SUPREME COURT OF QUEENSLAND

CITATION:	*R v Teichmann* [2014] QCA 50
PARTIES:	**R** **v** **TEICHMANN, Jamie Rex** (appellant)
FILE NOS:	CA No 114 of 2013 SC No 278 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2014
JUDGES:	Holmes and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the verdict of guilty.** **3. Order a retrial.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant was convicted of murder by a jury – where the appellant contended that the verdict was unreasonable because the evidence of two witnesses as admissions he had made was unreliable – where the jury was properly instructed as to how to approach the evidence, given its deficiencies – whether it was open for the jury to conclude beyond reasonable doubt that the appellant was guilty of murder – whether the verdict was unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN THE COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant was convicted of murder by a jury – where the appellant denied assaulting the deceased – where, on the version of events most favourable to the appellant, there was evidence of a physical attack by the deceased – where defence counsel accepted that provocation was not open – whether the trial judge erred in failing to leave the partial defence of provocation to the jury – whether there was a substantial miscarriage of justice

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

Huynh v The Queen (2013) 87 ALJR 434; (2013) 295 ALR 624; [2013] HCA 6, cited
James v The Queen [2014] HCA 6, followed
Lee Chun-Chuen v The Queen [1963] AC 220, cited
Masciantonio v The Queen (1995) 183 CLR 58; [1995] HCA 67, followed
R v Buttigieg (1993) A Crim R 21; [1993] QCA 214, distinguished
R v Getachew (2012) 248 CLR 22; (2012) 286 ALR 196; [2012] HCA 10, cited
R v Martin [2011] QCA 342, followed
R v Pangilinan [2001] 1 Qd R 56; [1999] QCA 528, cited
Stevens v The Queen (2005) 227 CLR 319; [2005] HCA 65, cited
Stingel v The Queen (1991) 171 CLR 312; [1990] HCA 61, followed
Van Den Hoek (1986) 161 CLR 158; [1986] HCA 76, followed

COUNSEL: E S Wilson QC, with L M Dollar, for the appellant (pro bono)
A W Moynihan QC, with NW Needham, for the respondent

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

[1] **HOLMES JA**: The appellant was convicted by a jury of murdering Michael Manson on or about 8 December 2010. He appeals his conviction on the grounds that the verdict was unreasonable and that the trial judge erred in failing to leave the partial defence of provocation to the jury.

The Crown case

[2] On the evening of 10 December 2010, Mr Manson's body was found in the tray of his utility vehicle parked on a dirt track off Jamieson Road near Atkinson Dam, in the vicinity of the town of Coominya. A forensic pathologist conducted an autopsy on the body, which was in a decomposing state. She found, on internal examination, a large area of subgaleal haemorrhage under the scalp over the left frontal and left parietal regions and, in the brain itself, subdural haemorrhage. Those haemorrhages were likely to have been caused by blunt force trauma involving the application of moderate force to the left side of the head. That blunt force could have been in the form of a kick or punch; in cross-examination the pathologist conceded that it could also have been the result of Mr Manson's having fallen forward and struck an object. Injuries caused in that way (as opposed to a backwards fall) were not often seen, but that mechanism was a possibility.

[3] The pathologist also looked for bruising in the subcutaneous fat of the limbs. She found a deep area of bruising over the knuckles of the fingers of the right hand. The bruises were of a type ordinarily seen when people had engaged in fist fights, although they could also occur when hands were struck against the ground or other

objects. The pathologist was unable to say what the immediate cause of death was: the subdural haemorrhage might have caused a loss of consciousness and positional asphyxia or the deceased man might have bled to death. She found nothing by way of any natural infirmity or other injury which could explain the death.

[4] Mr Manson's death occurred after an altercation between him and the appellant, probably around midnight on 8 December 2010. The two men and others had been drinking at the Coominya Hotel that afternoon. Those others included a woman named Katrina Bush, who was a close friend of Mr Manson, and two friends of the appellant, Andrew Kuiper and Michael Ambrose. The appellant had joined his friends at the hotel at about 5.30 pm. Some of the drinkers, including Michael Manson, went when the hotel closed to Ms Bush's nearby house. After a fight between Ms Bush and another woman, Mr Manson left the house but returned later in response to a telephone call.

[5] The appellant had not been among the group which went from the hotel to the Bush house; he went, instead, with Ambrose and Kuiper to Kuiper's house to watch a boxing match on television. According to Kuiper, the appellant left there at around 9.30 pm. From there, it appears, he went to Ms Bush's home. He had met her once previously, introduced to her by Michael Ambrose. Mr Kuiper gave evidence that at the hotel Ms Bush had expressed an interest in having sex with the appellant, and he, Kuiper, had made some comment to him on the subject. According to Kuiper, the appellant seemed enthusiastic about the prospect.

[6] A witness, Daniel McIvor, described standing at the front of Ms Bush's house with Michael Manson near Manson's car when the appellant arrived. According to Mr McIvor, the appellant said to Manson, "I don't like what you're doing, Mick". Manson responded with a question as to what he was supposed to be doing, to which the appellant replied "You know what you're doing". He turned to leave, but turned and punched Mr Manson before getting into his car and driving away towards Gatton.

[7] Different versions of that incident were given by Ms Bush and her teenage daughter. Ms Bush said that her daughter had rung Mr Manson, who returned to check that she, Ms Bush, was alright. He pulled up his utility in her driveway with the engine running and she spoke to him through the window. He told her, in effect, to calm down and go to bed and he would see her in the morning. At that point, the appellant arrived and said something to Manson through the car window to the effect that he should go home to his wife. He then leaned into the window. Ms Bush said, variously, that the appellant might at that point have hit Mr Manson or simply said "Boo" to him (in a police statement); that "at the time [she] thought he may have punched him" (in evidence-in-chief); and that he did punch him (in cross-examination).

[8] Ms Bush's 14 year old daughter said (in an interview with police tendered under s 93A of the *Evidence Act* 1977) that her mother and Mr Manson were close, but they had no sexual relationship. She described Mr Manson returning to their house as a result of a telephone call. According to her, the appellant arrived about five minutes afterwards. Her mother was leaning into Manson's car, talking to him. On the daughter's account, the appellant had tried to hit Manson through the window of his car. She said that they had started to fight, but she did not identify any other physical acts. The appellant told Mr Manson that he should be at home

with his wife, while Manson responded that it was none of the appellant's business what he and Ms Bush did. He rolled up his window, told Ms Bush he would see her the next day and left in his vehicle.

[9] The Crown case relied heavily on the evidence of the appellant's friend, Andrew Kuiper, as to what happened later that night and on the evidence of another man, Robert McNicol, as to confessions which he said the appellant made to him. According to Mr Kuiper, after the appellant left his house on the night of 8 December, he and Michael Ambrose continued to drink. They later went on to Ambrose's house near Atkinson Dam, arriving around midnight or 12.30 am. At about 2 or 2.30 am, Ambrose received a telephone call from the appellant, who arrived in his vehicle about 20 minutes to half an hour later. (Telephone records, however, show a series of calls, the first between the appellant and Kuiper, and the remaining four between the appellant and Ambrose, at around 20 minutes past midnight.)

[10] Mr Kuiper said that when the appellant arrived at Ambrose's house, he gave Kuiper and Ambrose the following account. He had been to Ms Bush's house. Mr Manson had also arrived and questioned his presence there. The appellant told him he should be at home with his wife and children, and gave both Mr Manson and Mr McIvor what Kuiper described as "a clip"; by which he meant a blow with his fist. The appellant was told to leave and drove away. Mr Manson had followed him in his vehicle. The two had both pulled over and alighted from their cars.

[11] Mr Kuiper recounted what the appellant told him happened next:

> "Mick's turned around and said, 'Jamie, I thought you could hit harder than that', and had a go at Jamie, and Jamie retaliated and beat the crap out of him, stomped all over him.
>
> So, according to the account you heard, Mick Manson said something like, "I thought you could hit harder than that." Is that what you said?-- That's correct.
>
> And what was Jamie's response to that?-- "Here I am, let's go."
>
> HIS HONOUR: So-----?-- He actually said - you know what I mean, like, I wasn't there so I can't actually tell you what Jamie's real response was but, as Jamie said, "Mick said, 'You know, I thought you could hit harder than that.'", so had another go at Jamie, and Jamie give it back to him, if that sounds any better."

The appellant continued by saying that he had "punched the crap out of [Mr Manson] and stomped all over him". He informed Kuiper and Ambrose that he had killed him and suggested that they go to where the corpse was.

[12] The three men travelled in the appellant's car to where he had left Mr Manson. On the way, Kuiper suggested that the appellant had only knocked Mr Manson out and that he would be all right, but the appellant disagreed. They arrived to see Mr Manson lying on his back behind his utility parked on the side of the road. Kuiper looked at the body; he heard the release of gas from it but saw no sign of life. Ambrose and the appellant picked the body up and placed it in the tray of Mr Manson's utility. Ambrose then drove the utility away, with the appellant and Kuiper following in the appellant's car. The appellant pulled up at the corner of Jamieson Road where he and Kuiper saw Ambrose emerging from the bush. They could no longer see the utility. They all drove to Ambrose's house, which was

close by. (On 15 December 2010, police conducting a search of Ambrose's premises found the appellant's shoes, shorts and T-shirt in a feedbag in a shed at the rear of the property. According to the police officer who located them, the clothes were "soaking wet".)

[13] In cross-examination, it was established that Mr Kuiper had been at the hotel on 8 December from about 11.00 am and while there had drunk at least 10 full-strength stubbies of beer, a couple of cans of a mix of bourbon and Coke and a shot of tequila. When he left the hotel with the appellant and Ambrose, he had bought some more beer, of which he drank about six stubbies during the boxing match and another six stubbies when he went to Ambrose's house. He agreed that was a lot for him to consume. He continued to drink over the following days, without sleeping, up until 10 December when the police spoke to him.

[14] Kuiper said that when the police first took a statement from him, he was intoxicated, but by the time of an interview on 12 December, had sobered up. In that interview, he told the police that when he, Ambrose and the appellant arrived to see Mr Manson's body behind his utility, he thought that Manson was simply unconscious. He was breathing and snoring and Kuiper thought that he would be all right; that if they put him in the utility tray he would eventually wake up and drive home. On 13 December 2010, Kuiper said, he had been told (by whom, he did not specify) that he would be better off if he told the truth. He then took part in another interview, in which he said that Mr Manson was evidently dead when he saw him.

[15] Kuiper agreed that in light of his co-operation, a charge of being accessory to murder did not proceed, and, instead, he pleaded guilty to interfering with a corpse. Having given an undertaking to co-operate under s 13A of the *Penalties and Sentences Act* 1992, he received a sentence of six months imprisonment wholly suspended, with the indication that but for his co-operation, the sentencing judge would have imposed a sentence of 12 months imprisonment, suspended after three months.

[16] Mr Kuiper's level of certainty about his evidence wavered somewhat in cross-examination:

> "At no point did Jamie say to you, or for that matter to Mick Ambrose in your presence, that he beat the crap out of Mr Manson. He never said that, did he?-- Yes, he did.
>
> All right. You're able to be certain of this given – or despite the amount of alcohol you had drunk?-- No, I cannot be certain.
>
> No, right?-- No.
>
> He did not say, that is, Jamie did not say that he stomped all over Mr Manson, did he? He never said that?-- I heard Jamie say it. Yes, he did. He did.
>
> I'm putting to you that he didn't say it, and your consumption of alcohol, the amount of consumption of alcohol you had has adversely affected your recollection of events?-- Okay.
>
> Do you accept that?-- Yeah.
>
> ...

> I mean, you were so intoxicated that you couldn't even tell whether Mr Manson was alive or dead, could you?-- No.
>
> No. So the notion that you were certain about it just flies out the window, doesn't it?-- Yes."

[17] The second of the witnesses giving an account of confessional statements, Mr McNicol, said that he had known the appellant "on and off" over some years. At the end of 2010, he had had a number of conversations with the appellant, in the first of which the latter had said that he had a fight over a girl with a man from a hotel. A couple of days later, McNicol and the appellant had been at a hotel together and McNicol asked further questions about the fight. The appellant told him that there had been a minor altercation at a house, but the fight had been broken up. The man who later died had driven off, and was followed by the appellant for some kilometres before both pulled up on the side of the road. The other man had got out of his car and the appellant had walked over to him,

> "and just started laying into him, put a couple on him, punches that is, knocked him down and then proceeded to jump on his head. He then just went into a frenzy and kept jumping on his head, lost it sort of..."

[18] The following day, McNicol said, he was travelling in a car with the appellant when the latter spoke by mobile telephone to a man he referred to as "Mick". He heard the appellant say, "Make sure you do that thing for me. You have to get rid of it." After the call ended he confirmed with the appellant that the person spoken to was their mutual acquaintance, Ambrose. The appellant asked McNicol whether he thought he could trust Ambrose to do the right thing; McNicol reassured him.

[19] In cross-examination, McNicol conceded that he was taking large amounts of morphine for pain management in respect of cancer and other conditions that he was suffering, although he had not been using them at the time he spoke to the appellant in December 2010. At that time he was taking Subutex (buprenorphine), a narcotic used in treatment of heroin dependence. He had suffered strokes in January 2010 and about a year later, both of which had affected his capacity to remember things. McNicol agreed that in written statements to the police made on 21 and 23 December 2010, he had not mentioned the hotel conversation with the appellant, nor hearing the appellant on a mobile phone asking someone to get rid of something. It was only in a statement on 18 January 2011 that he informed them of the hotel conversation. He said that in December 2010, he had told the police everything he could remember, but other matters came back to him later. It was put to him that the claimed conversations with the appellant had not occurred; he maintained that they had.

The defence case

[20] The appellant gave evidence that he had arranged to stay with Mr Ambrose on the night of 8 December 2010. He confirmed that he had arrived at the hotel at about 5.30 pm and later that evening had gone to Kuiper's house to watch the boxing match. He had left there at about 11 or 11.30 pm and gone to Ms Bush's house, where that he expected there would be a party. He had some interest, he said, in meeting again a woman, not Ms Bush, who had been at the hotel. When he arrived, he pulled up in the driveway. He saw in front of him Ms Bush and Mr Manson embracing. Manson asked him to move his car out of the driveway, which he did. He got out of his car and asked whether there was a party and whether the woman

the subject of his interest was still there. She, in fact, had been involved in the altercation earlier with Ms Bush, who was annoyed by mention of her name. Mr Manson asked the appellant what he was doing there and told him to get out.

[21] The appellant explained to Mr Manson that he was not trying to "cut [him] out" but went on to say that he had thought he was a married man. When he said that, Manson became aggressive and came towards him with fists clenched. The appellant responded by pushing him; he did not punch him. At that point, another man (apparently Mr McIvor) came running out. The appellant, saying that he did not want any trouble, got back into his car to drive to Mr Ambrose's house. Unfamiliar with the area, he drove the wrong way. He retraced his path through Coominya and then rang Ambrose, who gave him directions. As he was driving along Atkinson Dam Road (which Ambrose had identified as the correct route) a car came up behind him, flicked its lights at him and then overtook him, the driver sounding its horn as it did so. The vehicle pulled in front of him and then slowed. Both cars pulled over to the side of the road.

[22] When he got out of his vehicle, the appellant saw that the driver of the other car was Mr Manson. Manson, who appeared "pretty drunk", indicated that they should get off the road and move up onto a bank beside the road. The appellant explained to Manson that he had gone to Ms Bush's house to see a woman he was interested in and because he thought there would be a party, and asked what was going on between Ms Bush and Manson. Manson said that they were in a relationship and complained that he was tired of the gossip about it in the small town. The appellant again pointed out that Mr Manson was a married man, which once more produced an aggressive response: Manson began to yell. The appellant at this point had turned to go and walked down the hill. When he had reached the bottom of the bank, Manson said the word "fight". The appellant said he did not want to fight, but Manson, who was at the top of the bank, rushed at him. The appellant jumped aside. Mr Manson fell into a ditch; the appellant heard a thud as his head hit the ground.

[23] The appellant went over to Mr Manson to see that he was lying across the ditch, face-up with his head towards the bitumen of the road. He could hear that he was breathing. The appellant said that he intended to ring the triple 0 emergency number on his mobile phone, but he had no reception. He fetched a bottle of water from his car and washed Mr Manson's face to try and revive him. When that did not work, he placed him on his side and decided to drive on to Ambrose's house. On the way there, he became lost and rang Ambrose from time to time for directions. It took him an hour to find his way to Ambrose's house. When he arrived, he told Ambrose and Kuiper what had happened and asked them to ring an ambulance, but Ambrose suggested that, instead, they should go and look.

[24] When they arrived at Mr Manson's vehicle, Ambrose and Kuiper went ahead of him and, on looking at Manson, began to laugh. They said that Mr Manson was simply asleep and snoring. He explained to them what had happened. He again said that an ambulance should be rung, but Ambrose said that Mr Manson was all right and an ambulance was unnecessary. He would take him home; Manson lived not far from him. Ambrose and Kuiper lifted Mr Manson to put him in the back of the utility. He assisted them in the final stages of the lift by lifting Mr Manson's mid-section.

[25] Ambrose drove away in the utility. The appellant and Kuiper followed him, but lost sight of him. However, when they reached Jamieson Road, Kuiper told the appellant to pull up. He pointed to the direction in which Mr Manson lived, and said that Ambrose would probably walk home that way. After about 10 minutes, Ambrose arrived and said that Manson was fine and that he had taken him home. The appellant denied having said anything to Kuiper or McNicol about having knocked Manson down or jumped on his head.

[26] Under cross-examination, the appellant denied that he had been goaded by Mr Manson, was angry with him, or had assaulted him. He said that during the hour in which he drove around trying to find Ambrose's house, he had not rung triple 0, even when he had reception on his telephone, because he was uncertain where he was. He agreed, however, that on driving away from Mr Manson he had continued west along Atkinson Dam Road, and had first been able to ring Ambrose between five and 10 minutes later. When he returned to Ambrose's house after Ambrose had supposedly taken Mr Manson home, he put on his pyjamas and went to bed. He did not know how his clothes ended up in the feedbag. In the morning, he left with his bag and did not notice that he did not have the clothes with him.

The unreasonable verdict ground

[27] The thrust of the appellant's argument[1] on the "unreasonable verdict" ground was that the critical evidence against him, that of Kuiper and McNicol, was unreliable. Kuiper had received benefits: the reduction of the accessory to murder charge to that of interfering with a corpse, and his reduced sentence. Kuiper had not told the police of the appellant's admissions in either his first statement on 11 December 2010 or his interview on 12 December 2010 and, up until the following day, had maintained that Mr Manson was alive when he saw him. He had been told that it would be better if he told the truth. He had been drinking heavily on 8 December 2010 and conceded that because of his intoxication, he could not be certain as to what the appellant had said, and was unable to tell whether Mr Manson was alive or dead.

[28] As to McNicol, it was pointed out that he was using Subutex (although it was not put to him below that use of the narcotic affected the accuracy of his recall). He had conceded that he had a poor memory and had suffered strokes before and after December 2010, which impaired his capacity to remember things. He had not told police about the appellant's admissions on two occasions in December 2010, and only informed police of them when the information "came back to him" in January 2011. The deficiencies in the evidence of McNicol and Kuiper, it was contended, were such that even allowing for the jury's advantage in seeing the witnesses, this court should conclude that there was a significant possibility an innocent person had been convicted.

Conclusions – unreasonable verdict

[29] There were, it is undoubtedly true, reasons for the jury to approach the evidence of both McNicol and Kuiper with considerable caution, given the limitations accurately identified by the appellant's counsel. But the trial judge gave the jury appropriate directions in that regard, of which no complaint was made. The concessions the two witnesses made as to deficiencies of memory did not

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1 Counsel for the appellant appeared pro bono, legal aid having been refused.

compel rejection of the substance of what they said. Moreover, it was significant for the jury's assessment of how much of their evidence should be accepted that neither account existed in isolation.

[30] The appellant had been seen, on evidence which the jury could accept, to assault Mr Manson earlier in the evening. The jury was entitled to infer that the appellant's conduct after the confrontation on the side of the road - the failure to call triple 0 when his phone had reception, the concealment of his clothing (if they inferred the appellant's involvement in it) - was not that of a man who thought that Mr Manson had fallen down and injured himself. They may also have considered that the finding of Mr Manson's body abandoned in the back of his utility was consistent with a dumping of a body by mutual consent rather than the appellant's claimed understanding that Mr Manson was being taken home. There was no suggestion that Kuiper and McNicol knew each other or in any way colluded; the fact that independent but broadly similar accounts emerged from both sets of the admissions allegedly made by the appellant may also have carried some weight with the jury.

[31] The jury was properly instructed and well placed to evaluate the accounts of Kuiper and McNicol, taking into consideration the deficiencies identified. It was, in my view, entitled to act on the two witnesses' evidence and, having done so, to conclude beyond a reasonable doubt that the appellant was guilty of murder. The verdict was not unreasonable.

The failure to leave provocation to the jury

[32] Defence counsel at trial raised during discussions with the trial judge whether provocation was available on the basis that, on Mr Kuiper's account, Mr Manson had said "I thought you could punch harder than that, Jamie". The trial judge expressed his view that it was doubtful that the statement could amount to provocation or that there could be "jury issues" in respect of the appellant's response. Counsel said that he accepted the judge's intimation and the question was not further discussed.

[33] Here, counsel for the appellant relied not only on the "I thought you could punch harder" statement, but also on the evidence of the appellant that Mr Manson mentioned the word "fight", that he was yelling and aggressive and that he had rushed at him; and Mr Kuiper's evidence that the appellant said Manson "had a go" at him. It was also pointed out that there was evidence of a violent interaction between the appellant and Mr Manson at Ms Bush's house. The jury could, it was contended, have accepted the appellant's evidence that Mr Manson became agitated, spoke of a fight and rushed at him, while rejecting his account of turning away and finding, instead, that he did assault Mr Manson in a loss of control, causing his death. They were entitled to accept different parts of the witnesses' evidence and could also arrive at a view of the case which did not precisely represent what either party said: *Stevens v The Queen*.[2]

[34] McNicol provided evidence of a loss of control: according to him the appellant said that he had gone into a "frenzy" and "lost it sort of" in his attack on Mr Manson. The evidence was sufficient to raise the issue of provocation; the failure to leave it to the jury had resulted in a miscarriage of justice in that the appellant thereby lost the chance, fairly open, of the jury returning a verdict of manslaughter.

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[2] (2005) 227 CLR 319 at 330.

[35] The respondent submitted that the judge's responsibility was to give the jury directions having regard to the real issues in the case.[3] In the present case, the real issue was whether the appellant had assaulted Mr Manson at all. His testimony was that he had not done so; the evidence in the Crown case, as it emerged from McNicol and Kuiper and, to a lesser extent, the evidence of the pathologist as to the deceased man's injuries, was that he had done so. The case was not one where counsel had simply failed to raise the availability of provocation as a partial defence; an experienced defence counsel had actually abandoned the point on the basis that the evidence was insufficient. The trial judge had properly directed the jury on the live questions: whether they were satisfied beyond reasonable doubt of the appellant's having assaulted the deceased with the requisite intent and whether the Crown had negated accident.

[36] As to the evidence relied upon by the appellant, it was noteworthy that in the encounter at Ms Bush's house Mr Manson had done nothing provocative and the appellant had not lost self control. A number of the other points raised by the appellant essentially relied upon a single passage from Mr Kuiper's evidence (set out at [11] above). Nothing in that, it was suggested, actually indicated that Mr Manson had engaged in any assault on the appellant; the words "had a go" could refer to a purely verbal taunt. At the highest, if Mr Manson did throw some sort of punch, it was in response to the appellant's invitation ("let's go") in a consensual fight. In the latter case, Mr Manson's conduct being merely what the appellant had invited, it could not be regarded as provocative.

[37] The appellant's evidence that Mr Manson used the word "fight" and rushed at him was given against a context in which, from his perspective at least, the encounter was a friendly one. There was no evidence that anything said or done to the appellant caused him anger, fear or loss of control; his own evidence was to the contrary. Mr McNicol's evidence of the loss of control could not be relied on for this purpose; he had made it clear that it was after the assault had been commenced and Mr Manson knocked to the ground that the appellant reacted in a frenzy of punches and head stomping.

[38] Nor was there evidence of anything that could cause an ordinary person to lose self-control and act as the appellant did. The case was different from *Van Den Hoek v The Queen*,[4] in which the applicant had given evidence that she was "terrified" and other witnesses spoke of her as "acting hysterically". It was clear from *Stingel v The Queen*[5] and *R v Buttigieg*[6] that the evidence was insufficient to justify leaving the question of provocation to the jury.

[39] Even if the judge erred in not leaving the partial defence, this Court ought to be satisfied beyond reasonable doubt that the appellant assaulted Mr Manson with the requisite intent causing his death, that a reasonable person would have foreseen death as a possible outcome, and that there was no evidence of anything which would cause an ordinary person to lose self control and act as the appellant did. There was, consequently, no substantial miscarriage of justice, so that the proviso under s 668E(1A) ought to be applied.

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3 *The Queen v Getachew* (2012) 286 ALR 196 at 204; *Huynh v The Queen* (2013) 295 ALR 624 at 632.

4 (1986) 161 CLR 158.

5 (1991) 171 CLR 312.

6 (1993) 69 A Crim R 21.

Conclusions – the failure to leave provocation

[40] Section 304 of the *Criminal Code* at the time relevant here (December 2010) provided:

> "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 section had not then been amended by addition of subsections, including one which excluded the provision's application if the provocation were based on words alone, other than in extreme and exceptional circumstances.[7] That amendment, however, reflected the common law.[8]

[41] The essential question for this court (as it was for the trial judge) 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."[9]

[42] If the evidence of provocation in this case had been limited to the comment, "I thought you could punch harder than that", there can be no question but that the trial judge was correct in regarding it as insufficient to raise the partial defence. But defence counsel's submission limited to that comment and the trial judge's resulting assessment appear to have disregarded the version of events most favourable to the appellant, to be found in the balance of Kuiper's accounts and the appellant's own evidence.

[43] As was submitted for the appellant, the jury could accept parts of his evidence and reject others:

> "A jury may reject, as well as an accused's denial of loss of self-control, a part or the whole of his account of events. 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."[10]

In the context of the hostility between the two men earlier on the night in question, the jury might have been prepared to accept as a possibility that Mr Manson had been the aggressor as the appellant described in his evidence, launching himself at him, while rejecting the balance of the appellant's account as to what happened thereafter as self-serving. In combination with that was Mr Kuiper's evidence that the appellant described Mr Manson as having "had a go" at him. The pathologist's evidence that Mr Manson had bruising to his right hand consistent with a fist fight might have been regarded by the jury as giving some substance to the latter evidence.

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7 The provision was amended by the *Criminal Code and Other Legislation Amendment Act* 2011 (Qld) which came into effect on 4 April 2011.

8 *Buttigieg* at 37.

9 *Stingel v The Queen* (1990) 171 CLR 312 at 334.

10 *Lee Chun-Chuen v The Queen* [1963] AC 220 at 233.

[44] The respondent's submission that Mr McNicol's evidence did not establish a relevant loss of self-control was correct to the extent that what was being described there was not a loss of control which led to an initial assault, but a loss of control when the attack was well under way and Mr Manson was already incapacitated. But the fact that the appellant did not give any evidence of a loss of self control as producing his initial response would not preclude the jury from inferring it[11] from (if it were accepted) the evidence of a physical attack by Mr Manson and the appellant's response as described to Kuiper:

> "He punched the crap out of him and stomped all over him."

[45] This was not a case in which the response (if the previously-mentioned findings were made) was so extraordinarily disproportionate that this court could say, as in *Buttigieg*, that no reasonable jury could fail to be satisfied beyond reasonable doubt that the appellant's reaction to the conduct

> "fell below the minimum limits of the range of the powers of self-control which must be attributed to any 'hypothetical ordinary' man".[12]

[46] In contrast with the facts in *Buttegieg*, the relevant conduct here went beyond mere words. The response would appear to have been spontaneous, with no interval of time lapsing so as to diminish the effects of what had occurred. It did not (as in *Stingel*) involve the use of a weapon. In any event,

> "It is the nature and extent – the kind and degree – of the reaction which could be caused in an ordinary person by the provocation which is significant, rather than the duration of the reaction or the precise physical form which that reaction might take. And in considering that matter, the question whether an ordinary person could form an intention to kill or do grievous bodily harm is of greater significance than the question whether an ordinary person could adopt the means adopted by the accused to carry out the intention."[13]

It is possible, in my view, that if they accepted the possibility that Mr Manson had moved to assault the appellant, the jury might have viewed a response of retaliating with intent at least to do grievous bodily harm as within the bounds of behaviour of an ordinary person.

[47] There was a real issue in this case as to whether the jury, instructed on the issue, might not be satisfied that the prosecution had negated provocation. Counsel's decision to disavow the partial defence did not remove the trial judge's responsibility to direct on it.[14] The failure to do so has deprived the appellant of a real chance of acquittal fairly open to him and has thereby occasioned a substantial miscarriage of justice. The proviso cannot be applied.

Orders

I would:

1. Allow the appeal.
2. Set aside the verdict of guilty.
3. Order a retrial.

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11 *Van Den Hoek* at 161; *R v Martin* [2011] QCA 342 at [80]; *Buttigieg* at 27; *Lee Chun-Chuen* at 232 and *R v Pangilinan* [2001] 1 Qd R 56 at 64 (in a different context).

12 *Buttigieg* at 38.

13 *Masciantonio v The Queen* (1995) 183 CLR 58 at 69-70.

14 *James v The Queen* [2014] HCA 6 at [31].

[48] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.

[49] **DAUBNEY J:** I have had the advantage of reading the reasons for judgment, in draft, of Holmes JA.

[50] I agree, for the reasons given by her Honour, that the appellant has not demonstrated that the verdict was unreasonable.

[51] I also respectfully agree with her Honour's conclusions in relation to the failure to direct the jury on the issue of provocation, and wish only to add the following observations.

[52] As Holmes JA has identified, there was some evidence of actions by the deceased from which it is possible that the jury may have reached a view that the deceased committed an act of sudden provocation against the appellant. As her Honour identifies, that evidence was, in particular, the appellant's evidence that the deceased had launched himself at the appellant and Mr Kuiper's evidence that the appellant had given him a version of the confrontation in which the deceased "had a go at" the appellant after saying the words "Jamie, I thought you could hit harder than that". For the reasons identified by her Honour, there was also the possibility of the jury inferring, from the evidence of the nature of the way in which the appellant then assaulted the deceased, that the provocation was such as could cause an ordinary person to lose self-control and act as the appellant did.

[53] In reaching these conclusions, it is appropriate to have regard to *Van Den Hoek v The Queen*[15]. In that case the applicant for special leave to appeal was the wife of the deceased. The applicant and the deceased were separated. The deceased returned to their home, entered the house in an aggressive mood, and told the applicant that he wanted a divorce. When she said she wanted to think about it, the deceased said, "I want it now" and "I'm going to kill you". The deceased then produced a knife and chased her through the house. He cornered her in the bathroom. He came at her with the knife. She backed away, and lashed out at him with her legs and hit him. He slipped and fell down. The applicant's evidence was:

> "He dropped the knife and I was so scared I just bent down, picked the knife and stabbed and ran. I didn't know what happened."

The deceased subsequently died as a consequence of the stabbing.

[54] The trial judge in that case had directed the jury that there was nothing in the evidence to sustain a plea of provocation. An appeal to the Court of Criminal Appeal of Western Australia was dismissed by a majority.

[55] In granting special leave to appeal and allowing the applicant's appeal, the plurality made the following observations[16]:

> "The question that then arises is whether there was evidence which, if believed, might reasonably have led the jury to return a verdict of manslaughter on the ground of provocation. With all respect to the views of the majority of the Court of Criminal Appeal in the present case that question should be answered in the affirmative. The jury were entitled to accept the evidence of the applicant, in its material

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15 (1986) 161 CLR 158.

16 Gibbs CJ, Wilson, Brennan and Deane JJ at 162.

> respects, notwithstanding that on some points there was a conflict between her evidence and other evidence. If they did accept the material parts of her evidence they were entitled to form the view that the conduct of Mr. Van Den Hoek was provocative and that by reason of that provocation the applicant was driven to lose her self-control and in consequence to do the acts that resulted in the death. They might further not unreasonably have concluded that a reasonable (or ordinary) woman might, in consequence of the provocation, be so rendered liable to loss of control as to do what the applicant did and that the applicant's actions were not disproportionate to the provocation. These were all questions for the jury and it is trite to say that in a case of provocation all that the defence need do is to point to material which might induce a reasonable doubt."

[56] In my respectful view, those observations are directly apposite to the present case. The matters identified by Holmes JA were questions which ought properly have been left to the jury.

[57] Accordingly, I join in the orders proposed by Holmes JA.