SUPREME COURT OF QUEENSLAND

CITATION:	*R v Martin* [2011] QCA 342
PARTIES:	**R** **v** **MARTIN, Kenneth Michael** (appellant)
FILE NO/S:	CA No 197 of 2010 SC No 28 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	29 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2011
JUDGES:	Margaret McMurdo P, Fraser JA and North J Separate reasons for judgment of each member of the Court, Fraser JA and North J concurring as to the order made, Margaret McMurdo P dissenting in part
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of the murder of his de facto partner – where the appellant argued the jury verdict was unreasonable as, in light of the evidence of his intoxication, the jury could not have been satisfied beyond reasonable doubt that he formed the necessary intent to kill or do grievous bodily harm – whether the verdict was unreasonable and cannot be supported having regard to the evidence CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – EVIDENCE UNFAIR TO ADMIT OR IMPROPERLY OBTAINED – PARTICULAR CASES – where the appellant argued the trial judge erred in allowing the prosecution to lead evidence of statements made by the appellant when first questioned by police in breach of the *Police Powers and Responsibilities Act* 2000 (Qld) – where the conversation between the appellant and police officers was highly relevant to the issues in dispute at trial – whether the trial judge erred in exercising his discretion to admit the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the trial judge found that provocation was not raised on the evidence and should not be left to the jury – where the appellant argued there was evidence raising provocation including the number of stabbing injuries to the deceased indicating a loss of self control, the evidence of the acrimonious relationship between the appellant and the deceased, and evidence that the deceased told the appellant she was leaving him and taking their child – whether the evidence was reasonably capable of raising provocation – whether the trial judge erred in failing to direct the jury on provocation as a partial defence

Criminal Code 1899 (Qld) (Reprint 7), s 304, s 668E(1A)
Police Powers and Responsibilities Act 2000 (Qld), s 5, s 7, s 8, s 9, s 10, s 420, s 423

Lee Chun-Chuen v The Queen [1963] AC 220, cited
Masciantonio v The Queen (1995) 183 CLR 58; [1995] HCA 67, cited
Pollock v The Queen (2010) 242 CLR 233; [2010] HCA 35, considered
R v Batchelor [2003] QCA 246, cited
R v Buttigieg (1993) 69 A Crim R 21; [1993] QCA 214, cited
R v Pangilinan [2001] 1 Qd R 56; [2001] QCA 81, cited
R v Rae [2006] QCA 207, applied
Ridgeway v The Queen (1995) 184 CLR 19; [1995] HCA 66, considered
Stingel v The Queen (1990) 171 CLR 312; [1990] HCA 61, considered
The Queen v Ireland (1970) 126 CLR 321; [1970] HCA 21, considered
Van Den Hoek v The Queen (1986) 161 CLR 158; [1986] HCA 76, cited

COUNSEL: D Shepherd for the appellant
D Meredith for the respondent

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

[1] **MARGARET McMURDO P:** The appellant, Kenneth Michael Martin, was arraigned in the Mackay circuit court on 28 July 2010 on the charge of murdering his de facto partner at Slade Point on 20 December 2008. He pleaded not guilty to murder and guilty to manslaughter. The guilty plea was not accepted by the prosecution. He was convicted of murder on 2 August 2010 after a four day jury trial. He has appealed against his conviction on the grounds that:

"1. The verdict of the jury was unreasonable and/or cannot be supported having regard to the evidence;

2. [G]iven the evidence of [the appellant's] intoxication, the jury could not reasonably have been satisfied beyond reasonable doubt that [the appellant] formed the necessary intent to kill or do grievous bodily harm to the deceased; and
3. The trial [j]udge erred in allowing the prosecution to lead evidence in the form of Police field tapes to be played to the jury – such field tapes being a record of interview between Police and [the appellant] in circumstances where Police breached sections 420 and 423 of the *Police Powers and Responsibilities Act* 2000 (Qld);
4. There was a miscarriage of justice because the learned trial judge erred in determining that he ought not direct the jury about provocation see section 304 of the *Criminal Code* 1899 (Qld)."

Did the judge err in allowing evidence to be given of an interview in breach of the *Police Powers and Responsibilities Act*?

[2] It seems logical to commence with the appellant's third ground of appeal, that the judge erred in allowing the prosecution to lead evidence of statements which the appellant made when first questioned by police, in breach of the *Police Powers and Responsibilities Act* 2000 (Qld) ("the Act").

The relevant legislative provisions

[3] The purposes of the Act include to consolidate and rationalise the powers and responsibilities police officers have for investigating offences and enforcing the law;[1] to provide powers necessary for effective modern policing and law enforcement;[2] to provide consistency in the nature and extent of the powers and responsibilities of police officers;[3] to standardise the way the powers and responsibilities of police officers are to be exercised;[4] to ensure fairness to, and protect the rights of, persons against whom police officers exercise powers under the Act;[5] and to enable the public to better understand the nature and extent of the powers and responsibilities of police officers.[6]

[4] Relevantly, the Act provides:

"**7 Compliance with Act by police officers**

(1) It is Parliament's intention that police officers should comply with this Act in exercising powers and performing responsibilities under it.

(2) For ensuring compliance with Parliament's intention, a police officer who contravenes this Act may be dealt with as provided by law.

8 Act does not affect certain principles

(1) This Act does not prevent a police officer from speaking to anyone or doing anything a police officer may lawfully do apart from this Act when performing the police officer's duties, whether or not in relation to an offence, without

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1 The Act, s 5(a).
2 The Act, s 5(b).
3 The Act, s 5(c).
4 The Act, s 5(d).
5 The Act, s 5(e).
6 The Act, s 5(f).

exercising a power under this Act or using any form of compulsion.

(2) Also, it is not the purpose of this Act to affect the principle that everyone in the community has a social responsibility to help police officers prevent crime and discover offenders.

Part 2 – Effect of Act on other laws

9 Act does not affect constable's common law powers etc.

Unless this Act otherwise provides, this Act does not affect—

(a) the powers, obligations and liabilities a constable has at common law; or

(b) the powers a police officer may lawfully exercise as an individual, including for example, powers for protecting property.

10 Act does not affect court's common law discretion to exclude evidence or stay criminal proceedings

This Act does not affect the common law under which a court in a criminal proceeding may exclude evidence in the exercise of its discretion or stay the proceeding in the interests of justice."

[5] Section 420 and s 423 are contained in Ch 15 (Powers and responsibilities relating to investigations and questioning for indictable offences), Pt 3 (Safeguards ensuring rights of and fairness to persons questioned for indictable offences), Div 3 (Special requirements for questioning particular persons) of the Act. They relevantly provide:

"**420 Questioning of Aboriginal people and Torres Strait Islanders**

(1) This section applies if—

(a) a police officer wants to question a relevant person; and

(b) the police officer reasonably suspects the person is an adult aborigine or Torres Strait Islander.

(2) Unless the police officer is aware that the person has arranged for a lawyer to be present during questioning, the police officer must—

(a) inform the person that a representative of a legal aid organisation will be notified that the person is in custody for the offence; and

(b) as soon as reasonably practicable, notify or attempt to notify a representative of the organisation.

(3) Subsection (2) does not apply if, having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally.

(4) The police officer must not question the person unless—

(a) before questioning starts, the police officer has, if practicable, allowed the person to speak to the support person, if practicable, in circumstances in which the conversation will not be overheard; and

(b) a support person is present while the person is being questioned.

(5) Subsection (4) does not apply if the person has, by a written or electronically recorded waiver, expressly and voluntarily waived his or her right to have a support person present.

(6) If the police officer considers the support person is unreasonably interfering with the questioning, the police officer may exclude the person from being present during questioning.

…

423 Questioning of intoxicated persons

(1) This section applies if a police officer wants to question or to continue to question a relevant person who is apparently under the influence of liquor or a drug.

(2) The police officer must delay the questioning until the police officer is reasonably satisfied the influence of the liquor or drug no longer affects the person's ability to understand his or her rights and to decide whether or not to answer questions."

The evidence relevant to this ground of appeal

[6] The appellant's blood alcohol reading taken some hours after his arrest suggested that, at the time Detective Sergeant David Geraghty first spoke to him, it was somewhere between 0.264 and 0.454.

[7] Police officer Geraghty gave the following evidence relevant to this ground of appeal. He had 33 years' experience as a police officer. On the evening of 20 December 2008, he went to 16 Pheasant Street, Mackay with Detective Berry and two uniformed officers, Constables Turner and Lodge, in response to a 000 call. He walked up the front steps, crossed the verandah and entered the lounge/dining room. He saw the deceased's body on the floor. The appellant was sitting in a chair beside the body and appeared upset. Police officer Geraghty asked him to move to the dining table end of the room. The appellant cooperated. He stood up and walked to a dining chair as directed without difficulty or assistance. He had obviously been drinking alcohol but he was coherent and was not slurring his words. Police officer Geraghty was experienced in dealing with people affected by alcohol. He considered the appellant was in the mid-range between sober and paralytic; he was quite capable of looking after himself.

[8] They had the following conversation which the police officer recorded on his hand-held tape recorder. The appellant was swearing. He was distressed about his wife and concerned for his young daughter who was asleep elsewhere in the house. He told the police to "leave [his] fucken baby alone" and that he did not want them "annoying" her. An unidentified female officer placated the appellant, saying she would put "bub to sleep". The appellant gave his date of birth and confirmed he lived at the premises. Police asked him what had happened. He responded:

> "I went down, I went down to the club, come home, we had a bit of an argument and I said I'm going for a walk. I was going into town, you know cause I like to walk, you know. And --
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> …
>
> I got away a bit. And when I come home --
>
> …

> I don't know. Darlene was down and there was fucken blood man, like you know? And fucken, okay Darleen like you know and the baby was still asleep, like you know? And what the fucken hell's going on here like, you know? And she was talking to me."

[9] Police officers Geraghty and Berry introduced themselves and explained they were making enquiries and investigating what had happened. Police officer Geraghty warned the appellant that he was not obliged to say anything or make any statement as anything he said would be recorded and could be later used as evidence in court. He asked the appellant if he understood that warning. The appellant responded: "Mm." Sergeant Geraghty continued:

> "You do? You also have the right to communicate with a solicitor if you wish. Okay, you also have the right to communicate and talk to a friend or relative. Okay, you understand all that?
> APPELLANT: Mmhmm."

[10] The appellant told police he had been drinking at the Slade Point Bowls Club and returned home. Police officer Geraghty asked if things got "a bit out of control". The appellant denied this. He explained his wife was lying on the floor bleeding. He told her that she would be "alright" and that they could "fix it". He did not know how she came to be in that condition; she was like that when he found her at about 9.00 pm. Police officer Geraghty pointed out that was three hours earlier. The appellant responded that his baby was asleep and he had been nursing his wife, implying that this made it too difficult for him to phone an ambulance or police. In answer to a question from police, he agreed he eventually phoned 000 and asked for help. He repeated that he did not know how his wife came to be stabbed. They had an argument but that was earlier in the afternoon before he went to the club. When he returned she was already on the floor. Police officer Geraghty asked him if he was responsible for the killing. The appellant responded: "I did not kill my wife … She is the mother of my daughter, she is my first born daughter. … Okay. I would never do that. I got boys. So you have someone in there looking after my daughter or what?" He became distressed as police dogs were present and again expressed concern for his baby daughter. Police assured him they would look after her. The appellant said that when he first came home, the deceased was lying face up, not face down as she was now. He did not roll her over; she rolled over herself. That was the last thing she did. He did not know how she was injured. He came home to find "this fucking pig sty, fucking blood everywhere. That's my fucking Darlene man, that's the mother of my child there." He said she had had a few rums. She said she was going to get a bottle of rum after their argument.

[11] The appellant's sister arrived to take the baby. He was distressed at not being able to personally hand the child to his sister. Police officer Geraghty continued to question the appellant who responded that he had already told them what had happened and he did not want to go "over and over and over" it. The following conversation ensued:

> "SERGEANT GERAGHTY: We'd just like the truth of the matter, that's all.
> APPELLANT: It's there, okay. I've already told you the story and that's it.
> SERGEANT GERAGHTY: You told us the story, but you didn't tell us the truth.
> APPELLANT: What are you calling me a liar?

> SERGEANT GERAGHTY: No, I'm just saying that you didn't tell us the truth.
> APPELLANT: You're calling me a liar then?
> SERGEANT GERAGHTY: No.
> APPELLANT: Yes, you are.
> SERGEANT GERAGHTY: No, mate.
> APPELLANT: If I don't tell you the truth, are you calling me a liar, you know?
> SERGEANT GERAGHTY: It's up to you. You know the truth of the matter of what happened.
> APPELLANT: I already told you what fucken happened man, like you know fuck."

[12] Police arranged for the appellant to be photographed at 1.16 am, took possession of his clothes and thongs for forensic testing, and arrested him for murder. The appellant changed his clothes and walked around as requested, unaided and without difficulty.

The primary judge's ruling

[13] The appellant's counsel at trial unsuccessfully applied to have police officer Geraghty's evidence excluded because of its non-compliance with s 420 and s 423. The judge's reasons for refusing that application were as follows.

[14] The police officer was obviously honest and did his best to relate the facts as he understood them. He was aware by the appellant's appearance that he was an Aboriginal man and that s 420 applied. He also became aware fairly quickly after entering the house that the appellant was under the influence of liquor to some degree. Police officer Geraghty had walked into the home at about midnight after an emergency call had been received, unaware of what he was about to face. He saw the appellant sitting in a chair near the deceased's body, which was in a pool of blood and with a knife nearby. He did not know then whether the appellant was a witness or a suspect. Fairly early on in his questioning, he formed the view that he was probably a suspect and warned him of his rights. The police officer gave evidence that when he administered the warning he did not have any concern about the appellant's level of education and understanding. The judge accepted that was the police officer's honest view. His Honour noted that the Act required police officers to positively satisfy themselves that the person is not at a disadvantage. That would normally require some inquiry or investigation which was not done here. The police officer did not comply with s 420.

[15] Similarly, s 423 placed a positive obligation on police officers to satisfy themselves that, whatever the influence of liquor may have been on a person, that influence had ceased at the questioning and no longer affected the person's ability to understand rights and to decide whether or not to answer questions. Police officer Geraghty did not make any further inquiry to determine the appellant's level of understanding or whether his consumption of liquor had clouded his judgment. The appellant's subsequently recorded high blood alcohol level meant that he would certainly have been confused and his judgment clouded during the interview. Police officer Geraghty failed to comply with s 423.

[16] After referring to this Court's decision in *R v Batchelor*,[7] the judge noted that police officer Geraghty was not in flagrant disregard of the Act and thought he was

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[7] [2003] QCA 246, [32].

complying with it as best he could in difficult circumstances. The appellant's ability to understand his rights and make an informed decision as to whether he should answer questions was in fact clouded by his intoxicated state. This was a factor which went against the court receiving the evidence. But on the other hand, police officer Geraghty warned the appellant of his right not to answer questions and his right to seek legal advice. The appellant gave every appearance of understanding that warning. At subsequent points in the interview, the appellant indicated that he was unhappy with the questioning and did not give answers. The appellant seemed aware of his situation. He did not make admissions; on the contrary, he sought to exculpate himself.

[17] Further, the conversation with the appellant was relevant to issues between the parties, namely, the appellant's capacity to form an intent; his level of functioning at the time of the interview and also "the possible defence and no doubt one that [the judge] will need to direct on, whether or not he raises it", provocation.

[18] The discretion whether to admit this evidence involved fairly finely balanced questions, but it ought to be exercised to allow the evidence to go before the jury despite the non-compliance with the Act.

The appellant's contentions

[19] The appellant's counsel contends that the judge erred in considering as relevant the fact that police officer Geraghty did not act in flagrant disregard of the Act and thought he was complying with it as best he could in difficult circumstances. He contends that the police officer's reckless failure to comply with the requirements of the Act of which he was aware, meant that the interview should have been excluded as a matter of public policy and in fairness to the appellant. The failure to do so has caused a substantial miscarriage of justice. He also contends the judge failed to consider the comparative seriousness of the offence and the nature of the illegality involved in obtaining the evidence. Although the interview was relied on by the prosecution as circumstantial evidence of intent as affected by intoxication and as a rebuff to a potential defence of provocation, it was not the only evidence of the appellant's voice and manner of speech at this time. There was also the transcript of the recording of the 000 call. The judge should have considered whether it was fair to admit the evidence in a trial of the most serious of all crimes, murder. Counsel contends the judge did not properly undertake the balancing process required in determining this issue.

Conclusion on the third ground of appeal

[20] As the primary judge appreciated, the decision whether to admit this evidence involved finely balanced questions and the exercise of a judicial discretion. That discretion was recognised by the High Court in *The Queen v Ireland*[8] where Barwick CJ explained that a criminal court, in deciding this issue, must consider the public interest in maintaining an individual's right not to be unlawfully or unfairly treated by law enforcement officers.[9] Unlawfully obtained evidence should be excluded where the public interest in the protection of the individual from unlawful or unfair treatment outweighs the public need to bring to justice those who commit offences; convictions achieved with the aid of unlawfully obtained evidence may be achieved at too high a price.[10]

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8 (1970) 126 CLR 321; [1970] HCA 21.

9 Above, 335.

10 Above. See also Kerri Mellifont, *Fruit of the Poisonous Tree: Evidence deriving from illegally or improperly obtained evidence* (Federation Press, 2010), 135.

[21] More recently, Mason CJ, Deane and Dawson JJ noted in *Ridgeway v The Queen*:[11]

> "At least since *Bunning v Cross*, it has been 'the settled law in this country' that a trial judge has a discretion to exclude prosecution evidence on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police. That discretion is distinct from the discretion to exclude evidence of a confessional statement on the grounds that its reception would be unfair to the accused. The discretion extends to the exclusion of both 'real' (or non-confessional) evidence and confessional evidence. As Barwick CJ pointed out in *R v Ireland*, in a judgment with which the other four members of the Court agreed, the rationale of the discretion is that convictions obtained by means of unlawful conduct 'may be obtained at too high a price'. In its exercise, a trial judge must engage in a balancing process to resolve 'the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law'. The basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of 'high public policy' relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty."[12] (footnotes omitted)

[22] The decision whether to exclude the contentious evidence in this case was a matter upon which different judges could reasonably have come to different conclusions. When police officer Geraghty first arrived at 16 Pheasant Street, he needed to speak to the appellant to effectively assess the situation. There was a dead or seriously wounded woman lying in a pool of blood with a large knife nearby and the appellant sitting next to her. There was a young child in a nearby room. He needed to find out if the appellant was a witness or a suspect, if he was dangerous, and if there were other suspects in the area who might be dangerous. He had to ask questions of the appellant to attempt to clarify these matters. But it seems that very early on in their conversation, immediately before he warned the appellant, he considered the appellant was a suspect. Police officer Geraghty was aware that the appellant was both Aboriginal and intoxicated and of the requirements of s 420 and s 423 and, as the appellant rightly contends, recklessly failed to comply with them from that point.

[23] It is true that the conversation between the appellant and police officers was highly relevant to the issues in dispute at trial. The appellant's self-serving and apparently exculpatory statements were plainly false in light of his guilty plea to manslaughter in front of the jury. Police officer Geraghty's conversation with the appellant reasonably close in time to the killing was highly relevant to the issues for the jury's consideration. The appellant's statements to police officer Geraghty were quite damning on the only two potential issues in dispute, namely, whether the appellant intended to kill or do grievous bodily harm to the deceased in light of his

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11 (1995) 184 CLR 19; [1995] HCA 66.

12 Above, 30-31.

intoxication; and provocation. His statements were both relevant and highly prejudicial, but given the persuasive objective evidence of his remarkably high level of intoxication, not much weight should have been placed on their reliability.

[24] Many judges may well have concluded that matters of public policy requiring police officers to comply with their responsibilities under the Act warranted the exclusion of the contentious evidence in this case, lest police officers be tempted to flaunt the requirements of the Act by taking investigative shortcuts. Further, a jury may place undue weight on the evidence without giving sufficient consideration to its unreliability as evidence of the appellant's true state of mind at the time of the killing because of his gross intoxication at the time of the conversation. Had the decision at first instance been mine, I would have excluded the evidence for these reasons.

[25] But I remain unpersuaded that the judge took into account any wrong consideration in exercising his discretion to admit this evidence. I do not accept the appellant's contention that the fact that the charge was murder, the most serious of all criminal charges, was necessarily a factor favouring the conclusion that the evidence was inadmissible. The primary judge was entitled to take into account, as he did, the fact that police officer Geraghty was not acting in flagrant disregard of the Act; that the evidence was sought to be led in a murder trial; and that the evidence was relevant to the key issues in dispute. It was open to the judge to exercise his discretion as he did and to allow the evidence to be admitted at trial.

[26] It follows that this ground of appeal is without substance.

Was the jury verdict unreasonable?

[27] The appellant's first and second grounds of appeal can be dealt with together. His counsel contends that the jury verdict was unreasonable as, in light of the evidence of his intoxication, the jury could not have been satisfied beyond reasonable doubt that he formed the necessary intent to kill or do grievous bodily harm to the deceased when he killed her. In order to deal with these grounds of appeal, it is necessary to review all the evidence given at trial, including the evidence to which I have already referred.

The evidence at trial

[28] The deceased and her young child (the appellant's daughter) travelled by bus from Mackay to Rockhampton on 17 November 2008 and returned to Mackay on 18 December 2008.

[29] Mr Brian Aley gave the following evidence. He had known both the deceased and the appellant since about 2001. In November 2008, the deceased phoned him. She said she was coming to Rockhampton, and asked if she could stay for a few days. She had her child with her, but no luggage. She complained that the appellant was drinking too much and that they were getting behind financially. She appeared to have been drinking heavily. She stayed for about three days. In the times that he had seen the appellant and the deceased together they seemed happy. He described the appellant as a gentle man. He did not hear them arguing or the appellant threatening her and nor did he see the appellant assaulting her. One day she said she was going to the shops and she did not return.

[30] Detective Senior Constable Paul Arnold took a phone call at the Mackay Criminal Investigation Branch on 12 December from a male person who would not identify himself. He said he wanted something more done about a murder which the deceased had committed. She had killed a previous husband in Yeppoon. The police officer made enquiries and ascertained that the deceased was convicted of manslaughter. The caller said that the deceased knew about knives and had been a butcher's assistant. He expressed the view that she should have gone to jail. The call was later found to be made from a phone booth near an ATM which the appellant had used about an hour and a half earlier.

[31] The deceased had made no complaints to police of assault against the appellant and there were no domestic violence orders or applications for such orders concerning him in place at the time of the killing.

[32] Julie Algar gave the following evidence. She lived at Slade Point and had known the deceased and the appellant for about eight months before the killing. She knew they had a 14 month old child. About two weeks before the death, the deceased told her that the appellant had thrown a hammer at her and the child, and had threatened to kill her after an argument. The deceased gave no further details of the incident. The deceased asked to stay with Ms Algar as she was scared. She stayed for four days before travelling by bus to Biloela. During that period, the appellant visited and spoke to the deceased. He wanted her to come home and tried to apologise for throwing the hammer and making a threat. After the deceased left for Biloela, Ms Algar spoke to the appellant. He said he wanted the child back but he did not want the deceased; he would kill her if she ever came back. Ms Algar urged him to be nice to the deceased.

[33] In cross-examination, she agreed she had never seen the appellant assault the deceased, nor seen any signs of an assault on the deceased, and (apart from the hammer episode) nor had the deceased ever complained of him assaulting her. She agreed that the deceased did not say the appellant threw the hammer *at* her and the child, but she certainly said he threw the hammer and it just missed the child's head. The appellant once told her that he was contemplating suicide.

[34] Ms Leslie Ranger gave the following evidence. She knew the deceased and the appellant. After their child was born, the deceased seemed more and more upset and the appellant began to drink a lot more. He frequently accused the deceased of having affairs with Aboriginal people in Slade Point and Biloela and claimed that she was sleeping with her and Ms Algar. The deceased told her that during an argument he had thrown a hammer at her which just missed her and nearly hit their child who was in her arms.

[35] In cross-examination, she agreed that whilst the deceased was not a heavy drinker before the child's birth, afterwards she would occasionally binge drink. The appellant also began to drink more after the birth. Their arguments escalated with their increased drinking. At one point she was concerned that the child might be taken away from them because they were drinking so much. On occasions, the deceased was unhappy and upset about her relationship with the appellant. There were also periods when they seemed very happy together. Their relationship was "hot and cold". She never saw the appellant assault or threaten the deceased. Apart from the hammer episode, the deceased never complained that the appellant had assaulted her.

[36] The deceased's brother, Gregory Saltner, gave the following evidence. The deceased came to Biloela on about 30 November 2008 and left on 17 December 2008. She stayed with him for four days. During that time the appellant rang on four to six occasions. On two or three occasions, he told Mr Saltner: "I shouldn't tell you this Greg, because you're her brother, but I will kill that bitch when she gets back to Mackay." At least on one occasion, Mr Saltner responded, "do what you got to do", because he did not believe the appellant would carry out his threats. On one occasion when the appellant rang and told Mr Saltner he would kill the deceased, he sounded affected by alcohol. He could not recall the precise terms of these phone conversations. He did not tell the deceased about the appellant's threats. She did not confide in Mr Saltner about problems she may have had with the appellant. He believed she was returning from Biloela to live permanently in Mackay. He looked after the deceased's two sons aged at trial 13 and 11 and the deceased had come to Biloela for a graduation ceremony for one of her sons. When she left for Mackay, he gave her some brotherly advice: he told her not to drink so much and to look after her child.

[37] Police found two mobile phones at 16 Pheasant Street, the house the appellant and the deceased shared. Text messages sent from the phones demonstrated an acrimonious relationship between the appellant and the deceased.

[38] The following text messages were sent from his phone to hers. On 10 December 2008 at 11.25 pm, 10 days before the killing:

> "HAVE U HAD MANY FUCKS SINCE U BEEN GONE COME HOME +LET ME FUCK U UP THE ARSE U FILTHY SLUT."

and 11.43 pm:

> "WE REALLY NEED 2 TALK I WILL PH U IN THE MORN".

[39] On 11 December 2008 at 7.52 am:

> "I HAVE LOST THE PLOT WILL U PH ME"

and at 8.06 am:

> "I AM SO TERRIBLY SORRY 4 WHAT I SAID CAN WE TALK PLEASE TEXT BACK YES OR NO".

[40] On 12 December 2008 at 12.24 am:

> "U WILL COME HOME AS SOON AS I CAN BUY UR TICKETS REMBER HER NAME IS TILLY JANE MARTIN NOT SALTNER OR PATERSON COME HOME WITH MY BABY IF I CANT HAVE HER NEITHER WHILL U IWOULD RATHER HAVE HER GROW UP ADOPTED THAN GROW UP IN HER PRESENT SITUATION WHERE U HAVE NOT TAKEN HER HOME 4 3 DAYS"

and at 12.33 am:

> "UR BRO TELLS ME U R SEEING RICKY HUNT ON A PERSONAL BASIS"

and at 6.27 pm:

> "SO DID U GET LAYED".

[41] On 13 December 2008 at 5.54 am:

"EH IN THE MESSAGE I SENT YOU A FITHY SLUT BUT UR MY FITHY SLUT AND I WILL ALWAYS Love u A".

[42] On 15 December 2008 at 11.51 am:

"I WAS THINKING OF PHONING FAMILY SERVICES BUT I CART DO IT CAUSE I LUV U +TILLY JANE 2 MUCH+ I HOPE U HAVE A GOOD LIFE PLEASE LOVE+PROTECT MY BABY I WILL ALWAYS LOVE YOU".

[43] On 17 December 2008 at 6.37 am:

"WILL GET COFFEE+MILK"

and at 8.34 am:

"TAXI GET U 5 PAST MIDNITE".

(all errors as in the original)

[44] The following text messages were sent from the deceased's phone to the appellant's phone:

On 8 December 2008 at 1.42 pm:

"What do u want stop fucking ring me im busy shopping"

On 9 December 2008 at 10.14 am:

"Have u gone to the bank to see if money in love u dada tilly jane"

On 10 December 2008 at 10.45 am:

"Ho we miss n love u dadda"

On 11 December 2008 at 12.46 am:

"Fuck u not ring me i hate u not come home fuck u"

and at 7.54 am:

"Cunt"

On 12 December 2008 at 1.27 pm: "What text me"

and at 1.42 pm:

"Dont get me bus ticket"

and at 1.51 pm:

"Me and mary going to pub to get man now fuck u"

On 16 December 2008 at 7.06 am:

"What days do the bus go text me back we love u 2 tilly jane"

On 17 December 2008 at 6.46 pm:

"On the bus will ring u in rocky love u dada tilly jane"

and at 7.01 pm:

"Have u get coffee n milk"

and at 17 December 2008, 7.06 pm:

"Thanks"

and at 17 December 2008, 9.03 pm:
"Thanks"

On 18 December 2008 at 12.10 am:
"At the truck stop now see u soon"

and at 12.55 am:
"Just Left saria see us soon".

(all errors as in the original)

[45] CCTV footage depicted the appellant at a bottle shop in Slade Point at 11.00 am purchasing a six pack of XXXX stubbies. Other CCTV footage dated 20 December 2008 and timed at 5.02 pm, showed him entering Gordi's Bar in Victoria Street, Mackay wearing clothing similar to what he was wearing when arrested by police. He admitted through his counsel that he was the person depicted in the footage and that the shoes worn by him there were found by police on the front lawn of 16 Pheasant Street after the killing.

[46] Elizabeth Miller gave the following evidence. She lived at 18 Pheasant Street, Slade Point, next to the home of the deceased and the appellant. On 20 December, not long after 2.30 or 3.00 pm she heard an argument. The male said something in an angry tone about "seeing someone else" and "being unfaithful". She heard the words to the effect of "shut the fuck up. You've been going on all afternoon about this." She heard a female voice which sounded as if she "was just sick of it". She heard a different male voice at one point say, "It wasn't like that bro." The argument went on for about an hour. She heard a lot of arguments from the house and regularly heard yelling, mainly from the male. She was sure she heard a second male voice that afternoon. She also heard the baby crying. At about 6.00 pm she went out. She came home about 1.00 am and there were police cars everywhere.

[47] Mr Joseph Webster was a taxi driver who collected the appellant at about 6.35 pm on 20 December from the Mackay Hotel. The appellant's counsel admitted that a photograph taken of a person in that taxi at that time was the appellant. Mr Webster drove him to 16 Pheasant Street. The appellant said that he had a "blue" with his "missus" but that he had won $600 on the poker machines. As they approached the appellant's home, he said he did not know what he was walking into. Mr Webster told him that if his wife was still upset he should go to the Bowls Club and have a few more beers until she settled down. The appellant was happy when he dropped him at 16 Pheasant Street and walked towards his house. He did not seem intoxicated; he said he had had only a few beers.

[48] Denise Cebulski gave the following evidence. On 20 December she was working at the Slade Point Bowls Club from 2.30 pm. She saw the appellant, the deceased and their baby at the club. They left about 3.30 pm. She served the appellant one schooner of heavy XXXX. She did not see the deceased drink anything. She saw the appellant again at about 6.50 pm at the Club. He bought a heavy XXXX schooner and asked about meals. He asked to use the phone to call the deceased to see if she would join him for a meal. The deceased did not answer the phone. He did not seem drunk; he seemed like his normal self and was always quite pleasant. He did not slur his words and nor was he unsteady on his feet. His conversations were rational. He ordered takeaway meals from the kitchen. Another club member, Scott Anderson, was talking to him. The appellant consumed a second schooner of

beer and she sold him a half dozen heavy XXXX stubbies to take away. He left at about 7.45 pm with three food containers and the six pack of beer.

[49] Brenda Cross gave evidence that she also worked at the Bowls Club that evening. She saw the appellant and had several conversations with him. She did not think he was intoxicated, although she was very rushed that night. He was not unsteady on his feet nor slurring his words. She had met the deceased on a prior occasion at the Club when she was there with her baby and the appellant. The deceased was upset as their baby was playing up and she wanted to go home; the appellant arranged for their food to be put in a takeaway container and they left.

[50] Scott Anderson was at the Bowls Club between 11.30 am and 3.30 pm on 20 December. He saw the appellant, the deceased and their child. The appellant was drinking but he was unsure what and how much he was drinking. He did not appear intoxicated and he and the deceased seemed happy. Mr Anderson left the Club at about 3.30 pm and returned about 7.00 or 7.30 pm to buy a meal. He spent a short period drinking with the appellant, who was not slurring his words, was not grossly intoxicated and was not aggressive or loud. They each received their takeaway meals about the same time and left. The appellant was jovial and in good spirits and had been drinking for most of the day.

[51] At 6.42 pm on 20 December, a call, which lasted 10 minutes and 37 seconds, was made from the home of the appellant's mother in Tasmania to 16 Pheasant Street. A phone call was also made from the Slade Point Bowls Club at 6.54 pm to 16 Pheasant Street but the call was unanswered.

[52] The appellant's mother, Janette Ricks, gave evidence that she telephoned the deceased from her home in Tasmania on 20 December at 6.42 pm Queensland time. She asked the deceased what her plans were over the Christmas period as she wanted to be sure she sent the child's gift to the right address. The deceased said she was having problems with the appellant. He was "playing up". He had "been on the drink for three weeks day and night" and was not eating. She was leaving him. She said "Mum, I have to go. … I can't take any more." They spoke for about half an hour. In cross-examination, she agreed that the deceased did not mention any physical violence from the appellant. She told the deceased the best thing was to take "the baby go over to Biloela to her little boys and her family". She did not think that the deceased was planning to permanently separate from the appellant.

[53] Kelly Callaghan resided in a property behind 16 Pheasant Street. On 20 December, she returned from work shortly after 8.45 pm. Sometime later, perhaps after about 20 minutes, she heard a pretty loud female voice coming from 16 Pheasant Street. Previously, on and off over a period of time, she had heard a man's voice yelling angrily. The female voice was repeating "Stop it. Fucking stop it" and sounded urgent, upset and desperate. She did not hear it again. The male voice sounded agitated and angry and she probably last heard it no more than a fortnight beforehand. She probably heard the female voice at about 9.00 or 9.30 pm; she did not look at a clock. At the committal proceedings, she said she heard this incident at around 9.30 to 10.00 pm.

[54] Michael Walker, the appellant's cousin, drove down Pheasant Street at about 10.50 pm on 20 December. He saw the appellant sitting on the steps of the house, but he did not stop.

[55] The appellant telephoned emergency services on 000 at 23.31 on 20 December and the following conversation was recorded:

> "APPELLANT: Is that the ambulance?
> EMERGENCY OPERATOR: No, it's the police --
> APPELLANT: Police --
> EMERGENCY OPERATOR: Do you need the ambulance?
> APPELLANT: Police, police?
> EMERGENCY OPERATOR: Yeah, it's the police mate.
> APPELLANT: I also need ambulance urgently, 16 Pheasant Street, Slade Point.
> EMERGENCY OPERATOR: What's happening there mate?
> APPELLANT: Urgently, I mean urgently.
> EMERGENCY OPERATOR: What's happening at Slade Point?
> APPELLANT: I mean urgently, it doesn't matter what's happening, I mean urgently --
> EMERGENCY OPERATOR: It doesn't matter mate.
> APPELLANT: [indistinct] especially an ambulance --
> EMERGENCY OPERATOR: What's happened there mate, tell me what's happened?
> APPELLANT: Oh, there's been a stabbing okay.
> EMERGENCY OPERATOR: A stabbing?
> APPELLANT: Yes. A bad stabbing, okay?
> EMERGENCY OPERATOR: Is there, what's the condition of the person?
> APPELLANT: Oh [indistinct] past dead, there's blood all over the floor and everything like you know. We need it now.
> EMERGENCY OPERATOR: Oh, just hang on a second mate, so just stay on the line with me will you?
> APPELLANT: No, I can't stay on the line, like you know?
> EMERGENCY OPERATOR: What's your name mate? What's your name? What's your name?
> APPELLANT: The person's name that has been stabbed has been is Darlene Saltner.
> EMERGENCY OPERATOR: Who?
> APPELLANT: Right.
> EMERGENCY OPERATOR: Darlene?
> APPELLANT: Tell you what my name is mate, we just need a ambulance. She wants a ambulance –
> EMERGENCY OPERATOR: Which street? Where are you mate? Pheasant at Slade –
> APPELLANT: 16 Pheasant Street.
> EMERGENCY OPERATOR: 16?
> APPELLANT: 16 Pheasant Slade Point.
> EMERGENCY OPERATOR: Right, okay. Your name please? And your phone number?
> APPELLANT: Phone number here is, oh Jesus Christ, we got someone dying on the floor --
> EMERGENCY OPERATOR: The phone number?
> APPELLANT: Phone number --
> EMERGENCY OPERATOR: Give me the phone number?
> APPELLANT: Um --

EMERGENCY OPERATOR: Phone number?
APPELLANT: O-4-3-3-4-4-0-5-5-6-1.
EMERGENCY OPERATOR: That's a bit too many numbers there mate.
APPELLANT: Okay, get someone over here now.
EMERGENCY OPERATOR: Righto.
APPELLANT: Okay, she's almost dead man."
(errors as in the original)

[56] Police officer Geraghty received information following a 000 call and went to 16 Pheasant Street at about 11.51 pm. He gave evidence generally consistent with that set out in paras [7] to [12] of these reasons.

[57] Police scientific officer Jewell attended 16 Pheasant Street and took swabs from the palms of the appellant's hands at about 1.00 am on 21 December. The appellant had no difficulty responding to her requests to hold the palms of his hands downwards and then upwards. She did not observe any shaking of his hands. He seemed to speak clearly and walk steadily over 20 to 30 metres. He did not appear to be affected by alcohol. She found some projection blood stains on the walls which were caused by blood coming into contact with the wall as a result of projection rather than simply falling as a result of gravity. These projection stains were the result of at least three separate events or impacts. The pooling of blood formation suggested that the deceased did not move from the area where she suffered the fatal injuries. There were footprints present which had been made after walking in blood. These footprints matched a pair of thongs the appellant was wearing when police arrived at about 11.50 pm on 20 December. She found other footprints which matched a pair of sandshoes located on the front lawn of the premises. The footprints from the runners were close to the pool of blood. The runners were bloodstained. Some of those stains were passive resulting from gravity but three seemed to be projection stains. There were no bloodstains on the steps. The DNA profiles from all the blood swabs taken from the house matched only that of the deceased. Swabs taken from blood found on the appellant were consistent with the DNA profile of the deceased. The knife was found at the edge of the pool of blood near a dining chair.

[58] In cross-examination, police officer Jewell agreed that in one of the photographs police officers appeared to be holding up the appellant who was wearing a special paper suit designed to collect evidence from crime scenes. She nevertheless thought that he was standing on his own. She confirmed that she did not think he was heavily intoxicated.

[59] No injuries were found on the appellant after his arrest on the morning of 21 December. He had what appeared to be blood on his feet, lower legs and hands. He was compliant and submitted to a breath analysis test.

[60] Pathologist Dr Nigel Buxton conducted an autopsy on the deceased's body on 22 December. The deceased was 39 years old, weighed 61 kilograms and was 162 centimetres in height. She had 56 wounds consistent with being inflicted by a sharp edged weapon such as a knife, and a bruise. Some were stab wounds from a sharp implement being plunged into the deceased. Others were incised wounds caused by a slashing motion with an edged blade. At least seven of the wounds appeared to be defensive wounds where a limb had been brought up to protect against an assault. These defensive wounds were on the hands, upper arms,

forearms, base of the thumb, wrist and middle finger. They were probably caused first in time.

[61] The stab wounds were across the upper chest and into the abdomen. Three penetrated deep into the chest and the lungs. One penetrated the upper abdomen and liver. Another penetrated the stomach. The deepest chest wound was 140 mm. The stab wounds caused the left lung to collapse. Even though the tissue in both lungs was subject to major tearing from the wounds, the right lung did not collapse because of adhesions from disease. The knife wounds also cut blood vessels in the chest wall. Without treatment, the four deep wounds to the chest were each life threatening. Together, they would have been fatal, even had the incident happened close to a cardio-thoracic unit. The wound penetrating the liver caused major blood loss into the abdominal cavity. The deepest wound into the abdomen was 170 mm. The wounds were consistent with being caused by a carving knife with a 225 mm blade. There were two wounds to the left upper arm, possibly caused by the knife travelling straight through the arm and a stab wound to the back. Once she received the chest injuries, her resistance would have fallen off reasonably quickly as she would have had difficulty breathing with effectively collapsed lungs. It would also be difficult for her to scream. Once she received the chest and liver wounds, she would have lapsed into unconsciousness within about five minutes.

[62] The incised wounds were to the arms, legs and face. There was a 37 mm long slash to the right upper lip below and to the right side of the nose. A number of wounds were scratch type wounds and reasonably superficial.

[63] The cause of death was the multiple stab wounds to the chest. A blood sample taken from the deceased showed a blood alcohol level of 0.01 which would reflect her alcohol level at the time of death. The presence of tetrahydrocannabinol was detected which was consistent with her having taken or smoked cannabis within a few hours of death. The cannabinol level was 0.02, "not a particularly noticeable level". No traces of amphetamines, barbiturates or other drugs were detected from the blood or urine analysis.

[64] In cross-examination, Dr Buxton agreed that many of the 56 wounds were superficial or trivial; only six were significant in terms of her fatal injuries. There was no evidence of sexual violence. He took forensic vaginal and other swabs which he handed to police for analysis.

[65] Government medical officer Dr Leslie Griffiths gave evidence that he received a toxicology report which showed the appellant's blood alcohol level in a sample taken at 9.30 am on 21 December was 0.169. He calculated that, given relevant elimination rates, the appellant's blood alcohol concentration level at 11.46 pm on 20 December 2008 (when he first spoke to police) was somewhere between 0.264 and 0.454. Elimination rates varied and those who regularly consume large quantities of alcohol generally tend to eliminate alcohol more quickly. A blood alcohol level of 0.45 would be fatal. Although there would be individual variation, at a blood alcohol level of 0.3, generally speaking, a person would be visibly intoxicated, with stupor and an adversely affected gait, to the point of being unable to stand. It would also be likely to cause memory loss, blackouts and urinary incontinence. If the appellant had eliminated alcohol at the average rate, his blood alcohol level would have been around 0.311 at 11.46 pm. Tolerance to alcohol would temper its usual effects up to a blood alcohol level of 0.3 or so. But beyond

that point, tolerance would not be an issue as physiologically the abolition of reflexes and then death would follow. At a blood alcohol level of 0.3 a person could not walk a straight line, would have difficulty putting a finger to the nose when asked and there would be other visible signs of intoxication, including a real difficulty in engaging in meaningful conversation. Conversely, if someone was able to engage in meaningful conversation and walk unassisted, it would suggest their blood alcohol level was below 0.3.

[66] The appellant did not call or give evidence.

The appellant's contentions

[67] The appellant contends that, after considering all the evidence, it was impossible for the jury to be satisfied beyond reasonable doubt that the appellant intended to kill or do grievous bodily harm to the deceased because of the high level of alcohol in his system.

Conclusion on the first and second grounds of appeal

[68] The appellant made no complaint about any of the judge's directions to the jury, including those concerning the issue of intoxication and its relevance to the element of intention. It is true that the blood alcohol reading taken from the appellant well after his arrest strongly suggested that at the time the police arrived late on 20 December he was heavily intoxicated. But other objective evidence, although confirming that he had been drinking throughout the day and into the evening, did not suggest that he was heavily intoxicated when he left the Bowls Club at about 7.45 pm. The appellant's extremely high level of intoxication when the police arrived shortly before midnight may have been because he drank a great deal *after* stabbing the deceased, perhaps to drown a guilty conscience as he realised the enormity and finality of his deadly deeds.

[69] The neighbour, Ms Callaghan, heard a woman yell from 16 Pheasant Street in a desperate, urgent way somewhere between about 9.00 and 10.00 pm and then heard nothing more. This, together with the pathologist's evidence about the number and nature of the wounds and the cause of death, suggested the stabbing incident occurred at about this time.

[70] There was evidence of disharmony between the appellant and the deceased, including during the afternoon of 20 December. Earlier in December, he told the deceased's brother that he would kill her when she returned to Mackay. She told the appellant's mother at about 6.45 pm that evening that she intended to take the child and leave him, at least for a time. There was therefore a clear motive for the appellant to intentionally kill the deceased: to prevent her leaving with the child for whom he claimed to deeply care.

[71] During the 000 call, the jury may have considered he deliberately avoided giving his name to escape detection. Later when talking to police officer Geraghty, he gave a falsely exculpatory version to cover up what he had done. Neither of these matters suggested that he was so intoxicated he did not form an intent to kill or to do grievous bodily harm to the deceased at the time of the killing. Importantly, the number, positioning and depth of the stab wounds described by the pathologist strongly supported a deadly intent to kill.

[72] The prosecution case was compelling. The jury were entitled to conclude that the appellant, after drinking all day, stabbed the deceased with an intent, albeit a drunken intent, to kill or do grievous bodily harm to her to prevent her leaving with the child.

[73] After reviewing all the evidence, I am confident that, despite the evidence of intoxication, the jury were entitled to conclude beyond reasonable doubt that the appellant stabbed the deceased, intending to kill or do grievous bodily harm to her. I would reach this conclusion even without the evidence of the appellant's conversation with police officer Geraghty. The first and second grounds of appeal are without substance.

Did the judge err in not directing the jury as to provocation under s 304 *Criminal Code* 1899 (Qld)?

The relevant legislative provisions

[74] At the time of the killing, s 304 *Criminal Code*[13] provided:

> **304 Killing on provocation**
> 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."

The primary judge's ruling

[75] The judge had foreshadowed leaving provocation to the jury when he ruled that police officer Geraghty's conversation with the appellant was admissible.[14] Prior to counsel's addresses, the primary judge raised whether provocation under s 304 should be left to the jury. After a requested adjournment, defence counsel stated that he used the adjournment to look at authorities and to take further instructions from his client. He did not request the judge to direct the jury on provocation. The prosecutor adopted a similar approach.

[76] The judge, appreciating that he was obliged to sum up to the jury on s 304 if it were raised on the evidence, even where this was not requested by counsel, gave the following reasons for not doing so. There was no evidence of any action of provocation on the part of the deceased. There was evidence from a neighbour who heard the voice of a male stranger at 16 Pheasant Street saying "it wasn't like that, bro". This gave rise to the possible inference that the appellant may have been upset at the deceased meeting with another male. But that incident occurred about six hours earlier than the stabbing of the deceased. The appellant left the Bowls Club at about 7.45 pm and seemed rational, content, and not grossly affected by alcohol. Whatever happened at the home between 3.30 pm and 6.30 pm was not provocative in the sense of the stabbing of the deceased many hours later. It was possible that whatever happened between 3.30 pm and 6.30 pm led to a later argument between them leading up to the stabbing, but this was speculation. As there was no evidence to raise the issue of provocation, it could not be left to the jury as a partial defence to murder.

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13 Reprint 7 as in force 1 December 2008. This provision was substantially amended by the *Criminal Code and Other Legislation Amendment Act* 2011 (Qld), s 5. See current reprint *Criminal Code* 1899 (Qld), Reprint 8C.

14 See these reasons [17].

The appellant's contentions

[77] The appellant relies on the following matters as raising provocation. The evidence of the 56 stabbing injuries to the deceased in itself indicated a loss of control: see *Masciantonio v The Queen*[15] and *Van Den Hoek v The Queen*.[16] The evidence established that the child was very important to the appellant. The deceased and the appellant had argued in the past. Their exchange of mobile telephone text messages revealed some animosity. On the evening of the killing, the deceased told the appellant's mother she was fed up with the deceased and was leaving him and taking the child, at least for a time. She had recently left him for some weeks, only returning on 18 December. Taken at its highest for the defence,[17] there was sufficient evidence for the jury to conclude that they could not exclude the possibility that the appellant acted under provocation within s 304 when he viciously stabbed the deceased. The failure to leave provocation under s 304 to the jury in this case was an error of law occasioning a substantial miscarriage of justice.

Conclusion on the fourth ground of appeal

[78] As the primary judge appreciated, where there is evidence reasonably capable of raising provocation, the issue should be left for the jury's determination. This is so where the matter is not raised by the defence, and even where the defence has submitted the judge should not direct the jury on it. If in the least doubt whether the evidence is sufficient, the trial judge should leave the issue to the jury: see *Van Den Hoek*;[18] *R v Pangilinan*.[19]

[79] It follows from my reasons on grounds 1 and 2 that the appellant had unlawfully killed the deceased in terms which, but for the provisions of s 304, would constitute murder. The question is whether there was any evidence that he may have done the fatal act "in the heat of passion caused by sudden provocation, and before there is time for [his] passion to cool".

[80] It is true there is a paucity of direct evidence in this case to support provocation. But the absence of direct evidence of loss of self-control is not fatal to a defence of provocation, certainly where self-defence is also raised. That is because the admission of loss of self-control would almost certainly weaken or destroy the complete defence to a murder charge of self-defence and courts do not require defendants to choose between self-defence and provocation. See *Lee Chun-Chuen v The Queen*;[20] *Van Den Hoek*[21] and *Pangilinan*.[22] Self-defence was not an issue in this case. But by analogy the defence that the appellant was too intoxicated to form an intention was an issue which was inconsistent with provocation. I accept the appellant's contention that the violence of the physical injuries he inflicted on the deceased, combined with the evidence of their relationship, suggested that he lost self-control when he stabbed and killed her.

[81] It is significant in this case that provocation is not necessarily excluded because there was a significant interval between the provocative conduct and the appellant's

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15 (1995) 183 CLR 58, 68; [1995] HCA 67.
16 (1986) 161 CLR 158, 162; [1986] HCA 76.
17 *Stingel v The Queen* (1990) 171 CLR 312, 318; [1990] HCA 61.
18 (1986) 161 CLR 158, 161-162, 169.
19 [2001] 1 Qd R 56, [29]-[31]; [2001] QCA 81.
20 [1963] AC 220, 232-233.
21 (1986) 161 CLR 158, per Mason J, 169.
22 [2001] 1 Qd R 56, [32].

emotional response to it if the loss of self-control was caused by the provocative conduct: see *Pollock v The Queen*.[23] French CJ, Hayne, Crennan, Kiefel and Bell JJ explained:

> "The words of s 304 that require that the act causing death is done 'in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool' are the expression of a composite concept incorporating that the provocation is such as could cause an ordinary person to lose self-control and to act in a manner which encompasses the accused's actions. …
>
> The jury were required to determine whether the prosecution had proved beyond reasonable doubt that the appellant did not kill the deceased while in a state of loss of self-control induced by the deceased's provocative conduct, being conduct that had the capacity to cause an ordinary person to lose self-control and form the intention to kill or to do grievous bodily harm and to act as the appellant acted."[24]

[82] The answer to the question whether provocation was raised in this case is particularly difficult. Certainly there was evidence that the relationship between the appellant and the deceased was acrimonious. She had recently taken their child and left him for two weeks. On 12 December at 1.51 pm, after receiving a threatening text message from him she responded with an offensive text message: "Me and mary going to pub to get man now fuck u". This was clearly intended to distress him. Other evidence established that the appellant was emotionally close to his baby daughter and that the deceased knew this. The appellant's neighbour, Ms Miller, gave evidence[25] from which it could be inferred that at about 2.30 or 3.00 pm on 20 December the appellant and the deceased had argued about her alleged infidelity, in the presence of a man whom the appellant considered was the suspect. Although this was about six hours before the killing, *Pollock* makes clear that it is a jury question whether the composite concept of provocation in s 304 caused the loss of self-control and the fatal stabbings. It is true that the appellant seemed happy when the taxi driver, Mr Webster, dropped him home at about 6.40 pm and when he left the Bowls Club with takeaway food for the deceased some time around 7.45 pm but the deceased was not present. It was possible that he was still very angry with her about the earlier episode. He telephoned her from the Bowls Club at about 7.00 pm but there was no answer. The telephone conversation between the deceased and the appellant's mother at 6.42 pm was evidence that the deceased planned to take the child and leave the appellant, at least for a time. The evidence of the appellant's neighbour, Ms Callaghan, suggested that the killing occurred between 9.00 and 10.00 pm. The 56 wounds inflicted on the deceased with a carving knife, some of which were deep into vital organs, were consistent with the appellant losing control and intentionally killing her. The evidence of his normal pleasant temperament, his subsequent apparent grief and of his ringing 000 to obtain help gave some support to the possibility of a sudden and temporary loss of control at the time of the killing caused by some provocation from the deceased.

[83] It is true that the evidence supporting some provocation on the part of the deceased was far from compelling. Even if the deceased may have taunted the appellant with

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23 (2010) 242 CLR 233, [53]-[55]; [2010] HCA 35.

24 Above, [65]-[66].

25 See [46] of these reasons.

claims of adultery and threatened to leave him and take the child, a jury would be unlikely to conclude that such conduct was capable of causing an ordinary person to lose self-control to the extent of forming the intention to kill or do grievous bodily harm to the deceased. But under the law as it stood at the time of the killing, this was a jury question and should have been left for their determination. I am satisfied that there was sufficient evidence to require the jury to consider whether the prosecution had proved beyond reasonable doubt that the appellant did not kill the deceased in a state of loss of self-control, caused by the deceased's provocative conduct, which had the capacity to cause an ordinary person to lose self-control and form the intention to kill or do grievous bodily harm and to act as the appellant did.

[84] The respondent does not contend that, in those circumstances, the proviso in s 668E(1A) *Criminal Code* can have application. Despite the very strong prosecution case, I consider there has been a miscarriage of justice because the appellant was denied the benefit of a partial defence which, if the jury was not satisfied the prosecution disproved beyond reasonable doubt, would have reduced the charge against him from murder to manslaughter. The appeal must be allowed, the verdict of guilty of murder set aside, and a retrial ordered.

Summary

[85] The appellant's first three grounds of appeal are not made out. The judge, however, should have addressed the jury on the partial defence to the charge of murder, provocation under s 304 *Criminal Code*. The failure to do so was an error of law which has caused a miscarriage of justice. I would allow the appeal, set aside the guilty verdict on the charge of murder and order a retrial.

ORDERS:

1. Appeal against conviction allowed.
2. Conviction and verdict set aside.
3. A new trial is ordered.

[86] **FRASER JA:** I have had the advantage of reading the reasons for judgment given by the President. I agree with her Honour's reasons for concluding that the first and second grounds of appeal are without substance. In relation to the third ground of appeal, I agree with her Honour's reasons for concluding that the appellant has failed to demonstrate that the trial judge took into account any wrong consideration in exercising the discretion to allow the prosecution to lead evidence of statements which the appellant made when first questioned by police in breach of the *Police Powers and Responsibilities Act* 2000 (Qld).

[87] I respectfully differ from the President's conclusion that the fourth ground of appeal is made out. I would hold that the trial judge was correct in ruling that provocation was not open on the evidence.

[88] The question under s 304 of the *Criminal Code* is whether the appellant's acts which caused the death of the deceased were done "in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool". In *Pollock v The Queen*,[26] the High Court held that the question for the jury was:

> "whether the prosecution had proved beyond reasonable doubt that the appellant did not kill the deceased while in a state of loss of self-

[26] (2010) 242 CLR 233 at 251 [66].

> control induced by the deceased's provocative conduct, being conduct that had the capacity to cause an ordinary person to lose self-control and form the intention to kill or to do grievous bodily harm and to act as the appellant acted."

What keeps provocation within bounds is the objective requirement "that the provocation is such as could cause an ordinary person to lose self-control and to act in a manner which encompasses the accused's actions."[27] It is that objective requirement which I think is of most importance for present purposes.

[89] *Stingel v The Queen*[28] established that the test for deciding whether provocation must be left to the jury is "whether, on the version of events most favourable to the accused which is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense." That expression of the test assumes that there is evidence of provocative conduct which the jury is able to measure against the legal requirements of provocation, including the objective requirement. That this is so is persuasively demonstrated, in my respectful opinion, by the following passage in the reasons of Douglas J (with whose reasons Fryberg J agreed) in *R v Rae*:[29]

> "The common law test for provocation, which applies to the usage of the word in s 304 of the *Criminal Code*, [*R v Pangilinan* [2001] 1 Qd R 56, 64 - 65, [33]] requires an examination of the effect of the conduct said to give rise to the provocation on the mind of an ordinary person. As Brennan, Deane, Dawson and Gaudron JJ said in *Masciantonio v The Queen* (1995) 183 CLR 58, 66:
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> > 'The provocation must be such that it is capable of causing an ordinary person to lose self-control and to act in the way in which the accused did. The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control before he has had the opportunity to regain his composure.'
>
> The necessary corollary of that test is that there should also be objectively ascertainable evidence of the conduct said to constitute provocation to measure against the capacities of the ordinary person and any relevant characteristics of the accused. The court has 'to see what was the extent of the provocation as disclosed by the evidence which the jury had to consider'. [*Mancini v DPP* [1942] AC 1, 9.] Where all one has is an unknown statement by the deceased, followed by the appellant saying 'Don't disrespect me' and objectively bizarre behaviour by him, there is nothing available to the jury to measure against the capacities of an ordinary person or any relevant characteristics of the appellant. In other words, the appellant's subjective reaction to whatever was said by the deceased cannot be used as the touchstone to measure what was capable, objectively, of causing an ordinary person to lose self-control.

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27 (2010) 242 CLR 233 at 251 [65].

28 (1990) 171 CLR 312 at 334, quoted with approval in *Masciantonio v The Queen* (1995) 183 CLR 58 at 67 - 68.

29 [2006] QCA 207 at [66] - [73].

The following passage in *Masciantonio* at 66 - 67 only makes sense in the context where the gravity of the conduct said to constitute provocation is known and can be assessed by reference to the characteristics of the ordinary person and relevant characteristics of the accused. Their Honours said:

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

One of the best statements of the English common law as to provocation before the *Homicide Act* 1957 (Eng) is said to be found in Devlin J's summing up reproduced by Lord Goddard CJ in *R v Duffy* [1949] 1 All ER 932, 932 - 933:

> 'Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.'

That focus on the nature of the acts and their likely effects on a reasonable or 'ordinary' [*Stingel v The Queen* (1990) 171 CLR 312, 326 - 327] person illustrates the objective nature of the test and the need to know what the allegedly provocative act or acts were. There was no such evidence here.

That loss of self-control may be inferred from other evidence, as Mason J said in *Van Den Hoek v The Queen* (1986) 161 CLR 158, 169 in reliance on what was said by Lord Devlin in *Lee Chun-Chuen v The Queen* [1963] AC 220, 232 - 233, does not allow the inference sought to be drawn here, that whatever may have been said by the

deceased could have been provocative in the objective sense required by the law. As Lord Devlin went on to say in *Lee Chun-Chuen* at 233:

> 'What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law. If no such narrative is obtainable from the evidence, the jury cannot be invited to construct one. Viscount Simon L.C. said in *Mancini v Director of Public Prosecutions* ([1942] AC 1, 12): "it is not the duty of the judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is on the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either judge or jury went outside it." This warning which Viscount Simon LC applied to provocative incidents applies equally to loss of self-control and to the other elements which constitute provocation in law.'

The passage of the decision of this Court in *R v Buttigieg* (1993) 69 A Crim R 21, 27 that says 'a jury is able to infer provocation from evidence, suggesting a possible loss of self-control', purportedly in reliance on these passages in *Van den Hoek* and *Lee Chun-Chuen*, misstates their effect. They are, as I have said, authority for the different proposition that loss of self-control may be shown by inference rather than direct evidence.

What I regard as the correct approach to evidence of provocation appears later on the same page of *Buttigieg* in this form:

> '(f) Conduct can amount to provocation for the purpose of s 304 of the Code if a reasonable jury could conclude that it might be capable of provoking an ordinary person to retaliate as the accused person did ...'".

[90] I have concluded that it would not be open to a reasonable jury on the evidence to find that there was conduct which might be capable of provoking an ordinary person to stab the deceased with intent to kill or cause grievous bodily harm. The President's detailed exposition of the evidence in this case in [28] – [66] of her Honour's reasons, which I gratefully adopt, makes it possible for me to explain my conclusion in quite brief terms.

[91] The first directly relevant event is that the deceased sent a text message to the appellant on 12 December 2008 at 1.51 pm. Earlier, at 12.24 am, the appellant had sent a text message to the deceased in which he threatened her that he "would rather

have [their daughter] grow up adopted than grow up in her present situation". In the deceased's text message to the appellant she stated that "Me and Mary going to pub to get man now fuck u". That message was sent eight days before the killing. It would not be open to a jury to find that an ordinary person might have lost self-control and stabbed the deceased simply as a result of reading that text message.

[92] Furthermore, whilst the law does not require that the loss of self-control immediately follow the provocation,[30] a lapse of time between provocation and killing remains a matter "bearing on the determination of whether the killing was in fact caused by provocation and done at a time when the accused was in a state of temporary loss of self-control."[31] It would be perverse for a jury to find that eight days after that text message the appellant might have reacted to it by losing self-control and stabbing the deceased, particularly when the only evidence of the appellant's attitude towards the deceased earlier on the day of the killing was to the effect that he was amicably disposed towards her. The appellant appropriately did not contend that this message in itself justified leaving provocation to the jury.

[93] The next relevant event relied upon in relation to provocation was an argument on the day of the killing. A neighbour, Ms Miller, gave evidence that at a time which was about six hours before the killing, a male said to a female that she was "seeing someone else" and "being unfaithful", and the female responded by saying "Shut the fuck up. You've been going on all afternoon about this" and she "was just sick of it." Ms Miller also heard the voice of a third person, a male stranger, saying words to the effect, "[i]t wasn't like that, bro." It may be assumed in the appellant's favour that he then encountered the deceased with a man who the appellant thought was in a sexual relationship with the deceased. Allowance must also be made for the effect of the earlier text message and the stormy nature of the relationship between the appellant and the deceased. Even so, the deceased's emphatic demand that the appellant stop accusing her of infidelity and the man's denial of the appellant's allegation could not conceivably cause an ordinary person in the position of the appellant to act as the appellant did. The appellant appropriately did not contend that the evidence of events up to this point was sufficient to require that provocation be left to the jury.

[94] The evidence of events up to this point was potentially important in colouring the effect of any subsequent provocative conduct, but the only direct evidence of any subsequent conduct involving the deceased was Ms Callaghan's evidence. She gave evidence that she sporadically heard a man's voice yelling angrily from the deceased's house and subsequently, at some time between about 9.00 pm and 10.00 pm she heard an urgent, upset and desperate female voice loudly say "Stop it. Fucking stop it", followed by silence. The President has concluded in [69] of her Honour's reasons that the evidence suggests that this occurred at about the time of the stabbing. This was self evidently not evidence of provocation. Again, the appellant appropriately did not contend that it was.

[95] The evidence of the ferocity of the appellant's attack upon the deceased could not justify the jury in drawing any inference about what, if anything, the deceased might have said or done such as might enable the jury to assess the reaction of an ordinary person to such conduct. Decisions of the High Court support the proposition that the ferocity of an attack is evidence of a loss of self-control, but in those decisions

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30 *Pollock v The Queen* (2010) 242 CLR 233 at 247 [53] - [54].

31 *Pollock v The Queen* (2010) 242 CLR 233 at 250 [62].

there was evidence of provocative conduct by the deceased.[32] Nor is evidence of the content of any provocative conduct by the deceased supplied by the evidence that the deceased planned to take the child and leave the appellant for a time, the evidence about the appellant's temperament immediately before he returned to his house, or the evidence about his apparent grief after the killing and his ringing 000 to obtain help.

[96] I acknowledge that, contrary to my own opinion, it is arguable that the evidence was capable of supporting an inference that the appellant killed the deceased as a reaction to her telling him that she had decided to leave with the baby (as she had discussed with the appellant's mother some hours before the appellant returned to the house). If so, a jury acting reasonably could not fail to be satisfied beyond reasonable doubt that an ordinary person would not react to such words in the way the appellant acted. Such words are far less provocative than the kind of conduct which the Court has previously regarded as being incapable of amounting to provocation for the purposes of s 304 of the *Criminal Code*.[33]

[97] It may be suspected that the deceased said both words to that effect and something further, thereby provoking the deceased to act as he did. But there is no evidence which is capable of supporting any inference about the effect of what, if anything, the deceased in fact said. Such evidence might be unclear, confusing, and merely inferential, but in this case there was no evidence even about the general effect of what, if anything, the deceased said before the appellant attacked her. Taking the view of the whole of the evidence which is most favourable to the appellant, there was no material upon which the jury could draw to identify the content of any supposed provocative conduct by the deceased, to assess its gravity, or to measure the appellant's actions against the reaction of an ordinary person to any such conduct. Provocation was therefore not open on the evidence.

[98] I would dismiss the appeal.

[99] **NORTH J:** For the reasons given by the President, I agree that the first and second grounds of appeal are without substance, and also that the appellant has not demonstrated any error on the part of the trial judge concerning the evidence obtained in breach of the *Police Powers and Responsibilities Act* 2000 (Qld).

[100] Turning to the fourth ground of appeal, provocation, I agree with the reasons of Fraser JA. As his Honour's reasons demonstrate the conduct or words of the deceased, in the days and hours before the killing, in evidence could not "cause an ordinary person to lose self-control". That something was done or said by the deceased that caused the appellant to lose control and kill her may be suspected, the evident ferocity of the attack is sufficient to warrant an inference of the loss of self-control. But what might have been done or said can only be the subject of speculation. There is no evidence. Consequently there is no content from which the behaviour of the appellant can be assessed against the conduct of a reasonable man.

[101] The appeal should be dismissed.

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32 *Masciantonio v The Queen* (1995) 183 CLR 58 at 68; *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 162 - 163.

33 *R v Buttigieg* (1993) 69 A Crim R 21 at 37 - 38.