

SUPREME COURT OF QUEENSLAND

CITATION: *R v Cowan* [2005] QCA 424

PARTIES: **R**
v
COWAN, Nathaniel Zyvan
(appellant)

FILE NO/S: CA No 86 of 2005
SC No 25 of 2005

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 November 2005

DELIVERED AT: Brisbane

HEARING DATE: 1 September 2005

JUDGES: McMurdo P, Jerrard JA and Fryberg J
Separate reasons for judgment of each member of the Court,
McMurdo P and Jerrard JA concurring as to the orders made,
Fryberg J dissenting

ORDER: **1. The appeal against the conviction for entering premises with intent whilst armed is dismissed**
2. The appeal against the conviction for murder is allowed. The conviction is quashed. A new trial is ordered

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - appellant convicted after trial of both entering premises with intent to commit an indictable offence whilst armed and murder - at close of prosecution case defence counsel submitted provocation was raised on prosecution case - after appellant gave evidence defence counsel indicated he did not think he would be pursuing provocation as an issue - defence counsel did not request provocation be left for the jury's consideration or address or seek redirections on the issue of provocation - trial judge summed up defence case on basis of self-defence only - alternative verdict of manslaughter left for the jury's consideration solely on the basis that if the jury rejected self-defence and were satisfied that the appellant caused the death but were not satisfied that he intended to kill or do

grievous bodily harm to the deceased they would convict the appellant of manslaughter only - whether there was evidence capable of raising the issue of provocation - whether the evidence raised the possibility that the appellant may have lost self-control, whether through fear, anger, panic or a combination of all these factors when he killed the deceased - whether trial judge erred in not directing the jury on the issue of provocation - whether appellant deprived of the opportunity of an acquittal of murder

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PRACTICE: AFTER CRIMINAL APPEAL LEGISLATION - POWER TO ORDER NEW TRIAL OR QUASH CONVICTION AND DIRECT ENTRY OF JUDGMENT OF ACQUITTAL - where appellant convicted after trial of murder - whether trial judge erred in not directing the jury on the issue of provocation - whether Court of Appeal can record a conviction for manslaughter and order a retrial only on the offence of murder - whether Court of Appeal limited to either ordering a new trial on murder under s 669 *Criminal Code* 1899 (Qld) or substituting a verdict of guilty for manslaughter under s 668F(2) *Criminal Code* 1899 (Qld)

Criminal Code 1899 (Qld), s 304, s 668E, s 668F, s 669

Hughes v The King (1951) 84 CLR 170, considered
Parker v The Queen (1964) 111 CLR 665, cited
Pemble v The Queen (1971) 124 CLR 107, cited
R v Hunter [1988] 1 Qd R 663, cited
R v Pangilinan [1999] QCA 528; [2001] 1 Qd R 56, cited
Stingel v The Queen (1990) 171 CLR 312, applied
Van Den Hoek v The Queen (1986) 161 CLR 158, applied

COUNSEL: A J Kimmins for appellant
 S G Bain for respondent

SOLICITORS: Bernard Bradley & Associates (Sunrise Beach) for appellant
 Director of Public Prosecutions (Queensland) for respondent

- [1] **McMURDO P:** The appellant, Mr Cowan, was convicted after a trial on 4 March 2005 of murdering Ardiel Nassiep on 17 October 2003 and of entering the deceased's dwelling with intent to commit an indictable offence whilst armed with a dangerous weapon. He has appealed against both convictions. The only ground of appeal now pursued is that he contends that there has been a miscarriage of justice in that the learned primary judge should have directed the jury on provocation.

The evidence

- [2] The determination of that issue requires a review of the relevant evidence.
- [3] Mr Nassiep, aged 23, died from massive blood loss from multiple stab wounds to the chest on 17 October 2003. He had been living with his then 15 year old

girlfriend, Katrina Watts, in a room in a boarding house at 5 Sinclair Street, East Brisbane for about a month before his death. Ms Watts had previously lived about two house blocks away at 509 Vulture Street with an 18 year old woman, Amani Deng, Mr Cowan's girlfriend. Mr Cowan was then 30 years old. Ms Watts met Mr Cowan through Ms Deng. Mr Cowan was also friendly with the deceased and with Ms Deng's 16 year old cousin, Julia Sulieman. Once Ms Watts moved out of 509 Vulture Street, she had little contact with Ms Deng, Mr Cowan and their friends. On the morning of 17 October 2003 the deceased went to 509 Vulture Street to talk to Mr Cowan about Ms Deng. Ms Deng, Ms Sulieman and Mr Cowan were home.

- [4] Ms Deng and Ms Sulieman could not be located at the time of the trial. The prosecution with the consent of the defence tendered their written statements, which gave differing accounts of the events surrounding the killing.
- [5] Ms Sulieman said the deceased swore at and made derogatory remarks about Ms Deng and her. He claimed that Ms Sulieman had "been sleeping with Toby". He said he was going to tell Mr Cowan that Ms Deng had been unfaithful. Ms Sulieman became so angry that she punched and kicked the deceased. Ms Deng joined in and hit him with a broom handle. The deceased left their unit but returned shortly afterwards. He handed a knife in a black knife-sheath (previously given to him by Mr Cowan) to Ms Sulieman to return to Mr Cowan. Ms Sulieman took it and threw it on the couch. Ms Sulieman and Ms Deng then followed the deceased into Vulture Street, intending to retrieve some clothes from Ms Watts.
- [6] Ms Deng's account was that on a previous occasion in Mr Cowan's presence the deceased had produced a knife in an altercation with some others and when Ms Deng tried to intercede he accidentally cut her hand. She said that on 17 October 2003, Mr Cowan, Ms Sulieman and she smoked a small quantity of marijuana at about 9.00 am. The deceased arrived at about 10.00 am. He wanted to talk to Mr Cowan and told both Ms Sulieman and Ms Deng that they were in trouble. She heard him speaking to Mr Cowan in the bedroom. He said something to the effect that Mr Cowan should leave her and go with another girl and that she and Ms Sulieman were just using Mr Cowan for money. When she walked into the bedroom the deceased yelled at her: "She is a bitch and a slut". Ms Sulieman then came into the room. The deceased said something to her and she suddenly jumped up and punched him in the forehead. The deceased then hit Ms Sulieman and she fell back onto the bed. Ms Deng went to Ms Sulieman's assistance and punched the deceased. Mr Cowan was sitting on the bed but did not do anything; he had his head in his hands. The two young women dragged the deceased from the bedroom. Ms Deng then struck the deceased with a broomstick to stop him hitting Ms Sulieman. When the girls saw the deceased take a knife from a knife block in the kitchen, they let him go and he left the unit. He returned less than 30 seconds later carrying the knife in the black knife-sheath. He said that Ms Watts wanted to talk to them and asked if they could be friends. He again left.
- [7] Ms Sulieman and Ms Deng then followed the deceased into Vulture Street and towards Sinclair Street. Ms Sulieman claimed that she told the deceased that Ms Watts also cheated on him and he then produced a knife. She recognised it as from the knife block in the Vulture Street unit. He held the knife to her throat. When she moved her head the knife cut into her face. The deceased released her

and she ran back to the unit. Mr Cowan saw her face bleeding. She told him the deceased was responsible. He called the police and the ambulance for her.

- [8] Ms Deng claimed that she followed Ms Sulieman out of 509 Vulture Street and across the road. She heard her call out "Knife". She saw the deceased armed with two knives: in one hand the kitchen knife from 509 Vulture Street and in the other the knife from the black knife-sheath. The girls ran back towards their unit. He chased them and screamed "Bitches, I'll kill you". He fell over and dropped one knife. Ms Deng went to retrieve the knife and also fell. As Ms Sulieman tried to help her up, the deceased grabbed Ms Sulieman and held the knife at her neck, cutting her cheek when she moved. He let Ms Sulieman go and she ran off. The young women returned to 509 Vulture Street. Ms Deng said she saw Ms Sulieman speaking to Mr Cowan. Ms Deng did not speak to him. She told a neighbour to call the police. She did not see Mr Cowan again until after his fatal altercation with the deceased.
- [9] Ms Watts gave evidence that she moved out of 509 Vulture Street because she and the deceased were tired of her fights and arguments with Ms Deng and Ms Sulieman. She then tried to avoid contact with them. Mr Cowan gave the deceased the knife in the black knife-sheath to look after in case Mr Cowan was questioned by police. On 17 October 2003 the deceased left Sinclair Street at about 8.00 or 9.00 am but she was not sure of the time. He came back about 10 or 15 minutes later and looked as though he had been hit: he had a red mark on his forehead. He then took Mr Cowan's knife in the black knife-sheath to return it to him and left again. Whilst he was away she heard Ms Deng and Ms Sulieman yelling and screaming but she could not remember what was being said. When the deceased returned this time he seemed shaken up. He was holding a silver bread knife about 30 cm in length in his hand. She recognized the knife as being from 509 Vulture Street. She took it off him and threw it on the couch. She heard a knock on the door; it was just a normal knock. She opened the door; the deceased opened it further. She saw Mr Cowan. He was carrying the knife from the black knife-sheath. The deceased tried to shut the door. She stood back near the TV and screamed. The deceased continued to try to shut the door. Mr Cowan entered the room. The deceased jumped on the couch and Mr Cowan went over to him. She watched the two protagonists fighting and saw blood. Their arms were all over the place. The deceased was struggling to get away and Mr Cowan was going after him. She ran to the room of the caretaker, Charles Vallins. She told Mr Vallins to call an ambulance and that the deceased had been stabbed. She then saw the deceased come around the corner. He could not walk properly and was holding his side. He fell down on the wall and lay on the ground. He asked for a pillow and water and the ambulance came.
- [10] In cross-examination she said that when the deceased returned for the last time he told her that Ms Sulieman had been accidentally cut on her face. She was unsure whether the deceased had a knife in his hand when he opened the door; at the committal proceeding she had said that she was sure he did not have a knife in his hand. She said that the deceased had been drinking "goon" from a cask that morning, and had been drinking all the previous night; he was a bit drunk. She was not affected by alcohol or marijuana. Prior to the deceased answering the knock on the door he was worried about Ms Sulieman.

- [11] Not surprisingly this noisy and violent episode attracted the attention of neighbours but their observations were not especially enlightening. Ronald Long saw Ms Deng and Ms Sulieman follow the deceased and heard some yelling at about 10.30 am. Hernan Vargas saw the group on the street at sometime between 8.00 am and 10.00 am. He observed one woman armed with a knife in animated discussion with a male before chasing him. He was unsure if the second woman was armed. He telephoned the police and returned to see the first woman throw the knife she was holding at the male. The man picked it up, walked towards her and seemed to hit her in the face with it. He could not see if he cut her. The man then went into his house and the women returned to their unit block. Margaret Amon also heard the argument on the street and saw a male and female with something in their hands.
- [12] Mr Vallins, the caretaker of 5 Sinclair Street, heard an argument on Vulture Street involving at least one male and one female. He then heard the deceased run down the side of the house to his room. Shortly afterwards another male, whom he did not know, arrived. This man asked where he could find the deceased. He was not aggressive. Mr Vallins directed him to the deceased's room.
- [13] The prosecution admitted that following the return of Ms Deng and Ms Sulieman to 509 Vulture Street Mr Cowan phoned police for assistance. Police attended there at about 10.15 am. Ms Sulieman had a tape across the length of her chin. The police called an ambulance and Mr Cowan returned from the deceased's residence. His clothing appeared to be blood-stained. The police then attended 5 Sinclair Street where they found the knife from the black knife-sheath outside the door to the deceased's room and the silver bread knife from 509 Vulture Street on the floor inside the room.
- [14] Mr Cowan told police "I went over there and got the knife off him". He said "The girls had come out screaming and that Ardiel had cut him [sic] up, so I went over there and got the knife off him". He was found in possession of a black knife-sheath. He had no significant injuries.
- [15] The pathologist's report described the deceased as 163 cm in height and weighing 63 kilograms. The deceased had five stab wounds to the front and side of the body. Three were in the armpit through or near the seventh and eighth ribs: one was 10 cm deep and angled down; another was 15 cm deep and angled down touching the top of the large bowel; another was 15 cm deep and angled across the body through the lungs to the spine. He also had two stab wounds to his back: one 18 cm deep in the middle of his back through the ninth and 10th ribs into the lower lobe of the right lung and the other a shoulder injury penetrating the scapula bone through the muscle and penetrating into the chest cavity. The deepest wound suggested the knife had been used with moderately severe force. Alcohol was detected in his blood and urine.
- [16] Mr Cowan gave evidence admitting he was responsible for killing the deceased but claimed that the killing was not unlawful because he was acting in self-defence. He said that on 17 October 2003 after he realized the deceased had cut Ms Sulieman, he took the black knife-sheath from her. He did not want to get the deceased into much trouble but wanted to get the knife from the black knife-sheath off him. He felt "pretty angry ... a little bit confused but angry as well because it seemed surreal sort of thing ... I was angry at the time". He did not arm himself but walked the two house blocks to the deceased's house. He asked for directions at the boarding house.

He intended to talk to the deceased about what had happened and to tell him that the police were coming. The door was open. He saw Ms Watts with the deceased behind her. He intended to talk to the deceased but the deceased's facial expression changed. The deceased shoved Ms Watts out of the road and lunged at Mr Cowan. Mr Cowan saw a silver knife in the deceased's hand and tackled him. They hit the couch and then fell onto the floor wrestling. The deceased appeared angry and had a strange look on his face. Mr Cowan then saw the deceased looking at the other knife on the couch; he was trying to reach it. Mr Cowan grabbed the knife on the couch to stop the deceased from getting it. They continued to struggle for two to three minutes. He remembered stabbing the deceased twice but accepted that he must have stabbed him more than twice although he could not recall this. When he saw blood he told the deceased to drop the knife and to stop it. The deceased dropped the knife. Mr Cowan flicked it away with his foot and told him he would get help.

- [17] He agreed in cross-examination that he went to the deceased's residence with the intention of confronting him about what had occurred with Ms Sulieman but he denied taking a knife with him, forcing his way into the room and deliberately stabbing the deceased.

Discussion at trial on the issue of provocation

- [18] At the close of the prosecution case, before Mr Cowan had indicated his intention to give evidence, defence counsel submitted to the learned trial judge that provocation was raised on the prosecution case in that "... the lunging at the man with the knife would be sufficient to afford a defence of provocation if the jury was satisfied that ... before his passion had time to cool, he attacked him back with the knife". His Honour expressed some scepticism as to whether that evidence was sufficient to raise provocation as an issue and invited defence counsel to refer him to a case or cases which supported the contention.
- [19] Prior to the commencement of counsels' final addresses the learned primary judge discussed with counsel in the absence of the jury the matters of law said to arise on the evidence. His Honour again raised the issue of provocation. Defence counsel indicated that he did not think he would pursue the issue but he would look at it in the lunch hour and if he found anything that supported leaving the issue of provocation for the jury he would inform the judge. As the learned primary judge indicated in his report to this Court, defence counsel did not request that provocation be left for the jury's consideration; nor did he address upon it; nor did he request any redirections on it.
- [20] The issues for the jury at trial were whether the prosecution had negated self-defence (on the murder charge) and whether the prosecution had proved that when Mr Cowan entered the deceased's room he was armed and intended to seriously assault the deceased (on the entering charge). A possible alternative verdict of manslaughter was left to the jury's consideration on the murder charge solely on the basis that if they rejected self-defence and were satisfied that Mr Cowan caused the death but were not satisfied beyond reasonable doubt that Mr Cowan intended to kill or do grievous bodily harm to the deceased then they would find him not guilty of murder but guilty of manslaughter.

Should provocation have been left to the jury?

- [21] Section 304 *Criminal Code* is in these terms:

"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."

It is well settled that, if there is evidence reasonably capable of raising the issue of provocation under s 304 *Criminal Code*, the trial judge should explain that issue for the jury's consideration even though provocation is not raised by the defence in its case; it is not necessary that the accused give evidence of actual loss of self-control. See *Parker v The Queen*,¹ *Pemble v the Queen*,² *R v Pangilinan*³ and *R v Hunter*.⁴ A trial judge in determining whether the issue of provocation is raised on the evidence must look at the version of events most favourable to the accused open on the evidence which could lead a jury acting reasonably to fail to be satisfied beyond reasonable doubt that the killing was unprovoked: *Stingel v The Queen*.⁵ It is sufficient to raise provocation if there is some evidence which might induce a reasonable doubt as to whether the prosecution had negated the question of provocation: *Van Den Hoek v The Queen*.⁶

- [22] In deciding this issue a trial judge should be entirely sure the issue is not raised before excluding it from the jury's consideration: if in the least doubt whether the evidence may be sufficient, provocation should be left to the jury.⁷ The doctrine of provocation is not confined to loss of self-control arising from anger or resentment but extends to a sudden and temporary loss of self-control due to emotions such as fear or panic as well as anger or resentment; the central element in the doctrine is the sudden and temporary loss of self-control: *Van Den Hoek*⁸ and *Pangilinan*.⁹
- [23] There was a body of evidence which did not support the possibility that Mr Cowan killed the deceased whilst acting in provocation. It is, however, always a matter for the jury as to what evidence they accept or reject. They were entitled to accept parts of the evidence of a witness and to reject other parts. The following evidence did raise the issue of provocation. Very shortly before Mr Cowan stabbed the deceased, the deceased had badly cut with a knife the face of Mr Cowan's 16 year old female friend and housemate, his girlfriend's cousin, Ms Sulieman. On an earlier occasion the deceased had cut the hand of Mr Cowan's 18 year old girlfriend, Ms Deng, with a knife. The deceased had also alleged in the presence of the accused that Ms Deng and Ms Sulieman had been behaving sexually permissively. Mr Cowan gave evidence that when he went to the deceased's residence to confront him after the wounding of Ms Sulieman, Mr Cowan was "pretty angry ... a little bit confused but angry as well because it seemed surreal sort of thing, like, to see [Ms Sulieman] coming up, yeah, I was angry at the time". Mr Cowan said that when he entered the deceased's room, the deceased had a knife in his hand and swung it at him. In the ensuing struggle he said he only recalled stabbing the deceased twice. In fact the

¹ (1964) 111 CLR 665, 681-682.

² (1971) 124 CLR 107, 117-118.

³ [1999] QCA 528; [2001] 1 Qd R 56, 63.

⁴ [1988] 1 Qd R 663.

⁵ (1990) 171 CLR 312, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, 334.

⁶ (1986) 161 CLR 158, Gibbs CJ, Wilson, Brennan and Deane JJ, 162.

⁷ *R v Pangilinan*, above, 64, [31]; *Van Den Hoek v The Queen*, above, 161 - 162, 169.

⁸ Above, Mason J, 168.

⁹ Above, 64, [32].

deceased had five deeply penetrating stab wounds to his body which could have only been caused by Mr Cowan.

- [24] On that evidence a jury may have thought it possible that Mr Cowan acted under provocation in stabbing the deceased after reacting to the deceased's cutting of Ms Sulieman's face and, or alternatively, to the deceased's inflammatory words and conduct at the Vulture Street unit. The evidence raised the defence of provocation on either of two bases or a combination of both. The first was the possibility that Mr Cowan went to the deceased's residence armed with a knife and stabbed him in anger soon after the deceased had cut Ms Sulieman's face. The evidence also raised the possibility that Mr Cowan became enraged or frightened, or a combination of both, when the deceased attacked him with the knife and that he suddenly reacted out of a combination of fear and anger when he stabbed the deceased. The short period of time between the deceased's visit to the Vulture Street unit and his cutting of Ms Sulieman's face and Mr Cowan's stabbing of the deceased and Mr Cowan's evidence (that he was angry and confused, his description of a surreal atmosphere and his recollection of stabbing the deceased only twice rather than the five deeply penetrating stab wounds in fact inflicted) give some support for the possibility that he may have killed the deceased in the heat of passion caused by sudden provocation before there was time for his passion to cool. This evidence raised the possibility that Mr Cowan may have lost self-control, whether through fear, anger, panic, or a combination of all these factors, when he killed the deceased.
- [25] Even though defence counsel did not request a direction to the jury on the issue of provocation, it was raised on the evidence. The judge was required to direct the jury on it. He did not. This constitutes an error of law which has deprived Mr Cowan of the opportunity of an acquittal of murder.
- [26] The defence of provocation can, at best for Mr Cowan, result in an acquittal of murder; it cannot save him from a conviction of manslaughter. Provocation does not provide a defence to entering a dwelling with intent whilst armed. The defence case at trial of self-defence and the absence of criminal intent at the time of entering the deceased's dwelling was rejected by the jury. There is no longer any complaint as to the sufficiency of the evidence supporting those verdicts. The jury were well entitled on the evidence to be satisfied beyond reasonable doubt that Mr Cowan was not acting in self-defence and that when he entered the deceased's residence he intended to commit an indictable offence and was armed with a knife. The guilty verdicts do not mean the jury necessarily rejected the evidence capable of establishing the issue of provocation on the bases set out earlier. What orders then should this Court make?
- [27] The absence of the directions on provocation can have no effect on the verdict of guilty of the offence of entering the premises with intent whilst armed. The appeal from that conviction should be dismissed.
- [28] The appeal from the conviction of murder must however be allowed and the conviction for murder quashed. But can and, if so, should this Court record a conviction for manslaughter and order a retrial only on the offence of murder? It is by no means clear whether this Court has the statutory power to make such an order: see s 668E, s 668F and s 669 *Criminal Code*. It seems this Court may be limited to either ordering a new trial on murder under s 669 *Criminal Code* (as was done in *Pangilinan* although the appeal there was successful because of inadequate

directions to both self-defence and provocation so that both manslaughter and murder remained in issue) or substituting a verdict of guilty for manslaughter under s 668F(2) *Criminal Code* (as in *Hunter*). It seems this Court cannot both substitute a manslaughter conviction and order a retrial on murder: see the High Court's observations in *Hughes v The King*.¹⁰ Neither counsel made oral or written submissions as to the appropriate orders in this case. In any event I am satisfied that the factual issues surrounding self-defence and provocation in this case are so closely interwoven that, even were it possible to substitute a guilty verdict of manslaughter and order a retrial on murder, it would be undesirable to have one jury determine self-defence and another provocation. The appropriate course is to allow the appeal, quash the conviction on murder and order a retrial.

[29] **Orders**

1. The appeal against the conviction for entering premises with intent whilst armed is dismissed.
2. The appeal against the conviction for murder is allowed. The conviction is quashed. A new trial is ordered.

[30] **JERRARD JA:** In this appeal I have read the President's reasons for judgment and proposed orders, and respectfully agree with each. I add only that the rejection by the jury of the defence of self-defence does not necessarily reject a view of the facts on which the jury could have found that the prosecution had not excluded provocation. The jury were clearly satisfied beyond reasonable doubt that Mr Cowan was armed with a knife and intent on committing unlawful and serious violence on the deceased¹¹ when he entered the latter's residence, minutes before he killed him after a struggle. But that finding, and rejection of the defence of self-defence, does not necessarily exclude that the deceased also had a knife, and had threatened Mr Cowan with it; and that that caused Mr Cowan to lose self-control and stab the deceased, as it would an ordinary person in Mr Cowan's situation. The evidence about the movement of the knife in the black sheath, and the knife from the knife block at No 509 Vulture Street, raised the possibility that both men had a knife in the deceased's residence. What the jury's verdict excluded was the possibility that Mr Cowan believed on reasonable grounds that it was necessary for him to use his knife on the deceased to make effectual defence against the threat of an attack by the deceased with a knife.

[31] **FRYBERG J:** The facts giving rise to this appeal are sufficiently set out in the reasons for judgment of the President.

[32] The applicable principles of the law relating to provocation are not, as I apprehend the parties' submissions, controversial. A number of them are referred to in the President's reasons. The most relevant authority for present purposes is *Van Den Hoek v The Queen*.¹² In that case, the majority judgment referred to *evidence* bearing upon each of the elements of provocation. Their Honours wrote:

“These were all questions for the jury and it is trite to say that in a case of provocation all that the defence need do is to *point to material* which might induce a reasonable doubt.”¹³

¹⁰ (1951) 84 CLR 170, 175 - 176.

¹¹ This was the direction (at AR 192) given to the jury on the count of entering with intent while armed.

¹² (1986) 161 CLR 158.

¹³ *Ibid* at p 162 (my emphasis).

They rejected the view of two of the judges in the court below that there was insufficient evidence that the acts of the deceased caused loss of self-control on the part of the applicant and that consideration of provocation would be an exercise in speculation. On the facts of the case they held that there was sufficient evidence to raise provocation because there was some evidence of loss of self-control.

- [33] Their Honours did not suggest that provocation should be left to the jury in a case where there really was insufficient evidence of loss of self-control; and Mr Kimmins did not in the end press any argument before us to the effect that it was necessary to leave provocation to the jury notwithstanding the absence of such evidence. The issue therefore is whether there was evidence to raise the possibility that the appellant killed the deceased in the heat of passion caused by sudden provocation before there was time for his passion to cool. I am prepared to consider this question on the assumption (the accuracy of which I doubt) that it is correct to ignore the clear implication from the appellant's own evidence that his behaviour was rational and proportionate.
- [34] My colleagues find such evidence in what is described as “the short period of time between the deceased's visit to the Vulture Street unit and his cutting of Ms Sulieman's face and Mr Cowan's stabbing of the deceased”; and in his evidence that when he saw the cut, he was “pretty angry” and “a little bit confused ... because it seemed surreal sort of thing, like, to see her coming up, yeah, I was angry at the time”. It is unclear how short was the period of time, but it was enough, on the appellant's own evidence, for him to arm himself with a knife, leave the house and walk the two house blocks to the boarding house where the deceased lived. My colleagues refer also to the appellant's evidence that he was scared and to his claim after the event that he recalled stabbing the deceased only twice (there were in fact five stab wounds). But that is it.
- [35] With the utmost respect I absolutely reject the proposition that this evidence was sufficient to raise a real possibility that the appellant killed the deceased in the heat of passion. If we must direct on provocation every time there is some evidence that an accused was angry or frightened as a result of the deceased's conduct, we will be very busy indeed in the Trial Division; particularly if that evidence must be regarded as reinforced by an ex post facto claim to have stabbed fewer times than actually occurred. That, it seems to me, is the result which necessarily flows from an acceptance of the view that this evidence was sufficient to raise provocation. A wink might be as good as a nod to a blind horse; but the purpose of a criminal trial is to decide real issues on evidence, not on hints. Were it otherwise defence counsel might usefully follow the old man's advice:
- “ ‘Next, when you are describing
A shape, or sound, or tint;
Don't state the matter plainly,
But put it in a hint;
And learn to look at all things
With a sort of mental squint.’ ”¹⁴
- [36] I would dismiss the appeal.

¹⁴ Carroll, L: “Poeta Fit, Non Nascitur”, in Grigson, G: *The Faber Book of Nonsense Verse*, London, 1979.