

SMITH v. THE QUEEN

1984. Court of Criminal Appeal : Neasey, Nettlefold and Cosgrove JJ.

May 29, 30, August 30, 1984.

Criminal Law — Particular offences — Offences against the person — Homicide — Murder — Onus of proof — Provocation.

Criminal Law — Particular offences — Offences against the person — Homicide — Murder — Alternative verdict of manslaughter — Particular grounds for returning alternative verdict — Provocation — What constitutes provocation — Insults — Proportionality — Criminal Code, s.160.*

Criminal Law — Jurisdiction, practice and procedure — Course of statements and addresses — Crown's right of reply when defence makes no final address — Criminal Code, s.371(d)†.

The applicant was convicted of the murder of a woman whom he had loved and who had sent for the police to get rid of him, an action which he contended was provocation. The trial judge declined to leave the issue of provocation to the jury, and counsel for the applicant though having adduced evidence made no final address. Counsel for the Crown then addressed the jury.

**Criminal Code*, s.160 — (1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation

(2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the self-control, is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

(3) Whether the conditions required by subsection (2) hereof were or were not present in the particular case is a question of fact, and the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law.

(4) No one shall be held to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

(5) Whether or not an illegal arrest amounts to provocation depends upon all the circumstances of the particular case, and the fact that the offender had reasonable grounds for believing, and did, in fact, believe, that the arrest was illegal, shall be taken into consideration in determining the question whether there was provocation or not.

†s.371 The following rules shall apply to the proceedings upon the trial of an indictment:-

(a) Before any evidence is given the counsel for the Crown is entitled to address the jury for the purpose of opening the case for the prosecution;

(Continued overleaf)

Held, that —

(a) the duty of the trial judge, where provocation is raised, is to decide as a question of law whether any matter raised by the evidence is capable, on any view reasonably open to the jury, of meeting the overriding or controlling standard of mitigation allowed by the law set forth in s.160, and if he holds it incapable, not to leave provocation:

Dictum of Dixon J. in *Packett v. The King* (1937), 58 C.L.R. 190, at pp.217,218, applied;

(b) the question of proportionality between provocation and retaliation, whilst not being an element of the legal concept of provocation, is an evidentiary matter of substantial importance:

Dictum of Barwick C.J. in *Johnson v. The Queen* (1977), 136 C.L.R. 619, at p.635, applied; *Hall v. The Queen*, Serial No. 85/1968, *Jeffrey v. The Queen*, 1982 Tas.R. 198, and *Askeland v. The Queen*, Serial No. 59/1983, followed; and

(c) s.371 is directory, not mandatory, regulating the order of proceeding, and the Crown's right of reply is not conditional on the defence making a final address:

Masnec v. The Queen, [1962] Tas. S.R. 254, at pp.267, 268, applied.

APPLICATION FOR LEAVE TO APPEAL.

The following statement of facts is taken from the reasons of judgment of Neasey and Cosgrove JJ.

Paul Edward Smith "was convicted of murder of Roslyn Clayton on 27th December, 1982, at Ulverstone. He was twenty years old at the time, and the deceased was approximately the same age. (No precise evidence of her age appears to have been given). The applicant shot the deceased dead with a shotgun from a range of approximately three feet, through the laundry window of the home unit which

(Continued)

- (b) At the close of the evidence for the prosecution an officer of the court shall ask the accused person whether he intends to adduce evidence in his defence;
- (c) If the accused person has no witnesses to call he may himself give evidence on oath (but by doing so shall not be deemed to adduce evidence), and thereupon, or if he does not give evidence —
 - (i) if he has no counsel, he may address the jury in his own defence; or
 - (ii) if he has counsel, the counsel for the Crown may, if he thinks it a proper case in which so to do, make a second speech summing up the Crown's evidence, and commenting on the evidence of the accused, if any; and the counsel for the accused may then address the jury on his behalf;
- (d) If the accused person adduces evidence —
 - (i) upon the close of the evidence for the Crown he or his counsel may address the jury for the purpose of opening the case for his defence, and call his evidence first if he desires to be sworn;
 - (ii) after the close of such evidence he, or his counsel, may address the jury, summing up his defence; and
 - (iii) counsel for the Crown may then reply.

she occupied. There had been an earlier trial, in which the jury had been discharged after failing to reach a verdict. Provocation had been left to the jury as an issue in the first trial, whereas at the second, in respect of which this application for leave to appeal is made, the learned trial judge withheld that issue from the jury after ruling that there was no evidence capable of constituting provocation. The principal aim of the defence at the second trial was to obtain a verdict of manslaughter on the basis of provocation pursuant to the provisions of the *Criminal Code*, s.160, so that when the learned trial judge declined to leave that as an issue for the jury, the applicant was apparently left without any substantial matter of defence, and his counsel took the unusual course of declining to make a final address to the jury. A minor ground of appeal relates to that fact, but the principal ground is that the trial judge was wrong in law to withhold the issue of provocation. Accordingly, it is necessary to consider the evidence in some detail, in relation principally to the question whether upon the most favourable view which the jury could reasonably have taken of it there was any matter which, in the words of s.160(3), was "capable of constituting provocation". According to the subsection, that is a question of law.

"The applicant gave evidence on oath at the trial, and a lengthy signed record of interview, the contents of which he did not dispute, was tendered in evidence by the prosecution. Together they gave an adequate account of the applicant's position in relation to matters said to raise the issue of provocation.

"The following is a summary account taken from the applicant's evidence. He is a plant operator and truck driver. He first met the deceased, Roslyn Clayton, in June or July 1981, and three or four weeks later they began living together. After a short time they moved into a home unit in Ulverstone, where the deceased was still living when she died on December 27th of that year. The deceased already had a young son, Raymond, when she met the applicant, and this child lived with them. The applicant became very fond of Raymond. His relationship with the deceased was happy until about November 1982, though during the relationship he had struck her twice. His work mainly took him away from Ulverstone, but he was usually home at weekends.

"The relationship began to deteriorate in about November, when the deceased complained, amongst other things, of hearing that the applicant was taking out another girl in Ulverstone. Tension increased, and they made a mutual decision to live apart for the time being, but in an arrangement whereby he would stay occasional nights at the unit with the deceased. The tension to some extent involved the two sisters of the deceased (both gave evidence), who according to the applicant appeared to disapprove of him and to be advising the deceased against continuance of her relationship with him. The

applicant described two or three incidents of a relatively trivial and domestic nature which he said had caused arguments between himself and the deceased and her sisters. It is not necessary to canvass the details of those.

"From about the first week in December, the relationship deteriorated further. The applicant described some of the incidents which brought this about, and again they were relatively minor and trivial.

"Some time before, the applicant and deceased had discussed having a child. They both decided they would like to, and in early December the deceased told him she was pregnant. He was pleased, because he wanted a permanent relationship with her. "Real trouble", to use the applicant's words, did not begin until about mid- December. Her family were, in effect, urging her not to continue the relationship with him. In about mid-December, he was allowed to go to the flat but was not allowed in. About 15th December, the deceased's sister, Patricia, moved into the flat to live.

"Some time during the second half of December, the deceased told him that she had been advised not to let him see Raymond anymore, and there was a discussion between them about arrangements for the future of the unborn child. (Medical evidence was that the deceased at the time of her death was ten to twelve weeks pregnant). Up to this stage, the deceased had said that he could have visiting rights to the child when born, and that he could help her with financial and other needs connected with it, but then she changed her mind, and said she had been advised not to let him have anything to do with that child when born, or Raymond. It was still being suggested that he was seeing another girl in Ulverstone, which was not true. On Christmas Day he made a telephone call to the mother of the deceased, with whom he was on good terms, and at some stage during the telephone call he heard someone in the background say, "Hang up on him because he is only a bastard".

"On Boxing Day, the applicant had some drinks at a party, but was not affected by alcohol. He left the party about 11.45 p.m. He had a shotgun in his utility. After leaving the party, which was at Leith, some miles from Ulverstone, he returned and drove to the flat. He parked his utility nearby and knocked on the back door. After a couple of minutes Patricia came to the open laundry window and they talked about general matters for half to three-quarters of an hour. He told her he wanted to see the deceased, and Patricia went away to get her. The deceased came to the window. At first she told him to leave, but he refused and said he wanted to see her to sort things out. She said alright, but then went to the toilet and was away about four or five minutes. She came back from the toilet and they talked. He said, "... we didn't argue or anything for about ten minutes, fifteen minutes

and we were going to arrange to get together at a later date and then she turned around and she said that I wouldn't be having anything to do with it", [meaning the unborn child], "she didn't want any financial help, she didn't want anything. And then she said that Patricia had gone to the 'phone box to ring the police. And she turned around and said she was going away, and that's when I left and I went to my . . .". He was stopped there by his counsel and taken to another subject, and then he said, "Well after she came back the first time we talked for a while and she said, "well I'll probably need some financial help later on in the pregnancy", and after she has the child and I said, "Well fair enough" — I said, "Like I've told you before if there is anything you need that she could always call on me to be there if there was anything that she needed . . . well she turned around and — she said, "Well no I don't want anything" — she had only told me two minutes before that she would — could have to call on me and then she turned around and said no she didn't want anything and that Patricia had gone to get the police."

"He was asked, "Yes, what happened then?", and said, "Well that was — she left the window and that was when I went and got the gun and came back and put it through the window and fired it." Asked why he had gone to get the gun, he said, "I can't give an honest answer to why I even thought of it being in the ute. Why I thought to go and get it . . . I was angry, felt cheated, that she'd deceived me by telling me one thing and then turning around two minutes later and saying something different . . . I don't think I can put it into words how I — how I felt. I was just — strange - how I just — I was just angry."

"The relevant part of the record of interview signed by the applicant is as follows:

'Q. After you had spoken to Roslyn for a while this morning, what happened then?

'A. She said that she wasn't going to let me have anything to do with the baby and she then said that she was going to the toilet and that she would be back in a minute. I went to my ute and pulled my shotgun from behind the seat and walked back to the window. Roslyn was coming back into the laundry just as I got there and I asked her again if she would allow me to have anything to do with the child or not and she said no. I asked her what had made her change her mind and she did not answer. Before I knew what happened I had the shotgun in the window I aimed the shot gun at Roslyn and fired. The lights went out and I took off.

'Q. At that time did you believe that you would hit Roslyn when you fired?

'A. I thought I must have hit her and the laundry light went out and I heard a tinkle of glass.

...

'Q. When Roslyn went to the toilet why did you go and get the gun?

'A. I don't know whether I wanted to scare her or whether I wanted to deliberately do it, but when I went back and pointed the gun at her and pulled the trigger I was angry and upset and when she told me that she would not let me have anything to do with the child. I was angry with her and I just don't know what happened. What made me wild was that there was another bloke going round and telling people that I was not the father of her child. I asked her several times about this, and she told me that I knew who the father was.

'Q. And did she indicate to you that you were the father?

'A. Yes. But every night when I came home from work somebody would tell me that Tom had been over shagging Roslyn. I know Tommy would not do it but this wasn't the problem the problem was that people were saying that I was saying it.'

Asked about the record of interview, the applicant said in evidence that it accurately reflected the interrogation, and that the only thing in it with which he disagreed was that he had made a mistake about the time at which he went to the flat."

The grounds of appeal which were finally relied upon, as amended, were :

"1 That the trial judge was wrong in law in that he failed to leave the issue of provocation to the jury.

"2. . . .

"3 That the trial judge erred in relation to his discretion on the issue of provocation in that he based his ruling (in part) upon a finding that it was not unlawful for the deceased to have summoned the police shortly before the death. The applicant had not claimed that the action in calling the police had provoked him, but stated in his evidence that it was the action of the deceased in deceiving him by calling the police and pretending to be friendly to him until they arrived. The applicant contended that such deception amounted to an unlawful act or in the alternative that it amounted to an insult.

"4 That the trial judge erred in law and in the exercise of his discretion in that he permitted counsel for the Crown to address the jury although no address had been made on behalf of the applicant."

Pierre Slicer for the applicant.

Grounds 1 and 3: The trial was a re-trial. At the first trial provocation was left to the jury and the jury was unable to reach a verdict after a deliberation in excess of six hours. Thus it could not be said no reasonable jury could find the existence of provocation. The facts were not different at the second trial, and the substance of the argument was the same. There were differences in the way the

applicant expressed himself, but they were differences of language or forms of expression, and his presentation at the second trial was less vivid, had less spontaneity.

Recent decisions of the appellate courts in Australia have expressed criticism of a line by line approach to directions given by the trial judge to juries. That principle should be applicable to the evidence of an accused given during a trial and to consideration of that evidence on appeal. A trial judge ought not to weigh each word of an accused (especially of a person untrained in the formulation of thoughts and emotions into language as if each word was devoid of a connection with the rest of the case). In any event apparently innocuous words may be considered provocative in the light of the past relationship between the accused and the victim. *Reg. v. R.* (1981) 4 A.Crim.R. 127, at p.133, 28 S.A.S.R. 321, at p.327.

It is for the Crown to negate provocation. Once the defence has raised the issue, the Crown should satisfy the judge it should not go to the jury. *Moffa v. The Queen* (1977) 138 C.L.R. 601. Even if the accused's explanation is not accepted by the jury the onus of proof is upon the Crown. *Reg. v. Prince* [1941] 3 All E.R. 37. Because of the wide scope of s.157(1) (c), when dealing with murder on this basis the court ought not be too restrictive in dealing with s.160.

There was sufficient evidence of provocation for consideration of the issue by the jury. The evidence was referred to in detail.

[Neasey J. requested argument on the meaning of "insult" in s.150(2). The following authorities were cited to the court : *Bedelph v. The Queen* (1980) 1 A.Crim.R.445, at p.446, 1980 Tas.R. 23, at p.27; *Parker v. The Queen* (1962) 111 C.L.R. 610; O'Connor and Fairall, *Criminal Defences*, pp.152, 153; *Holmes v. D.P.P.* [1946] A.C. 588; *R. v. Lukins* (1902) 19 W. N. (N.S.W.) 90; *Reg. v. Tsigos* [1964-5] N.S.W.R. 1607; *Reg. v. Stone* [1965] N.S.W.R. 898].

The test of provocation and the test of whether an ordinary person would be likely to be provoked is one for the jury. *Parker v. The Queen* (*supra*, at p.616); O'Connor and Fairall, *op.cit.*, p.164. The trial judge has the right to withdraw the issue from the jury in accordance with the test in *Moffa v. The Queen* (1976) 138 C.L.R. 601, at pp.607, 621, 622, 624-7. Where there is some evidence capable of constituting provocation it should be put to the jury. *D.P.P. v. Camplin* [1978] A.C. 705, *Edwards v. The Queen* [1973] 1 All E.R. 152, [1973] A.C. 648 [Nettlefold J. *Reg. v. Camplin* has no application in Tasmania, see s.160(3)]. *Reg. v. Dixon* (1938) 7 Crim.L.J. 122 was also referred to.

Ground 4. The use of the word "then" in s.371(d)(iii) means the reply can only be made if s.371(d)(ii) occurs. *Reg. v. Kelly* [1963] V.R. 325.

The following cases were included in the written submissions:

Reg. v. Bruce (1850) 1 Legge 591; *Carroll v. The Queen* [1964] Tas.S.R. 76; *Masnec v. The Queen* [1962] Tas.S.R. 254.

A. R. Jacobs, for the Crown was not called upon.

MAY 30.

Leave was granted to appeal, and the appeal was dismissed. The Court indicated that written reasons would be given later.

AUGUST 30.

NEASEY and COSGROVE JJ. set out the facts and continued:

Prior to the trial judge's ruling on the question of provocation, counsel for the applicant was asked to specify the matters upon which he relied as constituting provocation, and he replied *inter alia*, that they were in accordance with a submission he had made to the trial judge at the first trial. This material is set out in the appeal book, and consists of approximately eight points. Learned counsel during argument on the application for leave to appeal was asked to state or re-state this material, and he provided the court with a written document which sets out the following matters:

1. That the deceased had used him and rejected him.
2. Denial of right to see his unborn child.
3. Denial of right to see the child Raymond.
4. That her rejection was contemptuous in that it had been caused by other members of the family.
5. (Her threat to) take steps to avoid the legal process. (By involving her lawyer, by threatening to leave the State and move to the mainland).
6. Denial of entry to the flat. (This being an insult, in that, in the words of the applicant in the record of interview "Every other dickhead was there and I had to stand at the door talking to her.")

The learned trial judge, Cox J., ruled that no matter had been raised which was capable of constituting provocation, and in our opinion, he was clearly correct in that conclusion.

[Their Honours set out the *Criminal Code*, s.160 and continued:]

The words in subs.(3), "and the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law", were added in 1934 by amending Act, 25 Geo.V No.43, s.3. In *Packett v. The King* (1937) 58 C.L.R. 190, at pp.217, 218, Dixon J. after adverting to the evidence in that case, said:

"Perhaps it may also be conceded that a jury might infer that he acted under the influence of emotions of fear and resentment amounting in his case to a loss of self-control and that he did so on a sudden. But the reason why the question whether any matter alleged is capable of constituting provocation is made

a matter of law lies in the main in the necessity of applying an overriding or controlling standard for mitigation allowed by law. At common law the test of provocation is not whether the occurrence is sufficient to deprive the particular individual in question of his self-control, having regard to his nature and idiosyncracies, but whether it would suffice to deprive a reasonable man in his situation of self-control. (*R. v. Lesbini* [1914] 3 K.B. 1116). This standard is embodied in the language of the code and the court is entrusted with the duty of ruling whether the matter relied upon is capable of depriving an ordinary man of his self-control."

The duty to which his Honour there referred has not changed, nor has its essential nature been altered by later decisions of the High Court of Australia. The duty of the trial judge, where the question properly arises, is to decide as a question of law whether any matter raised by the evidence is capable, on any view reasonably open to the jury, of meeting the "overriding or controlling standard for the mitigation allowed by law". That controlling standard cannot be described or delineated better than in the words used by the section itself, although a study of the history of relevant cases at common law, and also those in this State, provide useful guidance as to the application of the standard. No doubt it is right, as Evatt J. said in *Packett v. The Queen* (*supra*, at p.220), that —

"... the character of the wrongful act is almost invariably a question for the jury and that a judge who takes the issue away from the jury assumes the very gravest responsibility",

but in the present case in our view there was no material which even approached being capable of satisfying the controlling standard.

The question of proportionality of the deed done to the act or insult alleged to have provoked it, whilst not being an element of the legal concept of provocation either at common law or under the *Criminal Code*, is an evidentiary matter of substantial importance. That was affirmed by a majority of the High Court in *Johnson v. The Queen* (1977) 136 C.L.R. 619. In that case Barwick C.J., one of the majority (the dissentient being Murphy J.) held that "loss of self-control" is a relative and not an absolute concept. His Honour there said (at p.635):

"My reading of the early cases relating to provocation leads me to the opinion that it was then conceived that there were degrees of loss of self-control; that the description 'loss of self-control' was not of an absolute state; this acceptance that there are degrees of loss of self-control was consistent with the later adoption of the view that whether the accused had relevantly lost self-control depended on whether the ordinary man would, in like circumstances, have lost self-control to the point of doing an act of the kind and degree by which the accused killed the

deceased. Disproportion between the provocative act and the fatal act might result in the conclusion that an ordinary man would not have so far lost self-control in like circumstances. The provocation in that case is relevantly inoperative. The notion that a state of loss of self-control is relative is basic to the concept of the objective test. That test properly applied keeps provocation within bounds. I can see little warrant for applying a test of reasonableness to the acts of a man who has justifiably i.e., satisfying the objective test, lost his self-control. First to find such justifiable loss of self-control and then to measure according to reason what the person so out of self-control did, seems to me to be an erroneous step. But I can understand, once the objective test of the lack of self-control has been adopted, that it is necessary to consider in applying it whether an ordinary man would have lost self-control to the requisite extent by reason of the provocation before it is possible to reduce the crime to manslaughter. East's reference to an act of provocation which might heat the blood to a proportionate degree of resentment and keep it boiling to the moment of the commission of the fatal act is understandable, in my opinion, on the footing that the act of resentment must in fact have been the act of a man out of self control in circumstances where an ordinary man would have lost self-control to the point of doing an act of that kind and degree (see *Pleas of the Crown* (1803), vol. 1, p.238). It thus relates both to the extent as well as to causality of the loss of self-control. Keating J's remarks in *Reg. v. Welsh* (1869) 11 Cox C.C. 336, at p.339 are, in my opinion, to a like effect: 'Something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act'.

"Having considered the reported cases and the writings on this matter I have come to the conclusion that the proportion of the fatal act to the provocation is part of the material on which the jury should consider whether the provocation offered the accused was such as would have caused an ordinary man, placed in all the circumstances in which the accused stood, to have lost his self-control to the point of doing an act of the kind and degree of that by which the accused killed the deceased. That proportion is not, in my opinion, a separate matter to be considered after it has been decided that an ordinary man would have lost self-control in the circumstances by reason of the provocation. The relationship of the fatal act to the provocation is perhaps best expressed by saying that the provocation must be such as would lead an ordinary man in the accused's circumstances to so lose his self-control as to do an act of the kind and degree as the act by which the accused killed the deceased."

In our respectful opinion, the full substance of that passage is applicable to the law of provocation under s.160 of the *Code*. This principle has

been applied consistently by the Court of Criminal Appeal in this State — see e.g., *Hall v. The Queen*, Serial No. 85/1968; *Jeffery v. The Queen* (1982) 7 A.Crim.R. 55, 1982 Tas.R.198; *Askeland v. The Queen*, Serial No. 59/1983.

It was not contended in this case that the relevant conduct of the deceased amounted to a wrongful act, but that it was capable of being characterized as an insult. "Insult" is a general and non-technical word, and we are not persuaded that the learned trial judge was wrong in ruling against the submissions to that effect made to him, but in any event, even if there was any conduct by the deceased which was capable of being so described, clearly there was none capable of being held by a reasonable jury to be an insult sufficient to cause an ordinary person to lose the power of self-control so as to perform the dreadful act which the applicant performed, nor was there any evidence of conduct by the deceased remotely approaching that level.

The only other separate ground is that the trial judge erred in law and in the exercise of his discretion in permitting counsel for the Crown to address the jury notwithstanding the election by counsel for the accused to make no address. The contention is based upon the relevant part of the *Criminal Code*, s.371, which provides:

"(d) if the accused person adduces evidence —

- (i) upon the close of the evidence for the Crown he or his counsel may address the jury for the purpose of opening the case for his defence, and call his evidence, giving his own evidence first if he desires to be sworn;
- (ii) after the close of such evidence he, or his counsel, may address the jury, summing up his defence; and
- (iii) counsel for the Crown may *then* reply,"

[Their Honours' emphasis]

Section 371 "assumes that a regular order will be followed", but the section is directory and not mandatory — *Masnec v. The Queen* [1962] Tas.S.R. 254, at pp.267, 268. The principal purpose of s.371 (d) is to regulate the order of addresses in the circumstances to which it applies, and the function of the word "then" is merely to assist that purpose, as it is also where the word is used in sub-par. (c)(ii) of the same section. That is demonstrably the case in sub-par. (c)(ii), because it provides that counsel for the Crown may in the circumstances referred to make a second speech summing up the Crown's evidence "if he thinks it a proper case in which so to do", and that counsel for the accused may "then" address the jury on behalf of the accused. There could be no suggestion that counsel for the accused does not have a right of address whether or not counsel for the Crown makes a second speech. The word "then" performs a similar function in sub-par.(d).

NETTLEFOLD J. I joined with the other members of the Court in dismissing this appeal because I am of the opinion that the following passage in the reasons given by the learned trial judge is correct:

"But if I am wrong about that, that is not the end of the enquiry. One still has to ask the question posed by Mr. Justice Cosgrove in *Jeffrey's* case page 4 of his reasons for judgment, 'Is what is shown of such a nature as to be sufficient to deprive an ordinary person of the power of self-control to the extent that he might commit an act which would, but for the excuse of provocation, constitute the crime of murder, and which is of the type described in the evidence?' Neither area of activity by the deceased is of that nature in my view. Neither reaches that over-riding or controlling standard for the mitigation allowed by law which Mr. Justice Dixon referred to in *Packett's* case. In coming to that view I have had regard to what relationship there is between the wrongful — assuming that it was wrongful — conduct alleged and the mode of retaliation. That question of proportionality being a relevant evidentiary issue although I accept that a jury should not be directed that the plea of provocation must fail unless it satisfies some proportion rule. Nevertheless it must be considered when asking whether the activity alleged could be sufficient to deprive an ordinary young man of the accused's age, having the relationship that he did between himself and the expected child, of the power of self control to the extent that he would get and discharge a loaded shotgun in close proximity to the head and upper body of the deceased in a confined space. In my view no reasonable jury could conclude that it would be sufficient to have that effect and consequently I do not propose to leave the question of provocation to the jury."

Leave to appeal granted — Appeal dismissed.

Attorney for the applicant: *P. W. Slicer.*

C.A.W.