SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thompson* [2019] QCA 29
PARTIES:	**R** **v** **THOMPSON, Kyle Robert** (appellant)
FILE NO/S:	CA No 94 of 2018 SC No 100 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Townsville – Date of Conviction: 19 March 2018 (North J)
DELIVERED ON:	26 February 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2019
JUDGES:	Holmes CJ and Philippides and McMurdo JJA
ORDERS:	**1. Allow the appeal.** **2. Quash the appellant's conviction.** **3. The appellant be re-tried.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST CONVICTION – APPLICATION OF PROVISO – where appellant convicted of murder – where appellant submitted at trial that the killing was the result of sudden provocation in the form of an unwanted sexual advance – where s 304 *Criminal Code* (Qld) as amended by the *Criminal Law Amendment Act* 2017 (Qld) did not apply – where the primary judge erred by misdirecting the jury to apply s 304 *Criminal Code* (Qld) as amended by the *Criminal Law Amendment Act* 2017 (Qld) – whether 'no substantial miscarriage of justice has actually occurred' – whether there was a substantial miscarriage of justice whether or not, in the Court's view, the appellant was guilty of the offence of which he was convicted – whether operation of the proviso precluded CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – MISDIRECTION – where appellant convicted of murder – where appellant submitted at trial that the killing was the

result of sudden provocation in the form of an unwanted sexual advance – where s 304 *Criminal Code* (Qld) as amended by the *Criminal Law Amendment Act* 2017 (Qld) did not apply – where the primary judge erred by misdirecting the jury to apply s 304 *Criminal Code* (Qld) as amended by the *Criminal Law Amendment Act* 2017 (Qld) – whether 'no substantial miscarriage of justice has actually occurred' – whether there was a substantial miscarriage of justice whether or not, in the Court's view, the appellant was guilty of the offence of which he was convicted – whether it was open for the jury to not consider the questions to be answered under s 304 *Criminal Code* (Qld) because they concluded that a distinct question should be answered in the negative

Criminal Code (Qld), s 304, s 668E(1A)
Criminal Law Amendment Act 2017 (Qld), s 12

Baiada Poultry Pty Ltd v The Queen (2012) 246 CLR 92; [2012] HCA 14, followed
Kalbasi v Western Australia (2018) 92 ALJR 305; (2018) 352 ALR 1; [2018] HCA 7, followed
Lane v The Queen (2018) 92 ALJR 689; (2018) 357 ALR 1; [2018] HCA 28, followed
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, followed

COUNSEL: L K Crowley QC for the appellant
C W Heaton QC for the respondent

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

[1] **HOLMES CJ:** I agree with the reasons of McMurdo JA and with the orders his Honour proposes.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by McMurdo JA and his Honour's reasons for allowing the appeal. Unfortunately, in the present case, the applicable Benchbook direction concerning the defence of provocation under s 304 of the *Criminal Code* (Qld) was not followed. Had it been, a misdirection would have been avoided. The misdirection undoubtedly caused a substantial miscarriage of justice in that there was a real prospect that the jury did not give proper consideration to that defence. To exercise the proviso in such circumstances would result in this Court impermissibly usurping the role of the jury.

[3] **McMURDO JA:** The appellant was charged with the murder of Mr David Knyvett on or about 15 November 2015, at Mr Knyvett's house in Townsville. At the trial, it was uncontested that the appellant killed Mr Knyvett by striking him several times on the head with a bottle. The principal issues for the jury were whether the appellant did so with the intention of killing Mr Knyvett or causing him grievous bodily harm, and if so, whether he acted in response to a sudden provocation such that he would be guilty of manslaughter only, by the operation of s 304 of the

Criminal Code (Qld) (the "Code"). After a four day trial, the jury found the appellant guilty of murder.

[4] He appeals against that conviction upon one ground, namely that the trial judge misdirected the jury on the law of provocation. The judge instructed the jury that the partial defence of provocation was not available, in a case such as this where the provocation was based on an unwanted sexual advance by the deceased, other than in circumstances of an exceptional character. His Honour was there describing the effect of sub-sections (4) and (8) of s 304. But those provisions did not apply to this case because they were enacted only in 2017 and, as is common ground, they had no application to an offence committed in 2015. Unfortunately this was overlooked by the trial judge and counsel at the trial.

[5] In this Court, the prosecution accepts that the jury was misdirected on provocation, with the effect that the appellant was required to prove that there were circumstances of an exceptional character as well as that he killed Mr Knyvett as a result of sudden provocation in the terms of s 304(1). However it is submitted that the conviction should stand, by the operation of the proviso in s 668E(1A) of the Code. That section requires the prosecution to persuade this Court that "no substantial miscarriage of justice has actually occurred." The prosecution argues that upon this Court's own independent assessment of the evidence, the Court would be persuaded that the evidence admitted at the trial proved the appellant's guilt of the offence of murder.

[6] For the appellant, it is argued that the proviso cannot be applied for two reasons. The first is that the Court should not be persuaded that the evidence proved the appellant's guilt of murder. Unless this Court is persuaded of the appellant's guilt, it cannot be said that no substantial miscarriage of justice has actually occurred, as the High Court held in *Weiss v The Queen* ("*Weiss*").[1] The second is that this is one of those cases where there has been a substantial miscarriage of justice whether or not, in this Court's view, the appellant was guilty of the offence of which he was convicted. For the reasons that follow, the appellant's second argument should be accepted, the appeal should be allowed, and a re-trial should be ordered.

The evidence at the trial

[7] The appellant and Mr Knyvett had known each other for about 10 years. The appellant was born in 1988 and Mr Knyvett was born in 1956. At times over that 10 year period, the appellant had lived in Mr Knyvett's house and the appellant had worked for him in his business. The prosecution case was that the appellant murdered Mr Knyvett after the pair had fallen out and the appellant had been asked to move out of the house.

[8] A friend of Mr Knyvett testified that on 13 November 2015, Mr Knyvett told him that he had discovered that the appellant had driven Mr Knyvett's car without his permission and had caused some damage to it, Mr Knyvett had confronted the appellant and told him "to be gone by the end of the day", and, on the following day, he had received a call from the appellant complaining that he had no money and no place to live.

---

1 [2005] HCA 81; (2005) 224 CLR 300 at 317 [44].

[9] A forensic pathologist gave unchallenged evidence that the ultimate cause of death was inhalation of blood caused by a head injury, and in particular by a crushed and flattened nose. The appellant did not dispute that he had beaten Mr Knyvett with an empty bottle and that this had caused Mr Knyvett's death.

[10] The appellant did not give or call evidence at the trial, but his version of events was contained in the record of his interview by police, which was played to the jury. On the day in question, the appellant was at Mr Knyvett's house and helping him to do some work there. The appellant said that as he bent over to pick up a tool, Mr Knyvett rubbed him on "the bum". He told police that this conduct was not unprecedented and that over the years Mr Knyvett had touched him and rubbed him many times. The appellant said that he had been sexually abused by Mr Knyvett, who had been infatuated with him.

[11] The appellant told police that when he was touched on the day in question, he felt angry and violated. He immediately left the house but then returned, approached Mr Knyvett in the kitchen, and hit him with the bottle, at least twice. He described a struggle after the first hit, but before the second hit, which caused Mr Knyvett to fall to the ground. As the appellant admitted to police, he then taped Mr Knyvett's hands with duct tape and dragged him to the bathroom, where he also taped Mr Knyvett's legs. He admitted that he then drove away in Mr Knyvett's utility, before returning to the house that night with his brother to collect some clothes, tools and a television. He and his brother then drove away in Mr Knyvett's other car.

[12] The appellant described his state of mind, at the time of the assault on Mr Knyvett, as follows:

> "I was just intending to … tell him that you ruined my life, I wasn't planning on killing him [and] that was the last thing I wanted to [do] just hurt him but I mean hitting someone …
>
> I didn't expect him to die, I just wanted to hurt him like hurt you know he's hurt me … and … I put him in the recovery position[.] I didn't want him to die[.] I didn't think he would die …"

The appellant said Mr Knyvett was breathing and talking after he had hit him with the bottle and was still conscious and breathing when, later that night, he returned to the house.

[13] As I have said, the appellant left the house after the alleged act of provocation. Before he returned to assault Mr Knyvett, the appellant went to a neighbouring house and told someone there that he and Mr Knyvett were "talking again [and] … sorting things out" after which the appellant had a beer before returning to Mr Knyvett's house, where he picked up the empty bottle. He estimated that there was "a good half an hour [or] 45 minutes" which passed "before I … decided to … hit him". During this period away from the house, the appellant also changed his clothes with the intention, the prosecution argued, of giving an impression that he was going out rather than returning to the house.

The directions to the jury

[14] After the appellant had elected not to give or call evidence, in the absence of the jury, the judge discussed with counsel some issues for the summing-up. One of them was provocation and his Honour immediately referred to sub-section (4),

observing that, on the version given in the record of interview, there had been an unwanted sexual advance. The prosecutor and defence counsel agreed. His Honour suggested that there was no evidence of any history of violence between the two men but there was some evidence of prior sexual conduct which would be relevant for the proof of circumstances of an exceptional character according to sub-section (8). Defence counsel agreed and his Honour then said that "that's how I apprehended … provocation arose in this case." Evidently there was no question about whether the jury should be directed about a defence under s 304 and that the evidence engaged sub-section (4) so that exceptional circumstances had to be demonstrated for the defence to be available.

[15] It is necessary to set out the whole of the judge's directions on the question of provocation, which were as follows:

> "Can I turn to the issue of provocation. Now, this issue arises – in the context of the evidence, I have provided you with a copy of the relevant parts of section 304 of the *Criminal Code* which deals with provocation and also with the question trail.
>
> Can I just direct your attention to the first sheet of sections from the Code that I handed out on the first day of trial, which has in it section 291, which is at the foot of that page. It's the section that provides that it's unlawful to kill any person unless that killing is authorised or justified or excused by law. Now, provocation is what is sometimes rather loosely called a partial defence, because it operates, not to excuse by law the murder of somebody, but if it is raised and proven to the requisite standard, it reduces what might otherwise be murder to manslaughter. So it's, in that sense, a partial defence. This is designed just to give you an introduction to the direction I will give you. That's why, in the question trail, I put it as question 5, because it arises for your consideration, assuming that otherwise you would have concluded that the defendant was guilty of murder.
>
> And if it is proven and made out, it reduces murder to manslaughter in the way that I will – and proven in the way that I will explain. It is unusual in that it is different from other aspects of the trial that I've spoken about. I have now said it more often than you probably care to remember that the onus is on the prosecution to prove beyond reasonable doubt the guilt of the accused. Provocation is different because the onus shifts to the defendant to prove provocation. It is, in that sense, rather exceptional or unusual. Also, the burden of proof, which is on the defendant to prove provocation, he doesn't have to prove provocation beyond reasonable doubt. He only has to prove it on the balance of probabilities, that is, that it's more probable than not that he was acting whilst under a provocation. So that is my introduction to the direction. It's in that context that you have section 304 which is the provisions of the *Criminal Code* and you have the question trail which is an attempt to replicate in summary the more complete directions that I will now be giving you. Under our law, the defence of provocation operates in the following ways. When a person kills another under circumstances which would constitute murder and he does so in the heat of passion caused by sudden

provocation and before there is time for his passion to cool, he is guilty of manslaughter only.

The defence, therefore, operates as a partial defence, not a complete defence because if it applies, its effect is to reduce what would otherwise be a verdict of murder to one of manslaughter. You only need to consider the issue of provocation if the prosecution has proved beyond reasonable doubt the elements of murder that I've already outlined. Providing you are satisfied beyond reasonable doubt of the elements of murder, it falls to the defendant to prove that the defence of provocation applies. To discharge this burden, the defendant must show that when he killed David Alan Knyvett, he did so in the heat of passion caused by sudden provocation and before there was time for his passion to cool.

The defendant does not have to satisfy you of that beyond reasonable doubt, but he does have to satisfy you that it is more probable than not that he so acted. What then is provocation? In this context, provocation has a particular legal meaning. It consists of conduct which, one, causes a loss of self-control on the part of the defendant and, two, could cause an ordinary person to lose self-control and to act in the way in which the defendant did. *If the sudden provocation is based on an unwanted sexual advance to the person, provocation does not apply other than in the circumstances of an exceptional character. In considering whether there are circumstances of an exceptional character, you have regard to the history of violence or sexual conduct between David Alan Knyvett and the defendant, Kyle Robert Thompson. That is relevant in all the circumstances*.

You must consider whether the deceased's conduct, that is, the things the deceased did or said or both, caused the defendant to lose his self-control and to hit the deceased with the Jack Daniel's bottle in the way described in the record of interview or as you find it to have been done. In that regard, you must consider the conduct in question as a whole and in the light of any history of violence or sexual conduct or disputation between the deceased and the defendant, since particular acts or words which considered separately might not amount to provocation. They may, however, in combination or cumulatively be enough to cause the defendant to actually lose self-control.

In considering whether the alleged provocative conduct caused the defendant to lose control, you must consider the gravity or level of seriousness of the alleged provocation so far as the defendant is concerned, that is, from this particular defendant's perspective. This involves assessing the nature and degree of the seriousness for the defendant of the things the deceased did or said just before the fatal attack. Matters such as the defendant's racial background, his colour, his habits, his relationships with the deceased, his age, are all part of this assessment, including his intelligence, background. You must appreciate the conduct that might not be insulting or hurtful to one person may be extremely hurtful to another because of such things as the person's age, their sex, their cultural background, their personal attributes, their personal relationships or past history.

> So you must consider the gravity of the suggested provocation to this particular defendant. Another question is whether the defendant acted in the heat of passion caused by a sudden provocation and before there was time for his passion to cool. The expression "sudden" involves a consideration of whether the defendant acted in the heat of passion, unpremeditated and in a temporary loss of self-control caused by the provocation. Provocation is not necessarily excluded because there is an interval between the provocative conduct and the defendant's emotional response to it. You'll see that I have included those words in brackets in question 5 just below point (ii) or as part of it."
>
> (Footnotes omitted.)

[16] I have highlighted in that passage the directions which, it is now agreed, should not have been given. At the end of that passage, the judge was referring to a question trail which he had prepared and distributed to the jury, having discussed it with counsel. The relevant part of that document was as follows:

> "Has the defendant satisfied you that it is more probable than not that when he inflicted the fatal wound upon David Alan Knyvett that:
>
> i. He acted in the heat of passion caused by a provocation and before there was time for his passion to cool;
>
> ii. The provocation was "sudden" in that the defendant acted in the heat of passion unpremeditated and in a temporary loss of self control (remember that provocation is not necessarily excluded simply because there was an interval between the provocative conduct and the defendant's emotional response to it);
>
> iii. The provocation was conduct that:
>
> (a) Caused a loss of self control on the part of the defendant; and
>
> (b) Could cause an ordinary person to lose self-control and to act in the way in which the defendant did;
>
> iv. The provocation occurred in circumstances of an exceptional character.
>
> If your unanimous answer to of questions (i), (ii), (iii)(a), (iii)(b) and (iv) above is 'Yes', then the defendant is Not Guilty of Murder but Guilty of Manslaughter.
>
> If your unanimous answer to any of (i), (ii), (iii)(a), (iii)(b) and (iv) above is 'No', the defendant is Guilty of Murder."

[17] The judge also provided the jury with an extract of what was said to be the relevant terms of s 304 as follows:

> "**304 Killing on provocation**
>
> (1) 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.
>
> …
>
> (4) Further, subsection (1) does not apply, other than in circumstances of an exceptional character, if the sudden provocation is based on an unwanted sexual advance to the person.
>
> ...
>
> (8) For proof of circumstances of an exception[al] character mentioned in subsection (4), regard may be had to any history of violence, or of sexual conduct, between the person and the person who is unlawfully killed that is relevant in all the circumstances.
>
> (9) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.
>
> …
>
> (11) In this section –
>
> ***unwanted sexual advance,*** to a person, means a sexual advance that –
>
> (a) is unwanted by the person; and
>
> (b) if the sexual advance involves touching the person – involves only minor touching."

[18] Sub-sections (4), (8) and (11) within that extract were added by the *Criminal Law Amendment Act* 2017 (Qld), which came into force on 30 March 2017.[2] Section 12 of the Act provided that the Code, as amended by that act, would apply to a proceeding for an offence only if the offence was committed after the commencement of the amending provision.

[19] By the directions which were given, including the terms of the suggested question trail, the jury may have considered that the defence of provocation could not apply simply because they were unpersuaded that there were circumstances of an exceptional character. This case does not call for an analysis of the effect of s 304 in its current terms or consideration of the directions which juries should be given in a case of that kind. But I would accept, as counsel for the respondent submitted, that characterisation of the circumstances, as exceptional or otherwise, would have to be by reference to the questions which arise under s 304(1). Where the current section applies, a jury must proceed from the premise that ordinarily an unwanted sexual advance could not cause an ordinary person to lose self-control and to assault with an intention to kill or do grievous bodily harm. A jury would have to consider whether all of the circumstances, including any relevant history between the accused person and the deceased, could have combined to cause that response on

---

2 Having received assent on that date: s 15A of the *Acts Interpretation Act* 1954 (Qld).

the part of an ordinary person. But the jury here was not instructed in those terms and the instructions which were given raise the possibility that the jury, or some of them, assessed the circumstances as unexceptional without considering the questions required to be answered under s 304 as it was for the purposes of this case. Put another way, it is possible that the jury did not consider at all the defence of provocation which, the parties evidently agreed, they were to consider.

The proviso

[20] In *Weiss*, it was held that the proviso cannot be applied "unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty".[3] In *Baiada Poultry Pty Ltd v The Queen*, French CJ, Gummow, Hayne and Crennan JJ said that this proposition "states a necessary but not sufficient condition for applying the proviso."[4] There will be some cases where the proviso cannot be applied irrespective of whether the appellate court considers that the evidence properly admitted at trial proved the appellant's guilt beyond reasonable doubt. In *Lane v The Queen* ("*Lane*"),[5] Kiefel CJ, Bell, Keane and Edelman JJ said that "some errors will establish a substantial miscarriage of justice even if the appellate court considers that conviction was inevitable." The present question is whether the error was one of that kind.

[21] It is not sufficient to say that the error was one of law. In *Kalbasi v Western Australia*,[6] Kiefel CJ, Bell, Keane and Gordon JJ said:

> "A misdirection upon a matter of law is always contrary to law, and it is always a departure from the requirements of a fair trial according to law. But sometimes a misdirection on a matter of law will prevent the application of the proviso; and sometimes it will not. … The question is always whether there has been a substantial miscarriage of justice, and the resolution of that question depends on the particular misdirection and the context in which it occurred.[7]"

Nor is it sufficient to say that this misdirection might be described as a "fundamental defect".[8]

[22] More generally, in *Weiss*, it was said that:[9]

> "[N]o single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt."

[23] Nevertheless, in *Lane*, the plurality described one kind of case of this category, where the proviso cannot be applied irrespective of the Court's view of the correctness of the outcome at the trial. The defect in the trial of that case was that

---

3 [2005] HCA 81; (2005) 224 CLR 300 at 317 [44].
4 [2012] HCA 14; (2012) 246 CLR 92 at 104 [29].
5 [2018] HCA 28; (2018) 92 ALJR 689 at 7-8 [38].
6 [2018] HCA 7; (2018) 92 ALJR 305 at 319 [57].
7 As confirmed in *Lane v The Queen* [2018] HCA 28; (2018) 92 ALJR 689 at 696 [39].
8 *Baiada Poultry Pty Ltd v The Queen* [2012] HCA 14; (2012) 246 CLR 92 at 103 [23].
9 [2005] HCA 81; (2005) 224 CLR 300 at 317 [45].

the judge failed to direct the jury that it must be unanimous as to which actions on the part of the appellant caused the death of the deceased, thereby leaving open the possibility that the jury had not reached a unanimous decision about an essential element of the offence. The plurality considered that this possibility precluded the operation of the proviso for the following reasons:[10]

> "[48] A misdirection that is apt to prevent the performance by the jury of its function, without more, will result in a substantial miscarriage of justice. The proviso is cast in terms which permit the appellate court to dismiss an appeal from a judgment of the court which gives effect to the verdict of the jury: the proviso does not permit the appellate court to exercise the function of the jury. The language of the proviso cannot be understood as if it were to the effect that an appeal in which the possibility that the jury has not performed its function of reaching a unanimous verdict may be dismissed on the basis that the appellate court is satisfied of the guilt of the accused.
>
> [49] On the approach of the majority in the Court of Criminal Appeal, the effect of the absence of a specific unanimity direction to the jury was disregarded notwithstanding that it might well be that the jury did not reach a unanimous conclusion as to the necessary basis of the appellant's guilt. As Barwick CJ said in *Ryan v The Queen*:
>
> > "the choice of the act causing death is not for the presiding judge or for the Court of Criminal Appeal: it is essentially a matter for the jury under proper direction."
>
> [50] To dismiss the appeal as the majority did is to disregard the requirement of a unanimous verdict on the part of the jury and to "substitute trial by an appeal court for trial by jury." Such an error is apt to deny the application of the proviso because it means that it cannot be said that no substantial miscarriage of justice has actually occurred."
>
> (Footnotes omitted.)

[24] In my view the present case is of the same kind. It is possible that the jury here, or some of the jury, did not consider the questions to be answered under s 304, because they concluded that a distinct question, namely whether the circumstances were of an exceptional character, should be answered in the negative.

[25] In the way in which the case was left to the jury, if they were otherwise satisfied of the appellant's guilt of murder, they had to consider whether he acted under provocation, according to the relevant terms of s 304. There was no suggestion by the prosecutor to the trial judge that the defence of provocation should not be left to the jury. In the consideration of the proviso, the appellate court must have regard to the way in which the trial was conducted by the parties and how the case was left to the jury. As the plurality said in *Lane*:[11]

---

10 [2018] HCA 28; (2018) 92 ALJR 689 at 697-8.

11 [2018] HCA 28; (2018) 92 ALJR 689 at 696 [41].

> "In deciding whether the trial process miscarried in a way that, without more, will result in a substantial miscarriage of justice, one cannot leap from the evidence to the verdict of the jury, ignoring the Crown's case and the directions of the trial judge."

[26] In order to apply the proviso in the present case, this Court is asked to exercise the function of the jury to determine whether the defence of provocation was established, when quite possibly that function was not exercised by the jury. If provocation was not considered, the jury did not determine whether the appellant was guilty of murder, but instead considered only whether the prosecution had proved the facts which it had to prove. In my view, it may be said that in this case, the application of the proviso would "substitute trial by an appeal court for trial by jury".[12]

Conclusion and Orders

[27] The proviso cannot be applied, and it is conceded that in that event, the appeal must be allowed. I would order as follows:

1. Allow the appeal.
2. Quash the appellant's conviction.
3. The appellant be re-tried.

---

12 *Lane* [2018] HCA 28; (2018) 92 ALJR 689 at 698 [50] citing *R v Baden-Clay* [2016] HCA 35; (2016) 258 CLR 308 at 330 [66].