SUPREME COURT OF QUEENSLAND

CITATION:	*R v Clark* [2013] QCA 333
PARTIES:	**R** **v** **CLARK, Peter Charles** (appellant)
FILE NO/S:	CA No 234 of 2012 SC No 702 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2013
JUDGES:	Margaret McMurdo P, Gotterson JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal against conviction is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant pleaded not guilty to murder but guilty to manslaughter – where the plea of guilty was not accepted by the prosecution – where the appellant was convicted of murder after a six day trial – where the appellant had a dispute with his wife and struck and stabbed her numerous times with a golf club – where counsel for the appellant submitted that he was provoked – where the appellant in person submitted that the trial was not a fair one, that his counsel failed to cross examine witnesses in accordance with his instructions and that certain witnesses were not brought forward – whether the verdict was unreasonable or cannot be supported having regard to the evidence – whether it was open to the jury to be satisfied beyond reasonable doubt that the claimed provocative acts could not have caused an ordinary person to lose control and act as the defendant acted *Criminal Code* 1899 (Qld), s 304, reprint 7M *Criminal Code and Other Legislation Amendment Act* 2011 (Qld), s 5

Masciantonio v The Queen (1995) 183 CLR 58; [1995] HCA 67, followed
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Pollock v The Queen (2010) 242 CLR 233; [2010] HCA 35, cited
Van Den Hoek v The Queen (1986) 161 CLR 158; [1986] HCA 76, cited

COUNSEL: A Hoare for the appellant (pro bono)
M B Lehane for the respondent

SOLICITORS: No appearance for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with McMeekin J's reasons for dismissing this appeal against conviction.

[2] **GOTTERSON JA:** I agree with the order proposed by McMeekin J and with the reasons given by his Honour.

[3] **McMEEKIN J:** The appellant, Peter Charles Clark, was arraigned on 16 August 2012 on the charge of murdering his wife at Coomera on 12 October 2010. He pleaded not guilty to murder but guilty to manslaughter. The guilty plea was not accepted by the prosecution. He was convicted of murder on 23 August 2012 after a six day jury trial. He has appealed against his conviction. The sole ground of appeal as set out in the notice of appeal is:

> "The verdict is unreasonable or cannot be supported having regard to the evidence".

[4] Upon the hearing of the appeal Mr Hoare appeared on behalf of the appellant on a pro bono basis. He informed the Court that he had been greatly assisted in the preparation of the matter by Ms Janice Crawford of counsel. The Court is grateful to both counsel for their efforts.

[5] Upon Mr Hoare's intimation that he understood that the appellant wished to make submissions that he, Mr Hoare, was not prepared to make, the court gave the appellant leave to address the court. The appellant sought to argue:

(a) That the trial was not a fair one as witnesses had been called by the prosecution who should not have been called;
(b) That his counsel had failed to cross examine witnesses in accordance with his instructions;
(c) That witnesses were not brought forward to attest to the state of the relationship between him and the deceased in the months and perhaps years prior to the killing, evidence which would have been relevant to the prosecution theory that he had long planned the murder of his wife.

The Unsafe and Unsatisfactory Ground

[6] Given the plea of guilty to manslaughter the only possible issues for the jury were the question of intent to kill or cause grievous bodily harm and whether the

prosecution had negatived any defences raised. There was no submission that the evidence could not support the finding of intent to cause death or grievous bodily harm. It plainly could.

[7] The only defence that was raised at trial was the partial defence of provocation. With some considerable hesitation the learned trial judge left provocation to the jury. There was no complaint made about the trial judge's summing up. It contained full and accurate directions on the question of provocation and a full summary of the evidence that could touch on the question of provocation.

[8] At the time of the killing s 304 of the *Criminal Code*[1] 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.

[9] The basis for the submission that provocation was raised on the evidence rested entirely upon the version given by the appellant to the investigating police officers in the course of a record of interview which was electronically recorded. That version was not entirely consistent throughout.

The Family Situation

[10] It is necessary to put the events of the evening in question into context. The evidence showed that the deceased and the appellant were married in November 2005 but had been in a relationship since mid 2001. There were two children but in respect of one the appellant was not the natural father. The relationship had been a difficult one. The parties had separated at times. At one point the appellant attended alcoholics anonymous and was successfully sober for one year. The appellant indicated that the main strain on the relationship was due to their financial position. There was other evidence to support that. The appellant said that he had been feeling stress in relation to this for some 12 to 18 months prior to the death. The appellant worked as a self employed painter and decorator. The deceased was employed on a part time or casual basis as a cleaner. She was not employed at the time of her death.

The Killing of the Deceased

[11] The killing took place at some time between 6.50 pm and 7.25 pm. The appellant arrived home and found the deceased on the computer. He said that he "just lost it with the way she was sitting on the computer like just sort of laughing and grinning at the computer and not even interested in what I was saying or anything. And just really just trying to frustrate me".[2]

[12] The appellant said that he then "slammed the computer down because she wouldn't get off it" and then, after the deceased opened the computer up again, "threw it across the room".[3]

---

1 Reprint 7M as current at 12 October 2010. This provision was substantially amended by the *Criminal Code and Other Legislation Amendment Act* 2011 (Qld), Section 5.

2 AB 332.

3 AB 340.

[13] On the appellant's account the deceased then indicated that "we're going. We're going", obtained some bags from a bedroom and threw a bag into each of the children's rooms and said "pack your stuff, we're going".[4]

[14] The appellant said that the following conversation then occurred:

> "I said what do you mean. What are you just go, I said what do you mean, what are you just going now?
>
> …
>
> And she said, what are you going to do about it? I said you can't just, just sit there and just fuck off with the kids. They're mine as well. And then she just said, oh we all hate you, she said. We all hate you, she said. Which that really got me. I didn't think that would have come out.
>
> …
>
> But she said we all hate you but that's never happened before. But I thought she might have said I hate you, but she said we all hate you. But that's not right.
>
> …
>
> You know, that's never happened. My kids have never hated me."[5]

[15] A little later the appellant then said, in response to a question as to whether the deceased was yelling at him:

> Appellant: "Yeh. Not real loud but loud enough. We all hate you, yeh.
> …
>
> I wasn't shouting but I said well what do you mean? Well what do you think you're fucking doing? I said…"
>
> Police Officer: "Ok. What happened then?"
>
> Appellant: "Oh you know, get the bags out and, I've always had this threat over me head for the last two or three years, she's always going to leave with the kids. It's always been the threat. I've always had the threat; she's leaving with the kids. I've lived with it for three, four years, more, more probably. Just that threat. That's all it is every day when you go to bed that threats always there. She wants to leave with the kids if she fells like it or something you know. It's just you got to do one thing out of line…."[6]

[16] The police officer then asked what happened after the deceased had said "We all hate you". The appellant replied that he went and got a golf club out of the

---

4 AB 340.
5 AB 342.
6 AB 342-343.

bedroom from a wardrobe. In response to a question of what happened then he replied:

> "Went out there and said something about you know, what do you think you're going to leave are you? (Inaudible) What, do you really think you're going to do something, are you? And I fucking, I said what you going to leave are you? And then she went, yeh. She said yeh. Cause I fucking, she said, we hate you. And that's when I fucking hit her over the head."[7]

[17] The appellant then said that the deceased was bleeding but grabbed the golf club from him. The appellant told the investigating officer that when he realized he couldn't get the club off the deceased he thought "well I'm going to get another club". While he was getting another club the deceased went to the toilet and locked herself in there. The appellant said that he tried to open the door three or four times but couldn't get it open. He then explained how he used that second club to get through the door:

> "Well toilet door's always have a hinge on them where you can lift them up. In an emergency you can get in there if they have a different hinge on them. … And you've only got to lift underneath the door to get it open".[8]

And a little later:

> "Oh I tried wedge it in underneath the door. And at the same time belting on handle at the same time and I don't know if, which side come open. The door handle or the door, but the whole door come off."[9]

[18] The appellant then hit the deceased with the club and it broke. His account was that he hit the deceased on only the one occasion and he couldn't recall where he struck her. Upon the inquiry as to whether he said anything to the deceased when she first got into the toilet the appellant replied:

> Appellant: "I don't know if I even said anything. I don't know by then. But, I know she said, I know she said, I won't leave you, I won't leave you. I know she said that.
>
> …
>
> I remember her saying that. But you know, she had blood pouring out of her head. But it was too late by then cause I know the police were involved and she was going to be going anyway so. Yeh.
>
> Police Officer: "Ok. what do you mean by that?
>
> Appellant: "Well, you know. Of course she's going to leave by then, isn't she, you know? And then I just, I've just had enough; I've, I've had a brain explosion. I've just lost it. I've just

---

7 AB 343.
8 AB 347.
9 AB 347.

> you know. I, I've just had enough. I've just really, really had enough. I've just really, really couldn't cope any more with the pressure of what's happening and things like that, you know."[10]

[19] The appellant said that he was "in a rage by then" and "just carried on"[11]. A little later in the interview the appellant said:

> "And that's what Janelle said you know, we're going, we hate you and. That's what [brought] on the rage. It, it definitely [brought] on the rage. We hate you, we all hate you, she said. I just lost it. I just couldn't, I've never been like that before. I've never been in that state of mind before to be like that."[12]

[20] Further into the interview the police officer enquired as to what was going through the appellant's mind and he explained that when he came back with the golf club in his hand:

> "And I thought she might turn around and settle down and say oh look, let's, let's just forget it. And then it would have been all, you know. She would have walked down the other way and I would have walked back the other way and put the club away and whatever but it was, no she just sort of, what are you going to do about it. Be a fucking big man now or something she said. You know."[13]

An Inconsistent Version

[21] Earlier in the evening the appellant had given a different version, also recorded. He said that after he slammed the computer down and threw it across the room and the deceased had got a bag for each of the children the following occurred:

> Appellant: "I said, look they're my kids too. And she said, fuck you, fuck you. You know. Says nuh, she said they don't deserve you or something. That's what she said and I thought, oh, you know."
>
> Police Officer: "Ok, what happened then?"
>
> Appellant: "I just went up to the room and got a golf club out and I had it next to me. And I said, so you're leaving are you? She said oh what do you think you're going to do with that? And I said something and in the end I just picked it up and fucking hit her over the top of the head with it."[14]

[22] The statement there of "they don't deserve you" is to be compared with the statement "we all hate you" said to have been made at this point in the events in the later version.

---

10 AB 348-349.
11 AB 349.
12 AB 353.
13 AB 356.
14 AB 321.

[23] On this version after the deceased grabbed the golf club and ran to the toilet and locked herself in the toilet, the appellant said he then thought "well I'm going to get another club" and he did so and then he claimed the following occurred:

> "I was trying to get in and she was yelling out to Jayden and, but when I was going to the toilet, after I hit her the first time she said oh no, I won't leave you, I won't leave you. And I thought well that's fucked (inaudible) bullshit.
>
> …
>
> And she said Jayden, ring the police, ring the police. You know or something, or get help, and get help or something.
>
> …
>
> And I wedged the thing under the door, smacked the toilet door open and I got her and hit her again and the golf club broke. And then I think I, well I stabbed her several times with it, on the ground. And the golf club went into her in several places.[15]

The Injuries

[24] The forensic pathologist who conducted the autopsy on the deceased explained that the deceased had sixty-four injuries, thirty-two of which were stab wounds. There were between twenty-seven and twenty-nine entry wounds. There was penetration of the heart, lungs and liver. One stab wound to the left of the neck penetrated through the common carotid artery, through the back of the oesophagus, the pharynx and the thyroid cartilage and fractured a bone on the right side. All wounds were consistent with having been caused with the broken shaft of a golf club. A piece of metal was embedded in the deceased's skull from one of the stabbings. There were a total of eight fractures to the ribs.

[25] Quite plainly the deceased was subjected to a ferocious and sustained attack.

[26] As Mr Hoare submitted the number of wounds and the evident ferocity of the attack supports the inference that there was a significant loss of self control.

The Questions for the Jury

[27] The learned trial judge suggested to the jury that while it was a matter for them as to how they approached their task they might consider the relevant questions in the order set out in a series of questions that her Honour provided to the members of the jury. After dealing with questions of causation and intention the trial judge then told the jury that the relevant questions were these:

> 3. "Are you satisfied beyond reasonable doubt that Janelle Clark did not engage in provocative conduct?"
>
> a) If yes to Question 3, then Peter Clark is guilty of murder;
>
> b) If no to Question 3, then go to question four.

---

15 AB 321.

4. "Are you satisfied beyond reasonable doubt that the conduct did not in fact cause Peter Clark to lose self-control?"

    a) If yes to Question 4, then Peter Clark is guilty of murder;

    b) If no to Question 4, then go to question 5.

5. "Are you satisfied beyond reasonable doubt that Peter Clark was not acting in a sudden and temporary loss of self-control when he killed Janelle Clark?"

    a) If yes to Question 5, then Peter Clark is guilty of murder;

    b) If no to Question 5, then go to question 6.

6. "Are you satisfied beyond reasonable doubt that the conduct could not have caused an ordinary person to lose control and act as Peter Clark acted with intent to cause death or grievous bodily harm?"

    a) If yes to Question 6, then Peter Clark is guilty of murder;

    b) If no to Question 6, then Peter Clark is guilty of manslaughter.

[28] There is no submission that those questions did not precisely set out the questions that the jury were required to consider and the proper result if they arrived at the answers as shown. As her Honour correctly directed, if the prosecution proved beyond reasonable doubt any one of the four matters that she postulated then the defence was negated.

[29] The learned primary judge was plainly very sceptical of the notion that the evidence could possibly justify an ordinary person acting in the way that the appellant did. However her Honour directed on provocation cognisant, no doubt, of the injunction the trial judges should do so if in the least doubt as to whether the evidence is sufficient: *Van Den Hoek v The Queen* (1986) 161 CLR 158 at 161-162,169.

Submissions on Appeal

[30] The appellant through his counsel submitted that the evidence plainly raised the defence of provocation and that the evidence relied on by the prosecution could not displace the defence - the jury acting reasonably could not have been satisfied to the requisite degree that the defence was negatived.

[31] The prosecution submitted that they had a compelling case capable of negating the defence particularly in relation to the questions numbered 5 and 6 that the trial judge left to the jury.

Discussion

[32] In my view there was evidence that the jury were quite entitled to accept that would have negatived each of the four matters to the required degree. However for present purposes it is necessary only to consider the last of them and the position of the "ordinary person".

[33] The question here put succinctly is whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the claimed provocative acts could not have caused an ordinary person to lose control and act as the defendant acted.[16]

---

[16] As to the test on an appeal under s 668E(1) of the *Criminal Code Act* 1899 see *MFA v The Queen* (2002) 213 CLR 606 at [25]; and as to provocation see *Pollock v The Queen* (2010) 242 CLR 233 at [48] – [54].

[34] In the joint judgment of Brennan, Deane, Dawson and Gaudron JJ in *Masciantonio v The Queen* (1995) 183 CLR 58 at 66-67 their Honours explained the test involved in the concept of the "hypothetical ordinary person" for the purpose of the application of the defence of provocation:

> "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."

[35] It is therefore necessary to identify the provocative acts said to have occurred, consider them in the context of the accused personal attributes, relationships and history and consider the likely affect on a reasonable or "ordinary" person.

[36] The claimed provocative acts consisted of three statements made by the deceased in the context of the deceased going to the bedroom, retrieving luggage, placing the luggage in the children's rooms and telling them to pack their suitcases - all this evidencing a desire to leave the appellant. The statements were, depending on the version preferred, "they don't deserve you", "we all hate you", and, when the appellant first brandished the golf club, "you want to be a big fucking man now".

[37] These statements must be judged in the light of the domestic circumstances. This was a relationship with some volatility, with some separations in the past, but essentially where a husband and wife were sharing a home, raising two children, the family being under some financial strain, and the husband returning home from work to find his wife on the computer. This, I think, is an entirely normal domestic setting.

[38] The breaking of the computer that immediately followed demonstrated that the appellant probably lacks ordinary powers of self control. That is not relevant on this question. But having acted in that way the deceased's announcement that she was leaving the appellant and her taking steps to do so could not conceivably cause an ordinary person to lose their self control and act as the appellant did. If the appellant's conduct represents the conduct of an ordinary person when one partner seeks to leave a relationship at all, let alone after irrationally breaking the family computer, then no-one is safe from extreme violence by their partners.

[39] Finally, I turn to the statements said to have been made. They must be judged in the circumstances I have described and as a whole. None of the statements was particularly provocative. The first "they don't deserve you" and the second "we all hate you" would no doubt annoy and distress a loving father. But without more, they could not possibly lead an ordinary person to attack another, particularly so in circumstances where the attack is on an unarmed person and one who had no history of violent behaviour towards the attacker, let alone with the ferocity shown here. An ordinary person might be given pause to reflect on their own conduct. The third statement, "you want to be a big fucking man now", might be construed as a reflection on the appellant's courage – he was threatening to do a cowardly thing and the deceased told him so. Perhaps she died because of her forthrightness. But if we as a community were to excuse perpetrators of violence set on doing cowardly acts to their unarmed, non-violent partners because the partners accurately identify their attackers' cowardice then we have lost our way.

[40] Whilst it was prudent for the trial judge to leave the issue of provocation for the jury's determination, in my view it would not be open to a reasonable jury, on the evidence I have endeavoured to comprehensively set out above, to find that there was conduct which might be capable of provoking an ordinary person to bash or stab the deceased with a golf club with intent to kill or cause grievous bodily harm.

[41] In my view that is sufficient to dispose of the one ground of appeal.

The Appellant's Complaint

[42] As I have mentioned the appellant was permitted to address the court after Mr Hoare of counsel had made his submissions. The matters that the appellant complained of in his personal address are without substance.

[43] The complaint that the witnesses should not have been called misunderstands the law – the prosecution would have been derelict in their duty not to call the witnesses. There was no objection taken to the calling of the evidence and nor could there have been.

[44] There is no evidence to support the complaints about counsel's conduct. The appellant was represented by counsel of considerable experience. He appears to have conducted this difficult trial competently. There is no suggestion in the record of any concern expressed by the appellant about the way the trial was conducted.

[45] The appellant's complaints about his instructions not being followed go to the evidence of those who had known the appellant and who asserted that he had made comments about a wish to kill the deceased, and how he would kill the deceased, in the years leading up to her death.

[46] There were four such witnesses, one of whom had been the appellant's best man at his wedding, his partner, a former work colleague of the appellant's and a good friend of the deceased. The evidence included statements, said to have been repeated many times, on the occasion of an earlier separation, that the appellant had intended to hire a "hitman" to kill the deceased, had found one, and the cost involved. The evidence of one witness also included a statement that the deceased had determined that he would not "put a hit on her if it happened again" – in context a reference to the deceased leaving the appellant - as "he would just kill her with

a golf club".[17] Another spoke of a statement made by the appellant to the effect that the appellant would kill the deceased if she tried to leave him again.

[47] None of this evidence was challenged directly. That is one complaint. The cross examinations were designed to show any uncertainty that the witnesses may have had about the timing of conversations, any change from prior statements made by the witness, the fact that after the statements were alleged to have been made the deceased and the appellant married, that two of the witnesses to these statements attended their wedding, the state of sobriety of the appellant at the time of making the statements, or the nature of the relationships of the witnesses with the appellant and the deceased to indicate potential bias against him. All this suggests detailed attention to instructions. But it was not put that the witnesses were making up their stories. Nor was it put, as the appellant claimed he had instructed, that the best man and his present partner were biased because of a complaint made by the appellant to the tax office about them.

[48] Having heard the appellant make submissions in this Court, it is difficult to believe that the appellant would have stood by quietly and without protest if his instructions on such basic matters were not being followed.

[49] However there seems to me to be two fundamental points. First there is no evidence led now to support the complaint made. It therefore should be rejected. Secondly, the challenge proposed to the evidence led by the prosecution would not assist in supporting the defence of provocation. The problem with the defence that I have set out above would remain unmet.

[50] The complaint that witnesses were not brought forward suffers from a number of problems. One is that there is no evidence of what the witnesses might have said. Another is that the complaint misunderstands the point of the evidence led in the prosecution case. It is doubtful that such testimony would have had any great relevance in the context of the evidence that was led. A third is that the suggested evidence was presumably readily obtainable and was not advanced.

Conclusion

[51] The appeal should be dismissed.

---

[17] AB 46/55 – evidence of Mr Pawson.