Fifth, the Parliament chose to use the words "based on" rather than "based only on" or "based alone on". This suggests that "sudden provocation" may be based on more than one thing, such as the immediate act of the deceased in inflicting an injury and also the earlier act done to change the relationship, which set those events in train, and therefore also may be described as a basis of the sudden provocation.
- [177] Finally, it should be acknowledged that the ordinary meaning of "based on" may engage s 304(3) in a case in which the defendant would not wish to deal with the exclusion and would seek to avoid it by nominating the cause of his loss of self-control as the more immediate act of the deceased. However, giving the words their ordinary meaning does not deprive the defendant of a defence under s 304(1). Instead, if it proves to be the case that the sudden provocation was "based on" a thing done by the deceased to change the relationship, the defendant may establish the defence by proving the kind of exceptional circumstances mentioned at the start of s 304(3). For example, in the example given above, being cut badly by a knife when unarmed may be such a circumstance.
- [178] The architecture of the section therefore accommodates a case in which the provocation is based on matters in addition to a thing done to change the relationship. Those matters, such as an act of serious violence by the deceased inflicted on the defendant, may displace s 304(3) and retain a s 304(1) defence.

Contextual support for the ordinary meaning of "based on"

- [179] The fifth matter mentioned above draws support from the immediate context of s 304(2) which, subject to the exception for "circumstances of a most extreme and exceptional character", excludes the s 304(1) defence if the sudden provocation is "based on words alone". If the Parliament had intended to confine s 304(3) to cases in which the sudden provocation was based only on a thing done by the deceased to change the relationship then it might have used the same or a similar form of words in s 304(3).

Conclusion on the meaning of "based on" in s 304(3)

- [180] Giving the words "based on" in s 304(3) their ordinary meaning gives the section a sensible operation, whilst allowing a defendant to nominate the "sudden provocation" upon which he relies.
- [181] If the Parliament intended to make s 304(3) depend on there being a coincidence between the sudden provocation nominated by the defendant and the act done by the deceased to change the relationship, then it might have used words suggestive of a coincidence, like "consists of".

- [182] The words used in s 304(3) are suggestive of an additional matter which the defendant must prove in a case in which there is evidence that the sudden provocation was closely related to a thing done by the deceased to change the relationship. Therefore, s 304(3) should not be read as being confined to a case in which the defendant nominates the sudden provocation as a thing done by the deceased to change the relationship. It may apply to a case in which a more immediate act of the deceased is nominated by the defendant, but in which the evidence permits the conclusion to be reached that, in addition to that immediate claimed cause of the sudden provocation, it was based on a thing done by the deceased to change the relationship.
- [183] Depending on the evidence, s 304(3) may apply where the sudden provocation is caused both by an act nominated by the defendant (such as being cut by a knife) and a thing done by the deceased that preceded it. The earlier, other thing may have occurred a few seconds or a few minutes earlier, and led to the act of the deceased nominated by the defendant.
- [184] The factual question of whether the claimed (or assumed) sudden provocation was “based on” an act of the deceased done to change the relationship calls for an evaluation of the chain of events and the causative potency of the act of the deceased. The statute uses words which suggest that the act of the deceased must have been a foundation of what followed. A mere connection between the act and the sudden provocation, in that the act made some contribution in terms of cause and effect to the eventual outcome is unlikely to be sufficient to support a finding that the sudden provocation was “based on” the act.
- [185] The words “based on” in this context connote a substantial causal connection. They are simple, ordinary words and should be given their ordinary meaning. They are simpler than terms like “underlying cause”, “dominant cause” or “substantial cause”.
- [186] They should not be interpreted too narrowly so as to deprive s 304(3) of its apparently intended operation or too widely so that a slight connection may suffice. The words do not necessarily require a coincidence between the act nominated by the defendant as the provocative conduct for the purpose of the defence in s 304(1) and the thing done by the deceased to change the relationship. Instead, they suggest a relationship between those two things.
- [187] I conclude that the ordinary meaning of “based on” in the context of s 304 does not confine the operation of s 304(3) to a case in which the act of the deceased nominated by the defendant for the purposes of s 304(1) is a thing done by the deceased to change the relationship. The words “based on” permit 304(3) to be engaged when a thing done by the deceased to change the relationship precedes the act nominated by the defendant.

The trial judge’s direction

- [188] Because, upon its proper construction, s 304(3) may permit reliance on an act of the deceased done to change the relationship, being an act that preceded the provocative conduct relied upon by a defendant, the trial judge did not err in law in directing the jury to the effect that they might find that s 304(3) was engaged by “something that preceded the stabbing”.

The factual issue

- [189] The remaining issue is whether there was evidence which might support the conclusion that the sudden provocation was “based on” anything done by the deceased, or anything the appellant believed the deceased had done, to change the relationship.
- [190] The evidence included a number of out of court statements by the appellant about events and what motivated his actions on the night of 31 March 2016. Some of them have been summarised or quoted above. The present issue is whether the evidence was capable of raising an issue that the “sudden provocation” relied upon by the appellant was based on a thing or things done by the deceased (or anything the appellant believed the deceased had done) to change the nature of the relationship (s 304(3)(c)(ii)) or, indeed, “to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change in the nature of the relationship” (s 304(3)(c)(ii)). For simplicity it is convenient to use similar terms to the trial judge’s direction to the jury which was cast in terms of whether Sandra did anything to change the nature of the relationship.
- [191] As already noted, one argument advanced by the prosecution to the jury was that the deceased’s actions with the knife were things done to change the nature of the relationship.
- [192] Things done by her which preceded those actions that night have been described. In summary, the appellant returned home, having discovered text messages on Sandra’s phone, asked her to come into his room and tried to talk to her about the mobile phone and the messages which had been sent to the man to whom he had spoken that evening. According to the appellant, Sandra told him to “stop talking shit”, and looked like she didn’t care.
- [193] This apparently is what prompted him to hit her in the face, causing her mouth to bleed. Soon after, she obtained the knife which the appellant grabbed and was badly cut by. This body of evidence established that the deceased hit his wife in the mouth in direct response to her refusal to engage with him in conversation about her suspected infidelity and communications with the man who had sent her text messages, her saying “stop talking shit” and her looking like she didn’t care. The deceased’s actions might be characterised (at the least) as indicating that there may be a change to the nature of the relationship between her and the appellant or that her refusal to engage with the appellant about a perceived threat to their relationship and her swearing at him were done to change the nature of their relationship. They seem to have been believed by the appellant to be things done to change the nature of their relationship and prompted him to hit her in the face.
- [194] This account of events is drawn principally from the appellant’s statements to police shortly after the events in question. A similar picture emerges from what he said to his mother when police allowed him to call her at that time. He explained to his mother:

“She cheating on me. She’s cheated on me...”

The appellant apologised repeatedly to his mother and asked her to look after his children, before continuing:

“Sandra, she cheated on me... She cheat too many time, mum. I try, I try, mum, to stop, but I can’t stop, mum... She swear at me, swear at my kid.”

After the call ended, while waiting for a second ambulance to arrive at the scene to attend to the appellant, a police officer asked the appellant what had happened. He explained:

“She cheated on me... She cheated on, ah, ah her boyfriend’s number on my phone. She cheat on me too many times. I can’t stop when I’m angry... I tries to talk to her. She, she going up and up... Swearing at me, swears with my kids there. I can’t stop, I can’t stop being angry... Yeah. I punch her.”

One of the police recordings on the night, at the scene of the crime, while attempts were being made to resuscitate the deceased, records the appellant saying to her:

“Oh, babe. Just you tell me the truth? I told you. I told you to tell me the truth? All I want. All I want. That’s all I want, is truth. All I want...”

- [195] The appellant’s accounts of events shortly preceding the killing include the deceased’s refusal to engage with his concerns about their relationship, swearing at him over his concerns and acts which suggested that she did not care about him or about their relationship. The evidence indicated that these things were the basis for what he did in response (hit her in the face) which, in turn, soon caused the deceased to obtain a knife and to cut him. The evidence was capable of supporting an argument that the cutting of his hand was based on things done by the deceased shortly before that time which were done by her (or which the appellant believed she had done) to change the nature of their relationship.
- [196] Because the evidence raised this possibility, the appellant was required to discharge the onus that the sudden provocation claimed by him was not based on anything the deceased did (or which he believed she had done) to change the nature of their relationship. The trial judge did not err in directing the jury in relation to s 304(3).

Conclusion

- [197] In my view, the appellant has failed to establish that the trial judge erred in directing the jury that it was for the defence to prove on the balance of probabilities that the provocation was not based on s 304(3)(c), in circumstances where the defence case did not rely on sudden provocation consisting of a thing referred to in s 304(3)(c).
- [198] Section 304(3) arose on the evidence and the trial judge was obliged to direct the jury about it. The appellant’s statements explained that the fight in which he was cut on the hand arose out of a confrontation that night between him and his wife about their failed or failing relationship. This was evidence capable of supporting the conclusion that the cutting of his hand was “based on” things done by her to change the nature of their relationship.
- [199] The law, rather than the trial judge, introduced an additional hurdle which, on the state of the evidence, the appellant was required to clear. The trial judge’s directions did not introduce an obstacle that the appellant was not obliged, by law, to meet. I would order that the appeal be dismissed.