SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pilcher* [2020] QCA 8
PARTIES:	**R** **v** **PILCHER, Dane Andrew** (appellant)
FILE NO/S:	CA No 179 of 2017 SC No 99 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Townsville – Date of Conviction: 4 August 2017 (North J)
DELIVERED ON:	4 February 2020
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2019
JUDGES:	Fraser and McMurdo JJA and Crow J
ORDERS:	**1. Appeal allowed.** **2. The conviction be set aside.** **3. The appellant be re-tried on the charge of murder.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – CRIMINAL LIABILITY AND CAPACITY – DEFENCE MATTERS – PROVOCATION – where the appellant was convicted of the murder of a woman with whom he had been in a sexual relationship – where the deceased had taken steps to end the relationship with the appellant and begin a relationship with another person – where the appellant learned of this new relationship, became intoxicated, then broke into the deceased's apartment seeking to find the deceased's new partner – where the deceased confronted the appellant and asked him to leave before arming herself with a knife – where the appellant gave evidence that a struggle for the knife then ensued – where the appellant killed the deceased by stabbing her with a knife 21 times – where the appellant argued at trial that he was provoked by the deceased's obtaining of the knife and therefore the partial defence of provocation in s 304 of the *Criminal Code* (Qld) applied – where the prosecutor submitted that the sudden provocation was based on the deceased's actions to end the relationship – where the trial judge did not direct the jury to decide whether s 304(3) was fulfilled, namely whether the sudden provocation was based on anything done or believed to be done by the deceased to

end or change the nature of the relationship – whether the trial judge erred by not directing the jury to make a finding of fact as to whether the appellant was provoked by something done by the deceased to end or change the relationship

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR OR PROSECUTION – where the prosecutor cross-examined the appellant and without leave asked questions to the effect that the appellant had deceived the deceased throughout their relationship – where the prosecutor inappropriately made comments to the jury in the form of questions to the appellant such as whether the deceased had "a reasonable expectation of a long and happy, healthy life" – where the prosecutor in their closing expressed some arguments in strong terms such as that "forgetfulness is the first refuge of the guilty mind" – whether the questions as to deception tended to show that the appellant was of bad character, in contravention of s 15(2) of the *Evidence Act* – whether the questions as to deception were relevant to an issue in the trial – whether the inappropriate questions could have affected the jury's proper consideration of the evidence – whether the prosecutor's departure from the practice of a dispassionate closing address could have distracted the jury from a dispassionate consideration of the evidence – whether the prosecutor's conduct resulted in a miscarriage of justice

Criminal Code (Qld), s 304
Evidence Act 1977 (Qld), s 15

R v Lafaele [2018] 3 Qd R 609; [2018] QCA 42, distinguished
R v Peniamina [2019] QCA 273, considered

COUNSEL: B J Power for the appellant
S J Farnden for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The appellant appeals on three grounds against his conviction of murder. The evidence at the trial is described in the reasons of McMurdo JA. I also respectfully adopt and will not repeat his identification of the issues at trial and the arguments in this appeal. Like Crow J, I agree with McMurdo JA's reasons for rejecting the second and third grounds of appeal. My reasons concern only the first ground of appeal, which McMurdo JA would uphold and Crow J would reject. I agree with McMurdo JA's reasons in this respect also and add only some brief remarks about the issue which I think is at the heart of the difference between my colleagues' analyses.

[2] McMurdo JA considers that there was a miscarriage of justice in the appellant's conviction of murder as a result of the trial judge misdirecting the jury about provocation. That partial defence arises under s 304(1) of the *Criminal Code* where

a person does the act which unlawfully kills another "in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool". If the requirements of s 304(1) are established a person charged who otherwise would be guilty of murder is instead guilty of manslaughter.

[3] At the time relevant in this case s 304(3) provided that s 304(1) did not apply "other than in circumstances of a most extreme and exceptional character" if (s 304(3)(a) and (b)) a domestic relationship exists between 2 persons and one person unlawfully kills the other person, and (s 304(3)(c)):

> "the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done –
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> (i) to end the relationship; or
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> (ii) to change the nature of the relationship; or
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> (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship."

[4] As McMurdo JA explains, an effect of the trial judge's directions to the jury was that s 304(1) was inapplicable unless the jury were satisfied that the sudden provocation had occurred in circumstances of a most extreme and exceptional character. The requirement for the defence to prove circumstances of a most extreme and exceptional character applies only where the circumstances described in each of paragraphs (a), (b) and (c) of s 304(3) are present. McMurdo JA concludes that there was a miscarriage of justice in the appellant's conviction of murder arising from the trial judge's failure to leave it to the jury to decide whether (in terms of subparagraph (i) or (ii) of s 304(3)(c)) the claimed sudden provocation was based on anything done by the deceased to end the relationship or to change the nature of the relationship between the deceased and the appellant.

[5] Crow J instead concludes that the satisfaction of s 304(3)(c) was not in issue between the Crown and the defence. In my respectful opinion, directions about that topic were necessary because, as McMurdo JA explains, the evidence at trial gave rise to an issue whether the sudden provocation was based on anything done by the deceased to end or change the nature of the relationship between the appellant and the deceased.[1] The record reveals that, although defence counsel made some submissions to the trial judge that were consistent with the absence of any such issue, he also submitted to the trial judge that whether the circumstances described in s 304(3)(c) were present such as to require the defence to prove circumstances of a most extreme and exceptional character was a question of fact for the jury. Defence counsel also unequivocally submitted to the jury that the provocative act of the deceased had nothing to do with those circumstances. If so, the appellant was entitled to invoke the partial defence in s 304(1) free of the requirement in s 304(3) that the circumstances be of a most extreme and exceptional character. That submission conflicted with other statements in defence counsel's address to the jury which convey that it was necessary for the defence to persuade the jury that the circumstances were most extreme and exceptional. The fact that there was this apparent conflict within defence counsel's address to the jury tends to reinforce

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[1] This description of the issue accords with the construction of s 304(3)(c) required by the majority decision in *R v Peniamina* [2019] QCA 273, which is not in issue in this appeal.

rather than to detract from the importance of the trial judge's duty to give clear directions about the issue raised by the evidence about the possible application of s 304(3).

[6] As McMurdo JA concludes, no such directions were given and the summing up instead encouraged the jury to proceed upon the assumption that it was necessary for the defence to establish that the circumstances were of a most extreme and exceptional character, thereby depriving the appellant of the possibility of an acquittal upon the charge of murder.

[7] I agree with the orders proposed by McMurdo JA that the appeal be allowed, the appellant's conviction of murder be set aside, and that the appellant be retried on the charge of murder.

[8] **McMURDO JA:** After an eight day trial, the appellant was convicted by a jury of the murder on 26 September 2015 of Corinne Henderson, with whom he had been in a sexual relationship. He appeals against his conviction.

[9] At the trial, it was common ground that the appellant had killed her, in her own home, by stabbing her with a kitchen knife. The jury was directed to consider questions of self-defence, accident, compulsion, intention and the partial defence of provocation under s 304 of the *Criminal Code*.

[10] The first ground of appeal is that the jury was misdirected about s 304. The second ground is that the prosecutor's cross-examination of the applicant contravened s 15(2) of the *Evidence Act* 1977 (Qld), by leading evidence of bad character without seeking leave to do so, and was otherwise unfair. The third ground of appeal is that the prosecutor's final address to the jury included inappropriate and inflammatory remarks, which may have improperly influenced the outcome.

The evidence at the trial

[11] The appellant met the deceased when they worked at a mine, and they began a relationship which lasted for about two years. They each had a home in Townsville, and he sometimes stayed at her unit when neither was at the mine. In about July 2015, she took steps to end the relationship, by sending him text messages and changing the locks to her unit. The appellant found it difficult to accept that the relationship was ending. He became suspicious that she had formed a relationship with another man.

[12] The deceased had begun a new relationship, and on the day on which she was killed, she and that man, Mr Wickham, together with her parents who had come up to Townsville from Tasmania to see her, went to the races. Photographs of their group at the races went on Facebook. A man who worked at the mine with the appellant saw the photographs and decided to forward to the appellant one of the pictures, which showed the deceased and Mr Wickham.

[13] By the time that the appellant had seen this photograph, he was already in a poor emotional state. On the previous evening, according to his own testimony at the trial, he had become "very distressed and upset and emotional", and had had something of "an emotional meltdown at home."[2] He said that he was then

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2 AR 314.

"struggling with everything in my life that was going on at that point", including the end of his marriage (resulting from his relationship with the deceased), his financial difficulties and what he called "the business with Corinne".[3] On the following day, he began drinking at about lunchtime, first at a pub and later at the Cowboys Leagues Club. It was there that he received the text message which contained the photograph of the deceased and Mr Wickham, whom the appellant knew from the mine. The appellant testified that when he saw the photograph, he was "[a]bsolutely gutted … angry, and … completely taken aback."[4] The appellant said that he had heard rumours of a relationship between her and Mr Wickham, but she had "continually denied it."[5] He said that it then appeared that his "fears of their having a relationship were … well founded."

[14] By this time of the night, he testified, he was "very drunk", and when asked to put his drunkenness on a scale of one to 10, he answered that it was "about a seven".[6] He decided to leave the club and called for a taxi. Video footage of the appellant in the taxi, and stopping at a service station during the trip, was played to the jury, and the appellant's trial counsel suggested to the jury that it demonstrated the appellant's heavy intoxication.

[15] The taxi took the appellant to the deceased's unit. The appellant said that, when he had left the club, at first he was intending to go home, but had changed his mind shortly after exchanging text messages with a friend, Karyn Gillham, whom the appellant described as "a confidante of sorts."[7] He had sent the photograph to Ms Gillham, to which she replied "Jesus- what's your thoughts?".[8] He responded "Kill them both".[9] He testified that this was "a very poorly chosen figure of speech, but it certainly wasn't meant to be taken literally."[10]

[16] When he arrived at the unit, the appellant could hear a male voice coming from the deceased's bedroom window. The appellant said that he went to the front door, knocked repeatedly and called out the deceased's name. No one came to the door, after which the appellant climbed around a timber frame on the outside of the unit, reaching the kitchen window, which was closed. He then kicked in the window, and entered the unit, feet first. He arrived on the kitchen bench and saw that he had a large laceration, from the broken window pane, to his left elbow. He looked up and saw that the deceased was standing three to five metres from him. She said to him that he was "bleeding everywhere" and that he should "get outside". She then said something about taking him to the hospital. He said that he then walked past her, into the hallway and then into her bedroom. He could not see anybody. In fact, Mr Wickham was in the unit and hiding in the bathroom, as he had been asked to do by the deceased when she had heard the appellant at the door.

[17] Mr Wickham testified that he could then hear the appellant and the deceased talking, with the appellant wanting "to know answers about us".[11] The appellant was asking her whether the appellant's relationship with the deceased was over, and

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3 Ibid.
4 AR 317.
5 Ibid.
6 Ibid.
7 AR 320.
8 AR 527.
9 AR 526.
10 AR 320.
11 AR 45.

whether she was sleeping with Mr Wickham, and he was promising to leave once she answered those questions. Mr Wickham described the tone of his voice as "loud, angry". He said that "then it all changed and [the deceased] yelled out, 'Dane, what are you doing?'". He then heard footsteps and a loud thump against a wall. It later became clear to Mr Wickham that this was the sound of the appellant smashing a vase of flowers on the floor, after asking "Did he buy these flowers for you?".[12] Following this, Mr Wickham said, he did not hear the deceased again, but he could hear the appellant saying "[t]here's blood everywhere. I think I've killed her." He remained in the bathroom until, shortly after, police arrived.

[18] In the appellant's evidence, he agreed that when he went into the hallway, he had seen flowers in a vase and had asked the deceased "Did he buy these flowers?".[13] He said that when he left her bedroom (having found no one there), and walked back into the hallway towards the living area, where he saw the deceased standing in the area of the kitchen, holding one of her kitchen knives, and looking at him. He said that the deceased again told him to "get outside".[14] He said that the deceased started to walk towards him, when again he asked her to say what was happening between her and Mr Wickham.[15] He said that he then stepped towards her, with his hands in front of him, intending to put them around her waist or hips. As he did so, the appellant said, she stabbed him with the kitchen knife in the top of his left arm.

[19] When this happened, he said, he "called her a fucking bitch" and "tried to get the knife from her".[16] There was a struggle in which he was trying to get the knife from her, which he said "was all very brief … a matter of five, six, seven, eight seconds."[17] The appellant and the deceased then fell to the ground, and she was face down and he was on top of her, with his chest against her back. He then rolled off her.[18]

[20] The appellant testified that "All I was doing was trying to stop her from stabbing me again. I tried to grab her hands" and "[i]t was all just very, very fast."[19] He said that he did not recall having "sole control of the knife at any stage during the wrestle, but it appears as though I did."

[21] His evidence of what then occurred was as follows:

> "And what happened then?---As I said, when we hit the ground, I got off Corinne. She was right beside me on the ground. I was on my knees on the tiles, looking at my arm. I had the knife wound to the top of my arm. I had the laceration from the window on my left elbow. I had a deep cut to my left index finger; I couldn't move my left index finger. And I had a slash to the back of my left hand. And I started screaming at her. I called her a fucking bitch, "What have you – look what you've done." I think I repeated that a number of times; I don't know how many. But I was screaming at her. And she was on

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12 AR 46.
13 AR 324.
14 Ibid.
15 AR 325.
16 Ibid.
17 Ibid.
18 AR 326.
19 Ibid.

> the floor, in that – near the speaker, in the entrance to the hallway. She - - -
>
> Yes?--- - - - was on her stomach. And as I was on my knees, screaming at her, she was crawling on her stomach towards the hallway, towards her bedroom.
>
> Yes, and what happened then?---I was on my knees. I took my black T-shirt off, and I was trying to stem the bleeding on my left arm with my black T-shirt. And I'm not sure how long I was on the ground doing that. Half a minute, a minute, maybe; not a long time.
>
> Yes?---I then got up to see if Corinne was okay, to see where she was. I walked towards her. I'd seen her crawling. I walked into the bedroom – I walked into the hallway.
>
> Yes?---And I could see her lying on her back in the bedroom, with her feet facing the hallway, and her - - -
>
> Yes?--- - - - head facing the pool area. And I walked into the bedroom, and I knelt down beside her, and I tried to move her over. I tried to roll her onto her side. She was on her back. And I tried to, sort of, put her into a – her eyes were still open. She was just staring, and I tried to roll her onto her side, but every time I tried to roll her onto her side, she kept falling and kept rolling back onto her back. So I grabbed a pillow from the bed, and I tried to jam it behind her underneath her back to stop her from continually rolling onto her back. And I – I looked at her. I put my hand down to her neck to try to take her pulse, and I noticed she had slices – cuts on her neck and on her face.
>
> Yes?---I didn't see any other wounds at that point. She was – she had a lot of blood on her. There was a lot of blood on the floor.
>
> Yes?---But I couldn't see any other individual wounds at that point. And I was – began to cry. I was crying. I began sobbing, crying. She had no pulse when her checked her pulse, sorry. I checked her pulse and she had no pulse. And to me, she was dead. She looked deceased then. I thought she was deceased. She was just staring blankly. She wasn't moving. She – I just had her in that side recovery position. She wasn't – she wasn't responding. She wasn't moving."[20]

[22] The appellant then rang his former wife, saying that he thought that the deceased was dead and that he had killed her.[21] Immediately after that call, the appellant rang the police, in which he said that he had stabbed the deceased with a kitchen knife.

[23] In cross-examination, there was this evidence:

> "So you remember … struggling beside the speaker system; is that right? --- I wasn't sure where we were at when we were struggling, that's where we landed on the ground, yes
>
> And you were only trying to get the knife from her?---Yes, sir.

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20 AR 327.
21 AR 328.

> That's all you were trying to do?---I was trying to prevent myself being stabbed initially and I was trying to get - yeah, get the knife from her, yes.
>
> And [at] no time did you try and stab her?---No.
>
> Is that correct?---That's correct.
>
> I'm just trying to understand your case. At no time did you try and stab her because you feared for your life; is that right?---I didn't consciously try to stab her at all, no.
>
> Right. So at no time did you intentionally or consciously try and stab her?---I didn't try to stab her, no."[22]

[24] A little further in the cross-examination, there was this exchange:

> "And at no stage did you fear for your life?---I felt being stabbed again - I was trying to stop myself from being stabbed again.
>
> Right. Did you understand my question?---You asked me if I feared for my life.
>
> Yes?---And as I said, it all happened in a matter of seconds. There wasn't time to consider it or make decisions. It was I just reacted to being stabbed in the arm."[23]

[25] The deceased suffered one fatal knife wound which was through the back of her chest and 20 other knife wounds to her face, throat, head, left shoulder and hands. Although there was no formal admission that the appellant had caused the injuries that resulted in her death, the trial was conducted by his counsel on that basis.

Section 304

[26] As I will discuss, it was not the principal argument at the trial that the appellant had killed the deceased under provocation. The appellant gave no direct evidence that he had lost his self-control. However the prosecutor told the trial judge that there was a case of provocation which should be considered by the jury (although, he said a weak one), and the trial judge agreed.

[27] In this Court, it is accepted by the respondent that there was a case of provocation to be left to the jury. There is no submission for the respondent that the defence should not have been left for the jury, or that the appellant should not be able to argue for the defence now, because the defence was inconsistent with his own testimony. It is also accepted that if the jury was misdirected about the defence of provocation, the appellant may have lost the benefit of that defence and an outcome in which he was convicted of manslaughter, rather than murder.

[28] In September 2015, s 304 was relevantly in these terms:

> "**304 Killing on provocation**
>
> (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute

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22 AR 373.
23 AR 374.

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.

(2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.

(3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if—

(a) a domestic relationship exists between 2 persons; and

(b) one person unlawfully kills the other person (the *deceased*); and

(c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done—

(i) to end the relationship; or

(ii) to change the nature of the relationship; or

(iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.

(4) For subsection (3)(a), despite the *Domestic and Family Violence Protection Act 2012*, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.

(5) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.

(6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.

(7) 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."

[29] The defence case about provocation which was argued to the jury was that the appellant had lost his self-control at the moment when he was stabbed in his arm by the deceased. The argument was that, although, before this had occurred, the appellant's "emotions" had been "through the roof", it was the stabbing of him which was the "straw that broke the camel's back".[24]

[30] According to s 304(1), if that provision applied, the appellant had to prove that there was provocative conduct by the deceased, the appellant was actually provoked by that conduct and, while still provoked, he did the act or acts which caused her death. The provocative conduct of the deceased had to have been something which could

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24 Transcript, 2 August 2017 p 39.

deprive an ordinary person of the power of self-control, and cause such a person to do what the appellant did.[25]

[31] The expression "sudden provocation" in s 304(1) is undefined. It takes its meaning from the common law. In *Pollock v The Queen*,[26] the High Court said:

> "The use of the expression "sudden provocation" was intended to import well-established principles of the common law concerning the partial defence in the law of homicide. Thus, the provision is to be understood as requiring that the provocation both involve conduct of the deceased and have the capacity to provoke an ordinary person (to form the intention to kill or to do grievous bodily harm and to act in the way the accused acted), although neither requirement is stated in terms."
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> (Footnote omitted.)

In that case, the High Court agreed with the statement of Keane JA, in this Court in that case, that the word "sudden" does not qualify the deceased's provocative conduct, but instead is "necessarily concerned with, and related to, the temporary loss of self-control, excited by the provocation."[27]

[32] In this appeal, there is no complaint about the trial judge's directions which explained the operation of s 304(1). It is his Honour's directions about s 304(3) which are now in question.

[33] If the defence of provocation was to be considered, the jury would have concluded that the appellant had unlawfully killed the deceased. Clearly a domestic relationship[28] had existed between the appellant and the deceased. Clearly also, the deceased had done things to end the relationship. Consequently, s 304(3) was engaged if the sudden provocation (the appellant's loss of self-control) was "based on" the acts of the deceased to end the relationship. At the time of this trial, there had been no decision of this Court of the meaning of those words in s 304(3)(c), and what connection they required between the sudden provocation and something done by the deceased to end the relationship. However that question is now the subject of the recent judgment of this Court in *R v Peniamina*.[29]

[34] In that case, this Court, by a majority, rejected an argument that s 304(3) is engaged only where the immediate cause of the accused's loss of self-control is something done by the deceased to end the relationship.[30] In the views of the majority, another connection might suffice. Applegarth J said that s 304(3) would be engaged where "the sudden provocation was closely related to a thing by the deceased to change the relationship", so that:

> "It may apply to a case in which a more immediate act of the deceased is nominated by the defendant [as the provocative conduct], but in which the evidence permits the conclusion to be reached that, in addition to that immediate claimed cause of the sudden

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25 *Stingel v The Queen* (1990) 171 CLR 312 at 331; [1990] HCA 61.

26 (2010) 242 CLR 233 at 245-246 [47]; [2010] HCA 35.

27 *R v Pollock* [2009] QCA 268 at [50], approved in *Pollock v The Queen* (2010) 242 CLR 233 at 244-245 [45] and 247 [52]; [2010] HCA 35 at [45] and [52].

28 As defined in s 304(4).

29 [2019] QCA 273.

30 Or to change it, or indicate that it should or will end or change.

provocation, it was based on a thing done by the deceased to change the relationship."[31]

[35] *Peniamina* was a case, like the present, where the provocative conduct, advanced by the defence case at the trial, was a knife wound inflicted upon him by the deceased, in the circumstance that the deceased had acted to terminate the relationship between them. Applegarth J said:

> "[183] Depending on the evidence, s 304(3) may apply where the sudden provocation is caused both by an act nominated by the defendant (such as being cut by a knife) and a thing done by the deceased that preceded it. The earlier, other thing may have occurred a few seconds or a few minutes earlier, and led to the act of the deceased nominated by the defendant.
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> [184] The factual question of whether the claimed (or assumed) sudden provocation was "based on" an act of the deceased done to change the relationship calls for an evaluation of the chain of events and the causative potency of the act of the deceased. The statute uses words which suggest that the act of the deceased must have been a foundation of what followed. A mere connection between the act and the sudden provocation, in that the act made some contribution in terms of cause and effect to the eventual outcome is unlikely to be sufficient to support a finding that the sudden provocation was "based on" the act.
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> [185] The words "based on" in this context connote a substantial causal connection. They are simple, ordinary words and should be given their ordinary meaning. They are simpler than terms like "underlying cause", "dominant cause" or "substantial cause".
>
> [186] They should not be interpreted too narrowly so as to deprive s 304(3) of its apparently intended operation or too widely so that a slight connection may suffice. The words do not necessarily require a coincidence between the act nominated by the defendant as the provocative conduct for the purpose of the defence in s 304(1) and the thing done by the deceased to change the relationship. Instead, they suggest a relationship between those two things."

[36] Applegarth J said that a sufficient connection might be found where, although something had occurred between the deceased's acts in ending the relationship and the accused's loss of self-control, "the intervening matter is a likely or not unexpected consequence of a thing done to end or change a relationship".[32]

[37] The other majority judgment was given by Morrison JA, who said that the phrase "based on" does not "indicate a causal connection simpliciter, but rather that the thing referred to is the foundation or basis for the subject".[33] Morrison JA said that in that case, "the jury had to consider whether what was done with the knife and the

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31 [2019] QCA 273 at [182].
32 [2019] QCA 273 at [166].
33 [2019] QCA 273 at [15].

consequent loss of control was, in fact, based on something done by the deceased to end or change the nature of the relationship."[34]

[38] The question of whether there is the necessary connection such that an accused person's sudden provocation is found to be "based on" an act of the deceased affecting their relationship, will be one of fact. In some cases, the connection will be an obvious and immediate one, in that the provocative conduct by which there was a sudden loss of self-control is the act which terminates or affects the relationship. For example, an accused might say that he killed his partner, having lost his self-control because she left their home to begin another relationship. In such a case, the deceased's act in ending the relationship will be, on the defendant's case, the cause of the loss of his self-control, and the engagement of s 304(3) will be clear and a jury could be so instructed. In other cases, however, of which the present is an example, there will be a question of fact for the jury of whether the connection is sufficient, and that question will have to be put to the jury, with an explanation of what the law regards as a sufficient connection for this purpose. As I will discuss, neither of those things occurred in the present case.

[39] Before going to the summing up, it is necessary to discuss the submissions which were made to the trial judge (in the absence of the jury) about whether the defence of provocation should be left.

[40] The trial judge was hesitant to direct the jury about provocation. He questioned whether the defence did arise on the evidence, because the appellant had said nothing in his testimony to the effect that he had lost his self-control. The judge also perceived a potential disadvantage to the appellant's case, by an alternative of provocation detracting from whatever force was in the argument that the defendant had acted in self-defence. The appellant's trial counsel expressed his own concern in that respect. The prosecutor, however, submitted that his Honour should leave provocation to the jury, that being "the safest course".[35] The prosecutor said:

> "[T]he nature of the injuries and his missing conscious recollection of the knife going in and out means that your Honour would be obliged to leave provocation in these circumstances, whether or not it's advanced as part of any defence address or defence case, because it raises its head on the facts. It's not a very strong case of it, but that's got little to do with your Honour's obligation to [leave] it."[36]

[41] A little later in this discussion with counsel, his Honour provided them with a proposed question trail. At that stage, he said, it referred to provocation but said nothing about "exceptional circumstances". The prosecutor submitted that although "the provocative [act] in this scenario [was] the stabbing of the arm, … it's the provocative act [which] has to be understood in the context …".[37] The prosecutor submitted that this provocative act was "[a]gainst the background where she had finished the relationship", so that "[t]his occurred in the circumstances where she was saying "Get out of my house"", and where she had indicated to him that the relationship was at an end.[38]

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34 [2019] QCA 273 at [24].
35 AR 382.
36 AR 390.
37 AR 397.
38 AR 398-399.

[42] After a short adjournment, the discussion between the trial judge and counsel continued, when there was this exchange with the prosecutor:

> "HIS HONOUR: Do I understand that your reading of subsection (3) is that if a domestic relationship has existed up until death, or in – or subject – or in light of subsection (6) in the very recent past, and one person unlawfully kills the other person, then if the sudden provocation is based on anything done to end the relationship or to make those changes, the jury would have to be directed that there must be a circumstance of exceptional character. Now, is it your submission that even if the provocative act is the knife prodding or the assault with the knife - - -
>
> MR COWEN: Yes
>
> HIS HONOUR: - - - it was a – it was arguably an extreme – it was arguably in the circumstances of an extreme character – well, it in the circumstances made it a matter of exceptional character.
>
> MR COWEN: It may do, and that would be for the jury to determine.
>
> HIS HONOUR: So the question would be – for the jury to answer was whether the provocation occurred in circumstances of an exceptional character where there'd been (a) that domestic relationship - - -
>
> MR COWEN: Yes.
>
> HIS HONOUR: - - - and (b) the provocation was based upon something done by Henderson – Corinne Henderson to end the relationship or change the nature of the relationship - - -
>
> MR COWEN: Or he believed.
>
> HIS HONOUR: - - - or to indicate in a way - - -
>
> MR COWEN: Or he believed that it had been so done, because there's – it's either/or. And if that is the case, has the defendant satisfied the jury on a balance of probabilities that in those circumstances that the act of stabbing to the arm was of a most extreme and exceptional character?"

[43] Following that exchange, this was said between the trial judge and defence counsel:

> "HIS HONOUR: Mr Walters, I think it's an issue that – well, I think that it's – if provocation – if the jury is to be directed on - - -
>
> MR WALTERS: Yeah.

HIS HONOUR: - - - provocation, then the section requires that they have to consider whether the defence has proved to the balance of probabilities that the provocation occurred in circumstances of an exceptional character where (a), (b) and (c) are indicated. And here they're indicated, aren't they?

MR WALTERS: I must confess, your Honour, it's caused me a lot of – I've toed and froed on it so often. Look, I see – it really, I think, ultimately becomes a question of fact for the jury. And I see that that is open here as a question of fact.

HIS HONOUR: Yes, but they have to be – if there's to be a direction that properly reflects what they must consider - - -

MR WALTERS: Yes.

HIS HONOUR: - - - under section 304, their mind should turn to whether the provocation occurred in circumstances of an exceptional character.

MR WALTERS: Yes.

HIS HONOUR: And that's because in the circumstances that would apply as part of the res – not only the res gestae, but the background in which the act and the reaction – the act by the deceased and the reaction by your client has to be considered - - -

MR WALTERS: Yes.

HIS HONOUR: - - - involved a domestic relationship that is either persisting or is undergoing a [indistinct] change.

MR WALTERS: Yes. No. Look, I would have to concede that I think that is applicable here."

[44] Influenced by that discussion, defence counsel addressed the jury, on the question of provocation, by saying, amongst other things:[39]

> "Now, in this position or in this situation there's no doubt here that [the deceased] has been killed. We say here that the ultimate, sudden provocation is the knife in the arm. Against a background of no physical violence, nothing between of that nature and that, to use a term I've used earlier, is a straw that broke the camel's back and if you're of the view that that caused a final loss of self-control, that would cause an ordinary person to lose self-control and act in that way, then the provocation has occurred.
>
> …
>
> Now, if there are – and we would submit to you, on the balance of probabilities, if you got to that point, that is what has occurred, this

[39] Transcript 2 August 2017, pp 39-40.

> loss of self-control in those circumstances, the heightened emotions. However, in the circumstances of this case, it is one where there is a domestic relationship. Even though they're split up, it's still a domestic type relationship and you must consider, "Were the circumstances extreme and exceptional in character, because unless they are, the defence doesn't apply". Well, getting a knife stabbed in your arm is as extreme and exceptional as you're going to get and particularly against a background where there is no history of violence. …
>
> The evidence is that they were in a domestic relationship. However, other than the circumstances of a most extreme and exceptional character, the defence of provocation does not apply when the alleged provocation is based on anything done by the deceased or anything the defendant believed the deceased did to end the relationship, even if the relationship has ended before the sudden provocation and killing happened, for to change the nature of the relationship or to indicate, in any way, that the relationship should or would end or that there may or should or would change the nature of the relationship.
>
> Members of the jury, what occurred with the knife incident had nothing to do with those matters, in my respectful submission to you, and these things have been discussed. The use of the knife had nothing to do with change in the relationship. Those things had previously been discussed, been dealt with and that was a circumstance where there was violence being used, a knife, which was an extreme and exceptional character. If you find those matters established that the provocation occurred and that those matters don't apply, on the balance of probabilities, members of the jury, you'd find him not guilty or murder, but guilty of manslaughter, because he's acted in such an emotional way because of those circumstances, because of the heightened awareness that it is that the murder has occurred in this heightened state."

[45] It must be said that the argument, by defence counsel, in those passages, was imprecise, where it addressed the terms of s 304(3). The argument appeared to accept that the jury would have to consider whether there were circumstances of a most extreme and exceptional character. But at the same time, it suggested that the acts of the deceased, in ending the relationship, had had nothing to do with "the knife incident", so that s 304(3) was not engaged in this case. But on any view, defence counsel did not unambiguously concede that his client's sudden provocation was based on something done by the deceased to end the relationship.

The summing up

[46] The trial judge distributed a question trail to the jury. It was necessarily lengthy, because of the several defences upon which the jury had to be instructed. By the question numbered 8, the jury was asked whether the prosecution had proved, beyond reasonable doubt, that the defendant caused the death of the deceased, intending to kill her or to do her some grievous bodily harm. They were instructed if they answered "yes" to that question, then they were to go to the question numbered 10, which was as follows:

> "10 Has the defendant satisfied you that it is more probable than not that when he inflicted the fatal wound upon Corinne Irene Henderson 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;
>
> 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 extreme and exceptional character.
>
> If your unanimous answer to all 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 one of (i), (ii), (iii)(a), (iii)(b) and (iv) above is 'No', the defendant is Guilty of Murder."

[47] It can be seen that the jury was not asked to consider whether s 304(3) was engaged. More particularly, it was not asked to determine whether the accused's sudden loss of self-control, was *based on* anything done by the deceased (or anything which he believed that she had done) to end the relationship, or to indicate that the relationship may, should or will end. The jury was to assume that, upon the evidence in this case, there existed the requisite factual connection between what the deceased had done in that respect and the accused's loss of self-control.

[48] His Honour's oral directions contained the same premise. The jury was directed as follows:[40]

> "What, then, is provocation? In this context, provocation has a particular legal meaning: it consists of conduct which causes a loss of self-control on the part of the defendant and could cause an ordinary person to lose self-control and to act in the way in which the defendant did. The evidence is that the defendant and the deceased were or had been in a domestic relationship, however, other than in circumstances of a most extreme and exceptional character, the defence of provocation does not apply where the alleged provocation is based on anything done by the deceased or anything the defendant believes the deceased did either to end the relationship, even if the relationship had ended before the sudden provocation or killing happened, or to change the nature of the relationship, or to indicate in

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40 AR 473-474.

> any way that the relationship may, should or would end, or that there may, should or would be a change in the nature of the relationship.
>
> In considering whether there are circumstances of a most extreme and exceptional character, you have regard to the history of violence, if any of it's relevant. Here the defendant relies upon the stab he says was inflicted by Corinne Henderson as the provocation, and as the extreme and exceptional circumstance that occurred justifying – affecting his self-control and leading to his provocation. You must consider whether the deceased's conduct, that is, the things that the deceased did, or said, or both, caused the defendant to lose his self-control and to stab Corinne Henderson. In that regard, you must consider the conduct in question as a whole and in light of any history of disputation between them, since particular acts or words which considered separately would not amount to provocation, may in combination or cumulatively be enough to cause the defendant to actually lose his self-control.
>
> …
>
> The acts relied upon by the defendant as relevant in affecting his mind and causing him to lose self-control include the close and intimate, sexually charged relationship they enjoyed, the circumstances that that relationship had led to the break-up of his marriage, and the effects that that had on his relationship with his friends, the circumstance that she was breaking off relations with him, or appeared to be, and the circumstance, as an exceptional circumstance, the stabbing of him and the causing of the injury to him in the context of their discussion and that confrontation where he was insisting on an answer from her about where her affections lay."

[49] A little further on, and immediately before the Court adjourned for the day, his Honour reminded the jury that the appellant had made no mention in his evidence "that he lost control in the context of a provocation."[41] After the jury retired, the prosecutor told the judge that, although the appellant had expressed no recollection of losing his self-control, the ferocity of his attack might provide some evidence of a loss of self-control. The appellant's counsel agreed, referring his Honour to *Masciantonio v The Queen*.[42] On the following day, the judge resumed his summing up by reminding the jury that the appellant had "an incomplete recollection of what happened", but that the ferocity of the attack might be evidence supporting an inference of provocation.[43]

[50] In referring to the defence argument about provocation, his Honour said only this:[44]

> "Concerning the issue of provocation, Mr Walters pointed out that that only arises if you were to form a view that the prosecution had otherwise proved beyond reasonable doubt that his client had murdered Corinne, but he submitted that in that circumstance the defence of provocation was made out. He pointed out that, although

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41 AR 475.
42 (1995) 183 CLR 58 at 68; [1995] HCA 67.
43 AR 481.
44 AR 494.

> the onus was on his client, the standard of proof was on the balance of probabilities. He indicated that standing with a weapon such as the knife, in the circumstances, could readily be accepted as provocative."

The arguments in this Court about the judge's directions

[51] It is submitted for the appellant that there were three ways in which the jury was not properly directed about s 304(3). The first is that the provocative act which was the basis for the defence case, namely the stabbing of him, was not an act of the deceased ending or changing the relationship, so that it was not an act which fulfilled the conditions of s 304(3). As I have explained, that argument is inconsistent with the majority judgments in *Peniamina*, and must therefore be rejected.

[52] Secondly, it is submitted that the jury should have been directed that "an intermediate" finding of fact by them was required, namely that he had been provoked by something done by the deceased to end or change the relationship. Thirdly, it is argued that the jury ought to have been instructed that, despite the terms of s 304, it was for the prosecution to prove that the facts engaged s 304(3).

[53] As to the second of those arguments, it is submitted for the respondent that there was nothing in the summing up which suggested that the "threshold" question, namely whether s 304(3) applied so that the defendant had to prove extreme and exceptional circumstances, was not a question for the jury to consider. The argument concedes that there might have been a specific question to that effect included in the question trail, but maintains that the jury would have understood that this was a question which they had to determine.

[54] As to the third of the appellant's arguments, it is submitted for the respondent that there is no burden of proof on the prosecution to prove that the facts engaged s 304(3).

The error in the summing up

[55] This was not a case in which the provocative conduct, upon which the defence case relied, was itself an act to terminate the domestic relationship. Consequently, it was not a case where, indisputably, the sudden provocation was "based on" conduct of that kind.

[56] Nor was this a case where a defendant had formally admitted the facts which would engage s 304(3). As I have discussed, at one point in his address to the jury, the appellant's counsel appeared to accept that he had to demonstrate circumstances of a most extreme and exceptional character. But at another point, counsel argued that there was no connection between the end or change to the relationship and "what occurred with the knife incident".

[57] What seems to have occurred is that, without the benefit of submissions from the appellant's trial counsel, the trial judge too readily accepted the statement by the prosecutor that this was a case within s 304(3), and consequently, his Honour did not direct the jury to decide the question.

[58] The respondent's argument, that this question was left to the jury, cannot be accepted. His Honour's oral directions made no reference to it, and suggested otherwise. Most tellingly, the judge's succinct and unambiguous question trail contained no reference to the question.

[59] The jury was thereby directed that the defence of provocation, under s 304(1), was irrelevant unless they were satisfied that the sudden provocation had occurred in circumstances of a most extreme and exceptional character. Further, the jury may well have considered that question without answering the questions which were listed by the question trail for their determination under s 304(1).

[60] It was by no means inevitable that the jury would have answered this question, about the applicability of s 304(3), adversely to the appellant, and there is no submission here that it was inevitable. It follows that the jury may have incorrectly reasoned to a verdict of guilty of murder simply by concluding that circumstances of a most extreme and exceptional character had not been demonstrated. A miscarriage of justice thereby occurred, which requires that the conviction be set aside and the appellant be retried on the charge of murder.

[61] It is unnecessary then to consider the third argument, which is that it was for the prosecution to prove that the facts engaged s 304(3). However, should it matter, I will explain my view that the argument is unpersuasive.

[62] The argument cites *R v Lafaele*,[45] and what was there said about the operation of s 24 in the context of a jury's consideration of a defence under s 304. The Court there rejected the argument that s 304(7) had the effect of shifting the onus of proof to an accused with respect to a mistake of fact when "the circumstance of the asserted provocation [is] intertwined with a mistake of fact."[46] North J (with whom Fraser and Gotterson JJA agreed) discussed the authorities which establish that, where the operation of s 24 is raised, it is for the prosecution to negative the existence of an honest and reasonable mistake of fact. In their view, there was nothing in the terms of s 304(7) to indicate an intention to affect the operation of s 24.[47]

[63] As is submitted for the respondent, *Lafaele* does not support the appellant's argument. The present question involves the effect of s 304(7) (as the section was then expressed) not upon s 24, but upon s 304(3). By s 304(7), it was for the defence to prove that, by the operation of s 304(1), the appellant was liable to be convicted of manslaughter only. Where the relevance of s 304(1) was in issue between the prosecution and the defence, then in order to prove that he was liable to be convicted of manslaughter only, the appellant had to prove that s 304(1) was to be considered, either by proving that the sudden provocation was not based on anything done by the deceased to end the relationship, or by proving that the circumstances were of a most extreme and exceptional character. The proof of either of those matters would be a necessary step in the proof that the defendant was liable to be convicted of manslaughter only, by the operation of s 304.

The other grounds of appeal

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45 [2018] 3 Qd R 609; [2018] QCA 42.
46 [2018] 3 Qd R 609 at 623 [39]; [2018] QCA 42 at [39].
47 [2018] 3 Qd R 609 at 625 [46]; [2018] QCA 42 at [46].

[64] My conclusions as to the other grounds of appeal may be shortly stated, given that I would allow the appeal and order a re-trial upon the basis of the misdirection about provocation.

[65] The appellant's argument makes two kinds of complaints about the prosecutor's cross-examination of the appellant. The first is that the prosecutor cross-examined him about his suggested bad character without leave being obtained according to s 15(2) of the *Evidence Act* 1977 (Qld). The second is that the cross-examination was so inflammatory as to distract from the jury's dispassionate examination of the issues.

[66] Section 15 provides:

> "**15 Questioning a person charged in a criminal proceeding**
>
> (1) Where in a criminal proceeding a person charged gives evidence, the person shall not be entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove the commission by the person of the offence with which the person is there charged.
>
> (2) Where in a criminal proceeding a person charged gives evidence, the person shall not be asked, and if asked shall not be required to answer, any question tending to show that the person has committed or been convicted of or been charged with any offence other than that with which the person is there charged, or is of bad character, unless—
>
> (a) the question is directed to showing a matter of which the proof is admissible evidence to show that the person is guilty of the offence with which the person is there charged;
>
> (b) the question is directed to showing a matter of which the proof is admissible evidence to show that any other person charged in that criminal proceeding is not guilty of the offence with which that other person is there charged;
>
> (c) the person has personally or by counsel asked questions of any witness with a view to establishing the person's own good character, or has given evidence of the person's good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution or of any other person charged in that criminal proceeding;
>
> (d) the person has given evidence against any other person charged in that criminal proceeding.
>
> (3) A question of a kind mentioned in subsection (2)(a), (b) or (c) may be asked only with the court's permission.
>
> (4) If the proceeding is a trial by jury, an application for the court's permission under subsection (3) must be made in the absence of the jury."

[67] The appellant's submissions suggest that there were at least five instances where the cross-examination proceeded contrary to s 15. The first of them is where the prosecutor asked questions to the effect that the appellant had deceived the deceased throughout their relationship, and had "used Corinne for sex". I accept the respondent's submission, in answer to this complaint, that the questions were relevant to an issue or issues in the trial, in that they went to the nature of their relationship and his sexual jealousy, which was relevant to his motive and intent at the time of the killing. Therefore the questions should not be characterised as ones which were directed to show that the appellant was of bad character, because they were relevant to an issue: see *Attwood v The Queen*,[48] where the High Court said:

> "When he expressly prohibited proof of the commission of an offence or of a conviction of an offence the draftsman saw that he was expressly prohibiting proof of a fact he definitely identified independently of its operation or of the ground of introducing it in evidence. On the other hand, in the case of "questions tending to show that he (the accused) is of bad character" the draftsman was dealing with a description of cross-examination going to credit which he thought of as, *ex hypothesi*, outside the field of relevancy altogether. In other words, in the case of strictly relevant facts he was regarding them as open to proof as part of the Crown case and as necessarily, or at least as naturally, the subject of evidence by the accused if he were called as a witness on his trial and he regarded them as not matter going to the bad character of the accused but as matter going to proof of his guilt. The words describe questions as to that kind of evidence excluded at common law upon the trial of criminal issues as a matter of policy but allowable in the cross-examination to credit of an ordinary witness."

[68] The second example consists of the suggestions by the prosecutor that the appellant had deceived his wife and had become "quite an accomplished liar". As the respondent submits, this questioning was also relevant to an issue, namely the way in which the appellant had conducted his relationship with the deceased.

[69] The third example involves cross-examination which, it is suggested here, was intended to show that the appellant was of a murderous disposition. The appellant had served in the Australian Army, including for a few months in Iraq. The appellant had agreed in cross-examination that his training had included bayonet training. The prosecutor, in possession of a record of the Army, which contained notes of the appellant's being debriefed upon his return from Iraq, suggested that they recorded the appellant's "expressed frustration at having such a quiet tour, and not being able to do the job that you were trained for". The appellant agreed such a thing he had said that upon his return from Iraq. As I read that evidence, it did not suggest that the appellant was of a murderous disposition. It suggested that he had been trained to stab a person, rather than that he had a disposition to do so. Notably, there was no objection to the question.

[70] The fourth example consists of the prosecutor's questions, by which there was evidence that the appellant had sent to the deceased a photograph of an erect penis

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48 (1960) 102 CLR 353 at 361-362; [1960] HCA 15.

with the deceased's surname written down its side. Again, this evidence was relevant to the nature of the relationship between the appellant and the deceased.

[71] The fifth example is in the same category. This was the cross-examination by the prosecutor that he had lied to the deceased, when telling her he was going to buy an expensive ring for her.

[72] It is submitted that the prosecutor made impermissible comments to the jury, in the form of questions which asked the appellant whether the deceased had "a reasonable expectation of a happy, committed and trusting relationship", and "a reasonable expectation of a long and happy, healthy life". It is submitted that this was likely to distract the jury from the proper and dispassionate examination of the issues in the case: see *Libke v The Queen*.[49] I accept that the prosecutor's conduct in this respect was inappropriate, because it was not for the prosecutor to use the process of examination to provide a commentary for the jury, ahead of his final address. However, I am unable to accept that it could have affected the jury's proper consideration of the evidence and the arguments, such that a miscarriage of justice occurred.

[73] There is another example of the same kind. The prosecutor read a text message from the appellant to the deceased, dated 27 July 2015, which included the phrases "I love, want you. You are my oxygen". The prosecutor then asked the appellant "were you concerned about her oxygen in the bedroom when the blood was on the bedroom wall?" Again, that was an improper commentary by the prosecutor, but I do not accept that it caused a miscarriage of justice.

[74] By ground three of the appeal, it is contended that the prosecutor's closing address lacked proper restraint and distracted the jury from a dispassionate consideration of the evidence and the law which they were to apply to the evidence. The comments of which this complaint is made were as follows:

(a) "Forgetfulness is the first refuge of the guilty mind, you might think, and in this case, it infects everything that the defendant has [indistinct]";

(b) "Now I'm going to give you a list of reasons why you would not accept that she stabbed him at all and it's the following … Number (3) he is a practised liar";

(c) "Now in relation to provocation do you not think it's fairly obscene that somebody would rely upon "I was provoked" about the very thing that they had a stated intention to do approximately half an hour before provocation doesn't fly for him if he had the intention before he went in that unit, and the timing of that stated intention becomes very important. He knew that he wasn't welcome there.";

(d) "Now, I've submitted to you you would easily dismiss any fanciful idea that she picked up a knife and stabbed him, but I have to speak to you about self-defence because that's his fantasy and he's raised it …";

(e) "He might regret it [killing the deceased] now and he might … have regretted it nine days later, but he won't take responsibility for his actions. You take responsibility for him and you should convict him of murder."

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[49] (2007) 230 CLR 559 at 588 per Gleeson CJ, Hayne and Heydon JJ.

[75] At least some of those arguments were centrally relevant to the jury's deliberations. The submissions were certainly expressed in strong terms, which would not be used by every competent prosecutor. It should be said here that a dispassionate consideration of the evidence and arguments is likely to be assisted by a dispassionate address from counsel representing the Crown. But that does not mean that every departure from that practice will result in a miscarriage of justice. The question is one of degree, and will obviously depend upon the facts, circumstances and issues of the particular case. In my conclusion, the appellant's argument here, on ground 3, has failed to demonstrate a miscarriage of justice.

Conclusion and orders

[76] The appeal should be allowed, because the jury was not instructed to consider the question of whether the evidence engaged s 304(3). As that question might have been answered in the appellant's favour, it is possible that he lost the chance of an acquittal on the charge of murder. I would order as follows:

1. Appeal allowed.
2. The conviction be set aside.
3. The appellant be re-tried on the charge of murder.

[77] **CROW J:** The factual background of the killing of Corinne Henderson on 26 September 2015 are set out in the reasons of McMurdo JA. I have had the benefit of reading those reasons, and I agree with reasons and orders proposed by his Honour on grounds 2 and 3 of the appeal. I am unable to agree with his Honour's conclusion on ground 1 of the appeal for the reasons that follow.

[78] According to the appellant, after the he had broken into the deceased's unit by smashing his way through a kitchen window, and cutting his arm in the process, the deceased asked him on six occasions to leave her apartment. The appellant then says he pushed past the deceased, walked down the corridor, and looked for other persons in the unit, namely, Mr Wickham. The appellant's evidence was that the deceased then obtained a kitchen knife which the appellant said was held by the deceased "in a non-threatening manner".[50]

[79] On the appellant's version, he admits the deceased refused to answer his questions as to whether the deceased was having a relationship with another man and whether their relationship had ended. He says the deceased did not answer that question but rather on a further six occasions asked the appellant to leave her unit. According to the appellant, after being asked on 12 occasions to leave the unit, he went to grab the deceased by the hips which resulted in the deceased striking the appellant on his left shoulder with the kitchen knife. His version, as set out in paragraphs [23] and [24] of the reasons of McMurdo JA, was that he "just reacted to being stabbed in the arm" but "didn't consciously try to stab her at all".

[80] It was a matter for the jury whether they accepted the appellant's evidence as to what occurred in the deceased's unit on 26 September 2015. The jury had before it evidence from the appellant that he was extremely emotional and angry. He had sent a text message to his friend Ms Gillam that he would "kill them both" at 10.19 pm "[t]his is going to happen" at 10.21 pm. These texts were about half an

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50 T5-14/6.

hour before the deceased was killed. The deceased's body was found not only with the fatal stab wounds but a further twenty stab wounds, with multiple wounds to the deceased's fingers and hands, and also her face.

[81] Confronted with this evidence, the jury was urged by the prosecutor[51] to conclude that the appellant had violently entered into the deceased's unit to carry out his threat sent in his text message to kill the deceased and Mr Wickham. There was, however, a less sinister view open upon the evidence and that was the appellant's violent entry into the deceased's unit was an act undertaken by the appellant not with the intent of killing the deceased or Mr Wickham, but rather to confront the deceased and/or Mr Wickham about their relationship, and the consequent ending of the relationship between the deceased and the appellant.

[82] Naturally, defence counsel in his address to the jury, urged the latter:

> "It might be advanced my client was angry about Dwayne and all this sort of thing and he was upset and whatever, that was his motive. Of course he was. Of course he wasn't happy that the woman he'd been in a relationship, who he'd left his wife and child for, was with somebody else that night. We know that. We know that from the text message, but he didn't go around there to kill Corinne Henderson. He might have gone around there to say what he thought or ask her is it over, which he mightn't do if he was sober, you know, but going around there to kill somebody is a different thing."[52]

[83] Accordingly, it was not in issue between the parties, that the appellant's entry into the deceased's unit was based upon the end of the relationship between the deceased and the appellant.

[84] In *TKWJ v The Queen*,[53] McHugh J, in a different context, made reference to "the adversarial nature of our legal system and the role and function of counsel". As McHugh J said:

> "Criminal trials are not inquisitions. They are contests 'in which the protagonists are the Crown on the one hand and the accused on the other'. Ordinarily, a party is held to the way in which his or her counsel has presented the party's case."

[85] On my reading of the evidence presented at trial and the addresses of crown and defence counsel, it was common ground that section 304(3)(c) was satisfied because the sudden provocation was based on a thing done by the deceased, namely, the stabbing by the deceased of the appellant, to end the relationship or change the nature of the relationship or to indicate the relationship shortly will end. On the appellant's case, he and the deceased were engaged in sexual relations only a few days prior to the night of the incident and on any view the stabbing of the appellant by the deceased at the very least indicates a change in the nature of the relationship, or was based on it.

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51 T1-13 - T1-14.
52 T1-9/34-41.
53 (2002) 212 CLR 124.

[86] The jury were required to consider numerous issues that are relevantly summarised in the six page "question trail for jury".[54] Question 10 dealt with the issue of provocation in the following terms:

> "10 Has the defendant satisfied you that it is more probable than not that when he inflicted the fatal wound upon Corinne Irene Henderson 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;
>
> 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 extreme and exceptional character.
>
> If your unanimous answer to all 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 one of (i), (ii), (iii)(a), (iii)(b) and (iv) above is 'No', the defendant is Guilty of Murder."

[87] Prior to the provision of the question trail for the jury, it was the subject of considerable submissions by counsel for the prosecution and counsel for the defence. Discussing the defence of provocation, defence counsel said:

> "I think the whole of this man's conduct on the night, including the extraordinary way in which he has entered, has shown that his powers of self-control, and I'm looking at it purely from a provocative situation, had – he was acting in an irrational way.[55]
>
> …
>
> Of course, his accusations to her of having an affair with somebody else or having a relationship with another were not denied.[56]
>
> …
>
> But it forms part – if that was alone, but it forms part of the totality of the evidence with the knocking on the door, then hearing the

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54 AR 658 - 663.
55 AR 384/20-25.
56 AR 385/19-20.

> voices in the house, then he enters. He walks through and then, finally, the culmination in being stabbed in the arm.[57]

[88] The trial judge and defence counsel then discussed the argument being advanced by defence counsel of a defence under section 23 of the Code. The trial judge expressed a concern that to "give a direction under a provocation is to introduce a real incoherence to undermine the defence case because suddenly I've got to tell them not only is the onus reversed, I've got to talk about willed acts and a loss of self-control on your client's part."

[89] Defence counsel responded "[t]his – I'm – I have struggled over this matter, your Honour, for a long period of time. I hear exactly what your Honour is saying."[58]

[90] Further important exchanges between defence counsel and the trial judge are set out in the reasons of McMurdo JA at [43].

[91] The question trail for jury raising, as it does, the determination of the appellant's argument that the circumstances were of a most extreme and exceptional character necessarily presumes that there is no issue between the parties that the requirements of s 304(3)(a), (b), and (c) have been satisfied. In a lengthy (40-pages of transcript) address, defence counsel argued that the appellant ought not to be found guilty of murder as the crown had not proved beyond a reasonable doubt that the appellant had intended to kill the deceased. Defence counsel argued "[n]ow, if he intentionally did that, he would have done it as soon as he entered the unit."[59]

[92] Defence counsel argued that the appellant's entry into the unit was to ask the deceased "Are you sleeping with him? Are you having sex?"[60]

[93] The second principal argument brought by defence counsel was that the appellant stabbed the deceased in the act of protecting himself. Of the provocation defence, defence counsel said in his address[61] "[h]ere, we say it's more probable than not that provocation would be applicable, if you had formed the view that, in fact, he'd killed her in circumstances of which there was no excuse and he had the requisite intent. I don't for one second, suggest to you that you would get to this point, but I must cover this if it does arise."

[94] With respect to the defence of provocation, prior to the passages of address set out in the reasons of McMurdo JA at [44], defence counsel addressed the jury as follows:[62]

> "Now, members of the jury, the – you must look at the whole of the circumstances, the whole of the relationship when considering this particular matter and – because it's not just what happened at the time, you've got to look at his state of mind: what has brought this about. And, once again, this is only if you formed the view that he had – that murder has occurred. Now, members of the jury, you've heard a lot about this man. You've heard a lot about the relationship.

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57 AR 385/26-31.
58 AR 386/15-22.
59 T1-35/32-33.
60 T1-38/45 - T1-39/5.
61 T1-38, lines 23 to 27.
62 T1-38/29-44.

> You've heard a lot about it being an on again, off again type situation. You've heard and you've seen the conduct and the texts and what – and you must look at that to assess what has occurred and what is the reaction, because our law says this: under defence of provocation, when a person kills another under circumstances which would constitute murder and he or she does so in the heat of passion, caused by sudden provocation, before there is time for his passion to cool, he is guilty only of manslaughter. And the defence, therefore, operates as a partial defence, not a complete defence because it applies to the effect to reduce what would otherwise be a verdict of murder to manslaughter."

[95] In conclusion, it is my view that the primary contention in the defence case as conducted at trial was that the appellant did not enter into the deceased's unit, in the admittedly extraordinary way, with the intent of murdering the deceased but rather with the intent of discussing the end of the appellant's relationship with the deceased. Accordingly, plainly, in my view, it was the defendant's case, as litigated at trial, that s 304(3)(a), (b) and (c) had been satisfied. The defence then argued that if the jury accepted the crown case beyond a reasonable doubt on the issue of intent, then the jury ought to find in favour of the appellant on the issue of self-defence. That is, the appellant stabbed the deceased in order to defend himself from being further stabbed by the deceased.

[96] The further alternative position raised by defence counsel, but not urged upon the jury, was the partial defence of provocation and in respect of which the appellant's only argument was that the circumstances constituted circumstances "of the most extreme and exceptional character". Pressing an argument that s 304(3)(c) had not been satisfied could only have materially weakened, in the jury's mind, the appellant's principal argument that the crown had not proved the element of intent to kill or do grievous bodily harm. As set out at [44] of McMurdo JA's reasons, defence counsel said "[t]he use of the knife had nothing to do with change in the relationship. Those things had previously been discussed, been dealt with". This statement is in my view a reference to the appellant's principle argument, repeated in defence counsel's address to the jury[63]; that is, the appellant did not intend to kill the deceased. The secondary argument was that the appellant acted in self-defence. The appellant's third alternative argument, that the killing was provoked by the deceased stabbing the appellant could only succeed if the jury were persuaded that the provocation occurred in circumstances of an extreme and exceptional character. As the satisfaction of s 304(3)(c) was not in issue between the crown and the defence there was no error in the summing up.

[97] I would order the appeal be dismissed.

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[63] Also the following paragraph after the last paragraph of defence counsel's address to the jury as set out in paragraph [44] of the reasons of McMurdo JA.