SUPREME COURT OF QUEENSLAND

CITATION:	*R v Habtu* [2004] QCA 228
PARTIES:	**R** **v** **HABTU, Girmay Gebru** (appellant)
FILE NO/S:	CA No 353 of 2003 SC No 122 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2004
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, Davies and Williams JJA concurring as to the order made, Jerrard JA dissenting
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE EVIDENCE CIRCUMSTANTIAL – where appellant convicted of murder – where Crown did not accept plea of guilty of manslaughter – where appellant raised defences of provocation and self-defence – where both defences relied substantially on acceptance of appellant's evidence – whether it was open to the jury to reject the appellant's evidence *Jones v R* (1997) 191 CLR 439, cited *M v R* (1994) 181 CLR 487, cited *MFA v R* (2002) 193 ALR 184, cited
COUNSEL:	J R Hunter for the appellant P F Rutledge for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of Williams JA and of Jerrard JA. I agree with Williams JA that the appeal must be dismissed for the reasons which he has given. In what follows I gratefully adopt Jerrard JA's statement of the relevant facts, disputed evidence and issues.

[2] There is no doubt that the appellant killed the deceased. The only question in this appeal is whether it was open to the jury to reject the appellant's alternative pleas of self-defence and provocation. Both of these defences relied substantially on acceptance of the appellant's evidence.

[3] As to self-defence the appellant said that when he arrived at the deceased's house he begged the deceased to leave his wife. According to him the deceased then threatened him and attacked him causing him to fall to the ground. The deceased, he said, then left the room returning with a knife and, probably, a machete. Whatever happened next, as to which the appellant claims to have little recollection was, he submits, in self-defence.

[4] The circumstantial evidence is inconsistent with this. There were a large number of extremely serious wounds inflicted by a machete on the deceased. Several of them were sufficient to immediately render him unconscious and to result in his death. Moreover disabling injuries had been inflicted on the deceased's knees rendering him incapable of walking or standing. Plainly these must have been inflicted before the fatal blows so that for some time prior to his death the deceased was substantially disabled. All of this, in my opinion was inconsistent with self-defence. It would have been surprising therefore if the jury had accepted that part of the appellant's evidence from which he submitted he acted in self-defence. The defence of self-defence plainly failed.

[5] The defence of provocation relied on the appellant's evidence that the deceased said to him "I am going to fuck you, too" thereby not only threatening to kill him but also implying, as the appellant had thought, that the deceased was having intercourse with the appellant's wife; and that the deceased attacked him. But the jury were entitled to reject the appellant's evidence in those respects and they plainly did so.

[6] It also relied on a conclusion that a reasonable jury could not have been satisfied beyond reasonable doubt that the appellant took the knife with him to the deceased's flat. Contrary to the conclusion of Jerrard JA, I am of opinion that the jury were entitled to be so satisfied. Ms Mengesha's evidence that the knife came from her flat, which the jury were entitled to accept notwithstanding rejection of her other evidence, and what seems to have been a continuing adulterous relationship between Ms Mengesha and the deceased, which plainly upset the appellant, and the apparent sequence of the injuries inflicted on the deceased - disabling blows to the knees before the fatal blows to the head - entitled the jury, in my view, to infer that the appellant's attack on the deceased was a premeditated one.

[7] In my opinion the jury's verdict, based as it was on the circumstantial evidence and a rejection of the appellant's evidence, was a reasonable one.

[8] **WILLIAMS JA:** The critical evidence with respect to issues raised by this appeal against conviction for murder is fairly comprehensively set out in the reasons for judgment of Jerrard JA. Though I disagree with the conclusion reached by his

Honour I do not consider it necessary to repeat in these reasons much of that material.

[9] By his plea of guilty to manslaughter the appellant admitted unlawfully causing the death of the deceased. The numerous serious injuries sustained by the deceased in the incident evidenced the savagery of the attack. Clearly the blows to the region of the deceased's knees were inflicted with an intent to disable him from effectively resisting the attack. The minor injuries sustained by the appellant in the incident stand in stark contrast.

[10] The case highlights the problems faced by honest witnesses in giving accurate detailed evidence as to times. Clearly in this case the evidence of honest independent witnesses as to the time of the visit by Ms Mengesha to the deceased's unit, and the time of the killing, cannot be reconciled. However, given the evidence of the appellant those inconsistencies are of no consequence. It is clear on all accounts, including the evidence of the appellant, that Ms Mengesha was not present when the events resulting in the death of the deceased occurred. Equally it is clear that she visited the deceased at his unit shortly before he met his death. Whether or not she and the deceased then had sexual intercourse is not critical; it is sufficient to say that there were ample grounds for the appellant believing that there was a sexual relationship between Ms Mengesha and the deceased.

[11] The defences raised at trial were self-defence and provocation. With respect to self-defence, the appellant's case was that he was attacked by the deceased who produced both the knife and the machete, but that his response involved the use of excessive force which had the consequence that he was guilty of manslaughter. The appellant's case on provocation was that he pleaded with the deceased to leave his wife alone but received the reply, "I'll fuck you too." That was said to convey the inference that the deceased had recently had sex with Ms Mengesha. That was followed, on the appellant's case, by the deceased taking hold of the appellant around the neck and threatening him with a knife and then with a machete. All of that, if accepted by the jury, could provide a basis for concluding that as a consequence of that provocation the appellant lost his self-control and viciously attacked the deceased.

[12] Critical to each defence was the appellant's evidence that it was the deceased who initially threatened him with the knife and also a short time later had recourse to the machete. That was essentially a credibility issue for the jury. If the jury rejected that evidence from the appellant, as they were clearly entitled to do, there was no basis for further considering either defence relied on.

[13] As is demonstrated in the reasons of Jerrard JA the jury was clearly entitled on the evidence to reject a defence of self-defence which the learned trial judge in her summing up indicated could result in a verdict of not guilty of either murder or manslaughter.

[14] Ms Mengesha gave evidence that she recognised the knife as coming from her kitchen drawer. In the course of her summing up the learned trial judge told the jury they had to consider "was she telling the truth about that and was she also correct about it." The prosecution relied on that evidence from Ms Mengesha to support the proposition that the appellant armed himself with that knife from the kitchen in the residence he shared with Ms Mengesha before going to the deceased's

unit. If that was so then there was a strong basis on which to draw the inference that the appellant went to the deceased's unit intending to cause him serious harm. One does not know whether or not the jury accepted the evidence from Ms Mengesha that the knife was hers and was in her kitchen drawer until shortly before the incident in question.

[15] It is at this point that I differ from the reasoning of Jerrard JA on the issue of provocation. His Honour quite correctly observed that as the deceased had been a visitor to Ms Mengesha's residence he could have taken the knife at some time back to his unit. Indeed Ms Mengesha could have herself taken it there for some innocent purpose and left it there. It was not a situation where the only conclusion open to the jury was that the knife (if indeed it be one belonging to Ms Mengesha) was available for use in the relevant events because the appellant took it there that morning.

[16] The knife (and indeed the machete) could have been taken to the deceased's unit on the morning in question by the appellant, or both items could already have been present in the deceased's unit when the appellant arrived. If those objects were then in the unit that would provide some support for the appellant's evidence as to the initial attack on him by the deceased amounting to provocation, but the fact that those items were then there is not conclusive of that. The critical question for the jury was whether or not the deceased threatened the appellant with the knife as the latter claimed. If the jury rejected that evidence, and they were clearly entitled to, it was irrelevant who owned the knife and how it came to be available for use at the unit. If that evidence is rejected it matters little whether the appellant took the weapon to the unit or made use of those items which were already there.

[17] It seems clear from the medical evidence that the more serious injuries sustained by the deceased were inflicted by the machete. Even if there was some threat or assault by the deceased with the knife that in no way explains the escalation in the violence by the appellant's use of the machete (wherever it came from) to cause the death of the deceased.

[18] There was no complaint about the summing up on the issues of self-defence and provocation; indeed it could be said that the summing up was extremely fair to the appellant. As already noted the ultimate outcome of the trial depended largely, if not entirely, on whether or not the jury accepted the appellant's evidence that he was threatened by the deceased with the knife. Once that evidence is rejected a verdict of guilty of murder was almost inescapable.

[19] In the circumstances the conviction of murder is not, in my view, unsafe and unsatisfactory; it is clearly a verdict which can be supported by the evidence.

[20] The appeal against conviction should be dismissed.

[21] **JERRARD JA:** On 28 October 2003 Girmay Habtu was convicted by a jury of the murder of Elias-Erfito Nedebo and sentenced to life imprisonment. He was acquitted on a count of having unlawfully assaulted Mariye Mengesha. He has appealed against that conviction, alleging it is unsafe and unsatisfactory and contrary to law. That sole ground of appeal should be understood as alleging pursuant to s 668E of the *Criminal Code* that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to

the evidence.[1] A ground of appeal so expressed requires that this court ask itself whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[2] To answer that question the court must make its own independent assessment of the evidence.

Matters that were common ground

[22] These included the following ones. Mariye Mengesha came to Australia from Ethiopia in 1994 with her two sons Samuel (also referred to as Samson in the evidence) and Solomon. She sponsored Mr Habtu and his daughter Genet as immigrants to Australia; they arrived here on 6 September 1999. Mr Habtu and Ms Mengesha then lived together at 97 Porteus Drive in the Brisbane suburb of Norman Park, with the three children. Solomon was the eldest, then aged about 12. Mr Habtu and Ms Mengesha married on 29 October 1999. On 29 December 1999 she returned to Ethiopia for a holiday, arriving back in this country perhaps two weeks before Mr Nedebo's death.

[23] Ms Mengesha had met Elias Nedebo after her arrival in Australia and had visited him at his unit in number 3/25 Overend Street, Norman Park. Her evidence was that she did this to get assistance from Mr Nedebo in filling out forms. After Mr Habtu's arrival in Australia Mr Nedebo had visited Ms Mengesha at the house at 97 Porteus Drive; but only when Mr Habtu was out.

[24] Ms Mengesha denied in evidence that she had a sexual relationship with Mr Nedebo. Mr Habtu believed that she did, and although he had not met Mr Nedebo until the day of the latter's death, his son Solomon had shown Mr Habtu where Mr Nedebo lived. Ms Mengesha's evidence was that Mr Habtu had questioned her frequently about whether she had a boyfriend, after his arrival in Australia, and that on two occasions prior to her return to Ethiopia for that holiday Mr Habtu had followed her when she left their home. On one occasion she had gone to the Post Office and on another she had gone shopping and on both she had noticed his unexplained presence, apparently watching her.

[25] On 1 March 2000 Mr Habtu unlawfully killed Mr Nedebo in Mr Nedebo's unit at 25 Overend Street.[3] Ms Mengesha had gone there by car that morning and before Mr Nedebo's death. Mr Habtu had gone to it independently and arrived there after she did. The time of her arrival and departure was not made entirely clear by the evidence, nor how long she stayed there.

[26] Continuing with the evidence that was unchallenged or common ground, a machete and knife were used as weapons to kill Mr Nedebo, whose body bore many injuries. The forensic pathologist called by the Director of Public Prosecutions identified 19 separate wounds to the head and neck area of the body. He numbered those for the purposes of assessment and description; and his evidence with respect to wound number one, for example, was that it was an oblique linear laceration 16 cm in length extending from the left side of the forehead posteriorly, gaping at its mid

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1 See *MFA v R* (2002) 193 ALR 184 at 195, referring to *Gipp v R* (1998) 194 CLR 106 at 147-50 [120]-[127]

2 This test was established in *M v R* (1994) 181 CLR 487 at 493, and affirmed as the appropriate test in *Jones v R* (1997) 191 CLR 439 and in *MFA v R* at [25] and [59]

3 Mr Habtu pleaded guilty to the manslaughter of Mr Nedebo at the start of the trial but the Crown did not accept that plea in discharge of the indictment (AR 3)

point to about 25 mm, with brain tissue and bone fragments identified in the base of the wound. That is, it penetrated right through the skull and quite deeply into the brain. He opined that somewhere between moderate and severe force would be needed to cause that injury, that it was consistent with being caused by the blade of the machete, and there was a very strong likelihood that that blow of itself would have caused death.

[27] He identified the other extensive wounds numbered by him two, three and four as each likely to have been caused by the machete and each likely or sufficient to have caused death. Those wounds also overlay areas of multiple skull fracture. Wound six also lay over fractured underlying bone, and was consistent with being caused by the machete; and wound nine, a laceration over a deeply fractured right jaw, was likewise consistent with cause by the machete. He considered the wound numbered 10 consistent with being caused by the machete; wound number 13 likewise, and sufficient by itself to have caused death. It also lay over a skull fracture.

[28] The other wounds were consistent with having been caused either by the knife or machete, and wound 14, a ragged laceration to the throat, was also sufficient of itself to cause death. All wounds would have required force for their infliction. In addition to those head and neck wounds Mr Nedebo had suffered an oval stab wound to his chest, causing a collapse of the left lung inside the chest cavity, and that was consistent with being caused by either the machete or knife. Additionally, both knees had severe wounds to them consistent with being caused by either weapon, requiring moderate force to inflict them, and the injury to each knee would have had the potential when inflicted to knock Mr Nedebo off his feet. The right knee had two horizontal lacerations of which the upper was approximately five cm in length, gaping to two centimetres wide, and the lower was 55 mm long. The left knee had a transverse laceration five cm long, gaping to three cm wide.

[29] Mr Habtu was examined on 1 March 2000 at 4.15 p.m. and he had some small abrasions to both thumbs, the right middle finger, some swelling with three small scratch marks on the right forearm, tenderness of the left lower ribs, a tender swelling on the outside of the left ankle, and vertical scratches just below both the left and right jaw line. His injuries were very minor.

[30] Mr Nedebo's body was naked when found at the unit by his brother Yigezu Ergeto at around 11.00 a.m. that morning. Mr Habtu had left his own blood stained clothes in the unit and had put on a shirt and trousers (not shown to be blood stained) belonging to Mr Nedebo, and Mr Habtu wore those home from Overend Street to Porteus Drive. Ms Mengesha's evidence was that those were the clothes Mr Nedebo was wearing when she had arrived at his unit earlier that day. It appears he later removed them, possibly after her visit.[4] After Mr Habtu's return to his home from the unit he was heard arguing with Ms Mengesha and she fled from the house into the street, asking for help. A neighbour's evidence was that Ms Mengesha said that her husband had killed someone and was going to kill her. Mr Habtu told the neighbour Ms Mengesha was "crazy" and walked off. He was subsequently apprehended by police later that day.

[31] Mr Nedebo's brother swore that Mr Nedebo did not own or possess a machete, and Ms Mengesha's evidence was that there was no machete in their home. She swore

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[4] The DPP made an admission of fact that there was a "large strong seminal stain" on the bottom sheet of the bed in the unit, with Mr Nedebo's DNA profile

that she recognised the broken knife recovered from Mr Nedebo's unit by the police, and clearly used in the commission of the killing, as one she had bought second hand and which had been in her kitchen prior to the murder, but which had been missing from it since then. The knife found in the unit had its blade broken, and both Mr Nedebo and Mr Habtu's blood was located on the handle and what remained of the blade. There was no blood on the broken blade. The machete had Mr Nedebo's blood on its blade and the blood of both men on its handle.

Matters unclear or disputed

[32] The evidence which is unclear, challenged, or confusing includes some given by Ms Mengesha and some about her own movements. She said that she had been at Mr Nedebo's unit on 1 March 2000 for about six or seven minutes, and that she had gone there to get help from him with a form. She said he had told her that he felt a little bit sick and could not help her that day, and she thought she left his unit at maybe 8.45 a.m. that morning. She was not sure.[5] Evidence from other witnesses suggested she was there much longer. Evidence of a Ms Kerrie Boynton was that a female apparently answering Ms Mengesha's general description had arrived at the units and gone to Mr Nedebo's at 7.45 a.m. that day. Ms Boynton had seen that woman visit before. A Mavis Bailey saw Ms Mengesha leaving that unit, at a time Ms Bailey fixed at close to 9.30 a.m. It is clear the woman Ms Bailey saw leaving was Ms Mengesha; both women described their meeting at Mr Nedebo's front door, and both described how Ms Bailey restrained her dog from barking at Ms Mengesha. Ms Bailey had seen that same person (who must have been Ms Mengesha) visiting that unit many times, sometimes with two young boys and sometimes at night. On 1 March 2000 she not only saw Ms Mengesha at the unit doorway but also noticed her very soon after that, sitting in her car outside the unit and on the opposite side of the road. If those estimates of time are correct then Ms Mengesha was at the unit for about an hour and three quarters.

[33] During the period covered by those estimates other witnesses heard noises coming from Mr Nedebo's unit. The occupant of Unit 6, a Jerry Tuma, heard screaming and shouting at around 9.00 a.m. that day[6] (plus or minus 10 minutes), and that accords with evidence from a witness Hayley Taylor who was living directly behind those townhouses. A large deck on her home faced the back of unit number 3. Ms Taylor arrived at her home at a time she fixed at 8.40 a.m. and heard what she described as grunting and groaning sounds, very loud, coming from Unit 3. She thought that it was "two people having sex." One voice was that of a male.[7] It grew quieter, then she heard what appeared to be furniture being thrown around, followed by noises now more resembling groaning and moaning than grunting. This was around 9.00 a.m.[8] She again heard the noise of things being thrown around and at about 9.10 a.m. told her husband that she thought something was happening next door. The groaning sounds she heard were a mixture of what she said was "grunting, groaning and wailing and sobbing."[9] She also heard a sound which resembled to her a chair hitting an object.

Mr Habtu's case

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5 At AR 64
6 Described at AR 31 and 32
7 At AR 107
8 At AR 108
9 At AR 109

[34] That last item of evidence is relevant in that some of the injuries to Mr Nedebo's body included marks consistent with a chair located in his unit having been pressed down on his torso, perhaps when another person was sitting on it. If all those estimates of times, and descriptions of what was heard, are accurate, then it is possible that Hayley Taylor heard Mr Nedebo being killed and that Ms Mengesha was present. Nothing like that at all was suggested to Ms Mengesha in cross-examination or described by Mr Habtu in his own case. His evidence, denied by Ms Mengesha on this point, was that he had gone to Mr Nedebo's unit that morning and had seen Ms Mengesha near it but not in her car. He asked her to stay, saying "we will go together"[10]; but she "has gone her own way to her car", and Mr Habtu then proceeded to the unit alone.

[35] He described his reasons for going there at all as being to plead, with the man he knew lived there, for that man to stop seeing Ms Mengesha, Mr Habtu's wife.[11] He had never met Mr Nedebo but knew of his relationship with Ms Mengesha, because his son Solomon had pointed out the unit and had told Mr Habtu that Ms Mengesha "has got a husband"[12] who lived there. Mr Habtu's evidence was that learning that information had made him sad; it accorded with his description of his life after arriving in Australia. His evidence was that he has had no education in his life, and believes he is about 40 years old. He had married Ms Mengesha in Khartoum, in the presence of witnesses who included her elder brother. At that time Solomon, their son, was a baby and their daughter Genet was born after that. His wife had wanted in later years to leave where they were living in Sudan and come to Australia, which she did in 1994, and she sent him money from there. He kept in contact by telephone calls. When he finally arrived in this country and went with her to the home in Norman Park they slept in separate rooms and, as he described it, "I came to know that she has got a husband and my decision was to kill myself."[13] He then learnt from Solomon where the man lived.

[36] On 1 March 2000 itself he had left their home to go to work, as he had a job cleaning in the Brisbane City for about one and a half hours. When he returned to their home the youngest child Samson was still there, and that boy told Mr Habtu that Ms Mengesha had "gone to her husband."[14] He then took Samson to school and walked from there to Mr Nedebo's unit, where he saw his wife outside. As already described, she declined to wait there and left in her car.

[37] Mr Habtu's evidence was quite clear about his understanding of his wife's relationship with Mr Nedebo. Her evidence was vaguer. She denied having a sexual relationship with Mr Nedebo and denied having been married to Mr Habtu in Khartoum or anywhere else before they went through a ceremony of marriage in Australia. She also said she did not know if she was Genet's mother. The impression gained from reading her evidence is that in the witness box she was attempting to minimise her relationship with each of Mr Habtu and Mr Nedebo, and it appears appropriate to disbelieve much of the evidence by which she did that.

[38] The jury were clearly not prepared to accept beyond reasonable doubt portions of her account of what happened when Mr Habtu returned to their home after he had

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10 At AR 220
11 At AR 221, 227, 237
12 At AR 218
13 AR 218
14 AR 220

killed Mr Nedebo. Her evidence was that on his return Mr Habtu had told her that "I kill your boyfriend", and told her that he would "finish you", and that he then "holded me on my neck" and offered the choice of knife by which to die.[15] She said that Mr Habtu then threw the knife away, washed himself very carefully, removed and changed his clothes, and then demanded that she give him the necklace she was wearing. She refused and he left the premises. She rang the police and also called Mr Nedebo's brother, and then Mr Habtu abruptly returned to the house. She fled from it, screaming for help; the latter part of that account was certainly confirmed by other witnesses who heard her pleas for help and heard her repeat his confession to having killed someone. However, the jury acquitted Mr Habtu of the count of assaulting her, which on the Crown case consisted of the act of seizing her shoulder accompanied by words threatening to kill her.

[39] Her general lack of credibility as a witness was the central plank in the argument of the appellant's counsel, who submitted that:

- her denials of a sexual relationship with the deceased was plainly untrue;
- her denials of a long term relationship with the appellant were similarly suspect;
- she had been at the deceased's residence for much longer than she was prepared to admit, and could well have still been there when the appellant arrived;
- her description at trial of the assault on her differed from that given on earlier occasions;

and counsel pointed to the fact that the jury had not accepted the description on trial of that assault.

[40] The crucial submission on the appeal was that the jury were not entitled to accept her identification of the knife used in the attack on Mr Nedebo as one which had come from her kitchen. Neither Mr Habtu's trial counsel, nor the different counsel who argued the appeal, suggested that any reason existed for suspecting Ms Mengesha had been present when Mr Nedebo was attacked, or that she had brought the knife there. The Crown case was that if the knife was correctly identified by Ms Mengesha, then clearly Mr Habtu had taken it to the unit with him, and that this fact contradicted Mr Habtu's limited evidence of how the killing occurred and his defences of self defence and provocation.

[41] Mr Habtu's evidence was that he had knocked on Mr Nedebo's door, Mr Nedebo had opened it, and that Mr Habtu knelt down and held Mr Nedebo's legs, begging him to "leave" Mr Habtu's wife. Mr Nedebo, who was wearing only a sarong or a towel, replied "I am going to fuck you, too". Mr Nedebo then grabbed Mr Habtu's neck and Mr Habtu fell down. Then Mr Nedebo went to the bathroom and came back carrying the knife. On Mr Habtu's account, Mr Nedebo also probably obtained the machete at the same time, also from the bathroom. All Mr Habtu could recall after he had seen Mr Nedebo with those weapons was that he had seized the knife blade, and from that moment onwards he could remember nothing of what

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15 At AR 52

occurred.[16] His said his next recollection was of seeing his wife at their home. He denied having taken the knife used in the incident to the unit and having had either a knife or a machete with him. He said he was out of control after Mr Nedebo produced the weapons and that this could have been from fear.[17] His evidence did not explain how his left palm print, found on the unit door, came to be there.

[42] The principal defences put to the jury were of self defence and provocation. The extent of the injuries to Mr Nedebo's body really rule out those being caused in self defence, as the forensic evidence was that quite a number of them would have each been capable of causing near immediate death or loss of consciousness. Moreover the injuries to the right knee caused some deeper damage to the knee joint itself, and those injuries to each knee would have hindered movement by Mr Nedebo. The jury were presented with a picture consistent only with an extremely savage and prolonged attack, in the course of which the victim was substantially incapacitated from any capacity to defend himself or harm another by any movement on his part, and in which he received a number of separate lethal injuries. Mr Habtu was hardly injured at all.

[43] That leaves the issue of provocation. The learned judge gave the jury careful directions sympathetic to Mr Habtu's case and the jury excluded that defence beyond reasonable doubt by their verdict. If it was open to that jury to find that Mr Habtu brought the knife that was used with him then the facts Mr Habtu put forward, from which a defence of provocation might arise, could be excluded. This is because if the jury could accept that Mr Habtu brought the knife, they could also find that he brought the machete. On that critical question the jury were directed that they were entitled to accept part of what a witness said and reject part of it;[18] that if they thought a witness was deliberately misstating something in their evidence then the jury would be very cautious, of course, about accepting the evidence of that witness generally;[19] that it was up to the jury whether it accepted as true and correct Ms Mengesha's evidence that the knife found at the unit was hers; and that it was then a matter for the jury whether its members were satisfied beyond reasonable doubt that Mr Habtu had taken it there.[20] If they so found, then the next question for them to decide was whether that meant beyond reasonable doubt that he did so with any particular intent. They were then reminded of the submission by the Crown that if they were prepared to draw the inference that he took both the machete and knife to the unit then that pointed to Mr Habtu having an intention to use those weapons and to the events not being something that happened unexpectedly, or as a response to any provocation or attack by Mr Nedebo.

[44] These matters were all explained with clarity to the jury, and there is no complaint about any of the directions the learned judge gave. I respectfully consider that it was open to the jury to come to a central finding of fact urged by the Crown at the trial, namely that the knife used in the killing had come from Ms Mengesha's unit. Her identification of that knife was given with confidence[21] and it was not actually challenged in cross examination. That might be explained by the fact that the trial was conducted with the proceeding being interpreted from English into Mr Habtu's

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16 This account is at AR 221-222
17 At AR 233
18 At AR 261
19 At AR 260
20 At AR 299-300
21 At AR 54 and in cross examination at AR 59, 60

Tigrinyan Language, and counsel at the trial did describe having experienced difficulties in having the interpreter available as well as in communicating concepts to Mr Habtu when the interpreter was available. However, counsel did tell the learned judge that he had had enough instructions with which to cross examine.[22]

[45] Both the Crown at the trial, and Mr Habtu's counsel on the appeal, made that identification of the knife, and the attack on that identification, an important part of their respective arguments. There is nevertheless another possibility, consistent with the identification being accurate, and consistent with Mr Habtu's evidence that it was Mr Nedebo who produced that knife. This is the possibility that Mr Nedebo had brought it there himself. After all, he had visited the home at Porteus Drive and after Mr Habtu had arrived in Australia. The possibility that he had taken the knife to his unit at an earlier time was not excluded by any evidence given at the trial, and if he did do that then one very important part in the prosecution argument that there had been a premeditated attack by Mr Habtu simply disappears. This is because I do not consider that it is open to draw the inference beyond reasonable doubt that Mr Habtu brought the machete there if the inference is not also open beyond reasonable doubt that it was Mr Habtu who brought the knife. If the latter inference cannot be drawn then there is simply insufficient evidence as to where and how the machete came to be there.

[46] The directions the learned trial judge gave on provocation were agreed to by both the Crown and the defence. They are at AR 302-305. Those directions describe the provocative acts as the remark Mr Habtu alleged Mr Nedebo made, and Mr Nedebo taking hold of Mr Habtu's neck and then getting a knife. The Crown did not contest at the trial that that evidence fairly raised that defence.

[47] If Mr Nedebo did produce the knife at his unit, it was either in the circumstances Mr Habtu described in evidence or in some other undescribed circumstances; whatever they were, while the evidence as a whole excluded beyond reasonable doubt any defence of self defence it did not so exclude the defence of provocation raised by Mr Habtu. If the jury could not exclude Mr Nedebo's possession of the knife, it could not exclude the other portions of his description of provocative conduct. My conclusion is that upon the whole of the evidence it was not open to the jury to be satisfied beyond reasonable doubt that Mr Habtu was guilty of murder. Since he had attempted to plead guilty to manslaughter, and since the evidence amply supported that conclusion, it was open to them to be satisfied beyond reasonable doubt that he committed that offence.

[48] I would therefore allow the appeal against the conviction for murder and, exercising the powers given by s 668F of the *Criminal Code*, set aside that conviction and substitute a conviction for manslaughter. I would invite the parties to make written submissions as to the appropriate sentence within 21 days of the date of publication of these reasons, or in the alternative remit the matter to the learned trial judge for sentence.

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22 AR 260. This was said by counsel after the Crown case had closed.