SUPREME COURT OF QUEENSLAND

CITATION:	*R v Batt* [2005] QCA 444
PARTIES:	**R** **v** **BATT, Victor Robert** (appellant)
FILE NO/S:	CA No 170 of 2005 SC No 45 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	2 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2005
JUDGES:	McPherson and Keane JJA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – HOMICIDE – MURDER – PROOF AND EVIDENCE – whether the police should have investigated whether the appellant was affected by alcohol at the time of the shooting – whether sufficient evidence to establish that the appellant suffered from epileptic automatism at the time of the shooting – whether the trial judge correctly advised the jury on the burden of proof – whether the trial judge should have left the defence of provocation to the jury *Criminal Code* 1899 (Qld), s 23, s 27, s 28, s 304A *Buttigieg v R* (1993) 69 A Crim R 21, cited
COUNSEL:	The appellant appeared in person M R Byrne for the respondent
SOLICITORS:	The appellant appeared in person Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** At about 8:37 pm on 29 January 2003 the appellant shot his wife Fiona. The .22 bullet entered behind her right ear and she died in hospital two

days later. They had separated some time before and were living apart, she with the four year old daughter of their marriage at a house at Goldsworthy Street, and he in a yacht or ketch at the Breakwater Marina. They had recently sold the former matrimonial home at Bushland Beach and were dividing or had divided the proceeds. Shortly before the shooting, people in the neighbourhood heard sounds of voices raised in argument. One or more of the witnesses said he or she heard a woman's voice saying "Get out", "Don't threaten me with the gun", and "Somebody call the cops", then female voices screaming, and a sound like a cap gun going off, followed by complete silence. The police attended at 8:41 pm and found the appellant and the little girl in the house with the unconscious body of Fiona. He said he had just shot his wife. The firearm, which was fitted with a silencer, was on the dining table. The appellant said he had acquired it to kill snakes at the former residence at Bushland Beach.

[2] At the trial in May 2005 in the Supreme Court, Townsville, the appellant was found guilty of murder and sentenced to imprisonment for life. He was represented by experienced counsel, who raised three matters going to the appellant's intention and his capacity to kill. One was intoxication in terms of s 28 of the Criminal Code. Section 28(3) provides that when an intention to cause a specific result is an element of the offence, intoxication, whether complete or partial, and whether intentional or unintentional, "may be regarded for the purpose of ascertaining whether such intention in fact existed".

[3] The other matters relied on were insanity under s 27 and diminished responsibility under s 304A. Section 27(1) excuses a person from criminal responsibility for an act if he was "in such a state of mental disease or natural mental infirmity" as to deprive him of "capacity to understand what [he] is doing", or of "capacity to control [his] actions", or of "capacity to know that [he] ought not to do the act". Section 304A(1), introduced into the Code in 1961, is concerned with diminished responsibility, and its effect is to reduce the crime of murder to one of manslaughter. It is available if, at a time of doing the act that causes death, the accused is "in such a state of abnormality of mind … as substantially to impair" his capacity to understand what he is doing, or to control his actions, or to know that he ought not to do the act. For present purposes the critical difference between it and s 27(1), is that it is enough if his capacity to do any of those things is "substantially" impaired rather than destroyed altogether.

[4] As regards intoxication, there was evidence at the trial that the appellant had been drinking on the afternoon of the day on which the shooting occurred. From about 3:00 pm, the appellant, who gave evidence at the trial, said that he would have drunk three or four beers spread out over a number of hours while he was at home and doing the washing, and probably another beer before having some wine from a cask in the refrigerator on the yacht. He could not say how much he had drunk that day, but he generally drank a six-pack. He didn't normally drink wine, but he had about half or more of the cask of about 500 to 600 mls. Mr Trevor Bye, who lived on another vessel at the marina, sat with and talked to the appellant for about 15 minutes until 6:15 pm, when he left. The appellant was "all right" at that time, having drunk one or two light beers while Mr Bye was with him. Mr Pett, a close friend of the appellant, received a telephone call from him at about 8:22 pm. To Mr Pett he did not then sound as if he was affected by alcohol. It was only 19 minutes later that the police arrived at the house and the appellant told them he had just shot his wife. He was asked a number of questions there, which were recorded, before

being taken to the police station and interviewed (ex 5). Detective Rahmann said he didn't observe any signs of intoxication. He denied that in the interview the appellant's speech was "very slurred". No blood sample was taken from the appellant and he was not breath-tested. Dr Fisher, who is the Government Medical Officer, examined the appellant at about 2:00 am on 30 January, was not asked if he noticed signs of intoxication at that time. On the evidence, Dr Fama, Psychiatrist, said there was no more than a mild state of intoxication.

[5] It was a matter of complaint by the appellant in his submissions on appeal that the police had not investigated his state of sobriety on that evening. But, unless they had reason to suppose that he might have been affected by alcohol, there was no occasion for them to test him. In any event, no such tests were conducted, and the appellant had no evidence from that source that he was intoxicated at the time of the shooting. The jury might well have concluded from Mr Pett's impression of him during the telephone conversation at 8:22 pm shortly before the shooting that the appellant was not affected by alcohol, or not so affected as to prevent him at 8:37 pm from forming the specific intention of killing his wife or causing her grievous bodily harm. There was no evidence at the trial that ought to have raised a reasonable doubt about that issue.

[6] Turning from s 28 to s 27 and s 304A, there was defence evidence at the trial that the appellant had a history consistent with epilepsy or of epileptic episodes in the past. At the age of 16, he was watching television one night when he "disappeared into the wilderness". He spilt a glass of milk he was holding; he was shaking and he was told his eyes rolled back; he couldn't speak properly. He was taken to a general practitioner, but nothing was prescribed for him. There was another such incident at Mullumbimby a good many years later. Then at age 27, when he was living at Burleigh Heads with his first wife, he collapsed one night banging his head and cutting the top of his eye. He was taken to see a doctor, who prescribed Dilantin, which he took for many years. He said in evidence that, after the incident on 29 January 2003, he felt the same then as he had on those previous occasions. When his first marriage ended, he married his wife Fiona, who in 1988 or 1989 persuaded him to be tested again. An EEG was done at the Townsville General Hospital, which showed no irregularity, and he ceased taking Dilantin.

[7] Dr James, a psychiatrist who examined the appellant in February 2003, was called by the defence at the trial. He said that, apart from grand mal and petit mal, there was a third kind of epilepsy, known as a twilight state, which should be considered in the case of the appellant. It was a condition in which consciousness was changed, so that the subject, while not unconscious, was not fully conscious or in control of his actions. It was sometimes known as epileptic automatism. In the case of the appellant, the first occasion was when he was 16, and the other two were when he was in his mid-twenties. At the time of the trial, the appellant was 59, so that it was some 30 years since he had experienced such an episode. This, Dr James acknowledged, raised a doubt about the initial diagnosis of epilepsy, but did not negate it. Under cross-examination, Dr James agreed that it might be "less than probable" that the appellant was in a twilight state at the time of the shooting. He thought the possibility of it was relatively small: "I would say very small". Without the earlier history of epilepsy, a diagnosis of "twilight state" would not be invited.

[8] In rebuttal, the prosecution called Dr Fama and Dr Allan. Dr Fama said he did not believe there was any reliable evidence to support an opinion that there was a

relevant episode of epilepsy on 29 January 2003. He thought that the earlier diagnosis of epilepsy was presumptive and had not been borne out by later events. Dr Allan considered that, although the three earlier episodes were epileptic, the history showed that the appellant was someone who had grown out of epilepsy. Epilepsy was of possible relevance to the events of 29 January 2003 only because "everything is possible"; but, he said, it was "very improbable".

[9] There is authority in Queensland that a state of epileptic automatism is not something that it falls to the Crown to exclude under s 23(1)(a) of the Code. It is a state of "mental disease" or "natural mental infirmity" within the meaning of those expressions in s 27 and is therefore not within s 23. If raised, the accused carries a burden of proof. See *R v Mursic* [1980] Qd R 482, at 488, citing *R v Foy* [1960] Qd R 225 and *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, at 402-403. The burden of proof falls to be discharged by the accused on the balance of probabilities. In the light of the psychiatric evidence from all three expert witnesses at the appellant trial, that burden was not discharged by the appellant in this case. Not even Dr James was prepared to place at that level the possibility that a state of epileptic automatism was operating when the appellant to shot his wife, or that he was suffering an episode of epilepsy on the evening of 29 January 2003. In relation to diminished responsibility, s 304A(2) imposes the burden of proof on the defence. Section 304A speaks not of mental disease or natural mental infirmity, but of "abnormality of mind", whether arising "from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury". For present purposes, the result in this case on the issue of diminished responsibility is the same as it is for insanity under s 27(1). The psychiatric evidence about the appellant's condition on the night of 29 January 2003 failed to establish on the balance of probabilities that he was suffering from an abnormality of the mind at the time when he shot his wife.

[10] The appellant, who conducted this appeal in person by video link from Townsville, submitted that, in directing the jury, the trial judge had misstated the standard of proof. It is true that his Honour did so at one stage early in the summing up. Having initially told the jury that, in relation to insanity and diminished responsibility, the onus of proof was on the accused and it is "on the balance of probabilities", his Honour went on to say that the question which the jury would have to ask themselves was whether the appellant had satisfied them of insanity or diminished responsibility "beyond a reasonable doubt". This was wrong, and Mr Walters of counsel for the defence immediately interrupted the summing up to point it out. His Honour at once corrected it by saying that the appellant "must establish that it is more probable than not, and if I said otherwise I apologise".

[11] That was said specifically with respect to insanity. In relation to diminished responsibility, he said that the onus was on the appellant to satisfy the jury on the balance of probabilities; and "if I said anything else before please disregard it". Having said that, however, his Honour proceeded:

> "If he has not satisfied you of that beyond a reasonable doubt, your verdict is guilty of murder. If he has satisfied you of that on the balance of probabilities – I hope I did not slip up again – if he has satisfied you of that on the balance of probabilities your verdict is one of manslaughter"

He then repeated that, in coming to consider diminished responsibility, the appellant had the onus of establishing it "on the balance of probabilities". If he has done so, his Honour said, "he is guilty of manslaughter; if he has not done so, he is guilty of murder".

[12] The appellant complained to the Court that these differing statements might have confused the members of the jury. However, his Honour was not asked to discharge the jury, and the summing up proceeded. Later, after they had retired to consider their verdict, they returned and asked for a redirection on the meaning of insanity. The redirection was given using the language of the Code in s 27(1) covering "natural mental infirmity" and the form or forms of incapacity which for this purpose it was required to induce; that is, the capacity to understand what the accused was doing, or his capacity to control his actions. His Honour related this to the explicit evidence at the trial about the epileptic automatism or twilight state, and took the opportunity of repeating more than once that the jury would have to be satisfied that it "was more probable than not" that the appellant had that condition, and that it deprived him of one of those capacities.

[13] Some hours later the jury returned and asked for a redirection on diminished responsibility. In the course of giving it, his Honour read the provisions of s 304A(1), and then said that it required the jury to be satisfied of two things. The first was that the appellant was in a state of abnormality of mind, whether because of inherent cause or caused by disease or injury. These terms were explained to them; and his Honour then proceeded to add that the jury would also have to be satisfied that it was "more probable than not" that the condition impaired one of the relevant capacities. He said that, in contrast to insanity, the question was not whether the capacity was destroyed, but whether it had been substantially impaired, meaning by this "more than a slight impairment". In what followed in the course of this redirection his Honour again stated that the jury would have to be satisfied "on the balance of probabilities" that the appellant had such a condition and that it substantially impaired one or other or both of those capacities.

[14] I find it difficult to accept that, having at an early stage erred in saying that the standard of proof was beyond a reasonable doubt, his Honour did not remove any confusion by repeating in the directions and redirections that the jury needed to be satisfied by the appellant on the balance of probabilities of either insanity or diminished responsibility. In my view, what he did was more than sufficient to remove any confusion and it is not possible to imagine anything else that could have been done. Ground 2 in the notice of appeal, which was evidently drawn by counsel, was that the judge had erred when directing the jury on diminished responsibility. No particulars are given and the appellant provided no written outline or oral submissions in support of the ground on appeal, Mr Byrne for the Crown suggested that ground 2 might refer to a late request by defence counsel at the trial for a further redirection on the relationship between diminished responsibility and the evidence of intoxication; but there is nothing in the jury's written request to suggest this was so. In any event, although in examination in chief Dr James was prepared to entertain the suggestion that alcohol might trigger an epileptic episode in someone who had a predisposition to it, the hypothesis fell down at the point of evidence that the appellant on the night in question had been suffering from some form of epilepsy. In cross-examination, Dr James said that his opinion about twilight states was independent of alcohol. Alcohol consumption might, he thought, have contributed to the formulation of a twilight state; but this assumed that the

appellant was suffering from epilepsy in January 2003, as to which Dr James's own opinion was in the end that the possibility of it was "very small". In my view, ground 2 cannot succeed.

[15] Ground 1 in the notice of appeal is that the trial judge was wrong in failing to allow the jury to consider the defence of provocation in the case of the appellant. Provocation was raised by Mr Walters at the conclusion of the evidence and addresses and before the summing up began. After hearing argument his Honour ruled that, on the evidence before him, the issue of provocation was not open for the jury's consideration. On the evidence there were several matters that were upsetting the appellant shortly before the time of the killing. The marriage break-up had occurred several months before, in about late 2002. After 15 years of marriage, the appellant was perplexed when his wife told him that she did not love him any more and that he should go. They agreed to sell the Bushland Beach house and to split the proceeds apparently in the proportion 45 to 55%. He moved into the boat at the marina and she and the child went to live at the house in Goldsworthy Street. They agreed that he should have access to their daughter, to whom he was devoted, and he agreed to pay maintenance for her. He was employed for only a small weekly wage and was finding it difficult to make ends meet. He said he was able to pay his debts; but, at the time, he was receiving demands from Centrelink for maintenance payments and on the day in question he also received a letter from his solicitors.

[16] The letter was not put in evidence and it is possible to ascertain its contents only from what the appellant and others said about it. So far as he was concerned, the critical feature of the letter was that the solicitors were requiring payment of $655 for their services in relation to the separation arrangements and it may be the sale of the house at Bushland Beach. At the time he spoke to Mr Bye in the late afternoon, he had not opened the letter and was apprehensive about doing so. When the appellant spoke to his friend Mr Pett at 8:22 pm, he knew of the solicitors' demand and said he did not know what to do about it. In the meantime, he had telephoned his wife and discussed paying the solicitors; but she, he said, had hung up on him. Telephone records produced at the trial showed seven calls from his number to hers between 7:23 pm and 7:54 pm. The first three lasted for about 2 ½ minutes each, the fourth for about 14 ½ minutes. The remaining calls are recorded as not having been answered by her. The last was recorded at 7:54 pm. It may have been these last three calls in which he said she hung up on him.

[17] In the meantime, Fiona had been speaking to Mr Gageler in Sydney. I say "in the meantime" with some hesitation because Mr Gageler, who was the child's godfather, said it would have been about 8:45 pm in Sydney under the daylight saving regime there. This would have made it 7:45 pm in Queensland. The police arrived at the house in Goldsworthy Street at 8:41 pm and found Fiona unconscious from the shot. Mr Gageler said that, while she was speaking to him, she suddenly said "I've got to go" and screamed and the phone went dead. He tried to call her back several times, but the phone just rang out. A witness from Telstra said that a triple 0 emergency call was received at 8:37.07 pm. It seems likely that Mr Gageler, who first spoke to Fiona and then to his goddaughter about her recent birthday, telephoned at about 7:45 pm EST and was again speaking to Fiona when the shot was fired. She had told him that the appellant had spoken to her about the letter from Centrelink and the demand for $655 from the solicitors, and that the appellant was upset and thought she should be paying that amount, which she had refused to

do. Mr Gageler told Fiona to grab the little girl and leave the house. The conversation was interrupted by what may have been the firing of the shot.

[18] It may have been while Fiona was speaking to Mr Gageler that the appellant had his telephone conversation to his friend Mr Pett, who fixed it at roughly 8:22 pm. It was the time that showed up on his mobile phone. The appellant told Mr Pett about the child support letters and the solicitors' demand, and said "I'm f___d. What am I going to do?" Then, right at the end of the conversation, he said "I'm going to shoot the bitch", to which Mr Pett responded "Don't do that. You've got too much to lose". The conversation ended there, with the appellant saying "See you later".

[19] The appellant was calling from his mobile telephone and may at the time in fact have been driving his car to Goldsworthy Street. Dr James said this showed he was not "that intoxicated". At the boat at the marina, the appellant had retrieved the .22 calibre pistol from where it was hidden down the back of a couch. When discovered after the shooting, it was loaded with five rounds. There was forensic evidence that it could not be fired without first cocking it, and tests showed it was not prone to being discharged accidentally. The appellant arrived at the house and went inside. Consistently with his claim to have been suffering an epileptic twilight, he could recall nothing about the encounter with his wife until after he had shot her. The first thing he remembered was turning to pick up his daughter afterwards.

[20] The result was that there was no direct evidence of anything capable of amounting to provocation at the time of the shooting. His Honour was correct in declining to allow that issue to be put. The rule is that even slight evidence of provocation should be left to the jury; but it is for the trial judge to decide whether as a matter of law there is any such evidence fit for consideration: see *Stingel v The Queen* (1990) 171 CLR 312, 333-334. In considering provocation for the purpose of s 304 of the Code, the Court of Appeal in *Buttigieg* (1993) 69 A Crim R 21 considered many of the observations in the authorities. In the end, the Court concluded (69 A Crim R 21, at 37) that "it seems now to be accepted that the use of words alone, no matter [how] insulting or upsetting, is not regarded as creating a sufficient foundation for this defence to apply to a killing, except perhaps in 'circumstances of a most extreme and exceptional character' ". The most that could be said here is that the appellant was frustrated by his wife's refusal to pay the solicitors' demand, and decided to solve his problems by shooting her. This accords with the appellant's statement to the police soon after the event, in which he said:

> "What instigated this was I got a letter from the solicitor – my solicitor which I had to go to – which was going to come out the estate, right, over $655. Not that the money means diddly squat okay, but she refused to go for it… and she's hung up on me about three times, so then I got cranky".

[21] Even if the appellant was correct in thinking that his wife had hung up on him, it could not amount in law to provocation for killing her. Under s 304, "the act which causes death" must be done "in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool". Even allowing in this context for possible personal idiosyncrasies, there was nothing in the evidence capable of amounting to sudden provocation, and nothing that showed "passion" on the appellant's part at the time he spoke to Mr Pett at 8:22 pm, or at any time thereafter through to when he shot his wife. On the contrary, his telephone conversation with Mr Pett suggests he took a deliberate decision to kill her; and his

actions in finding the pistol and driving to her house and cocking the firearm showed a fixed determination to do so, from which Mr Pett's advice failed to deflect him. The learned judge was correct in concluding that the evidence, such as it was, of what happened before or at the house was not capable in law of amounting to provocation. It fell a good deal short of what was rejected as provocation in *Stingel v The Queen* (1990) 171 CLR 312, at 336–337.

[22] I would dismiss the appeal against conviction.

[23] **KEANE JA:** I agree with the reasons for judgment of McPherson JA and with the order proposed by his Honour.

[24] **MACKENZIE J**: I agree with McPherson JA's reasons for dismissing the appeal and with the order proposed.