Submission No 33

INQUIRY INTO PARTIAL DEFENCE OF PROVOCATION

Name: Mr Winston Terracini SC QC

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The Honourable Rev Fred Nile
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Reverend,

RE: LEGISLATIVE COUNCIL SELECT COMMITTEE & ITS INQUIRY INTO THE PARTIAL DEFENCE OF PROVOCATION

I am grateful for your letter recently requesting that I make a submission to the select committee dealing with the review of the Partial Defence of Provocation.

The history of Provocation

I have no doubt that both you and other members of the select committee have a good working knowledge of the history of Provocation, which has been part of NSW law since responsible government in NSW and prior to that in other English speaking countries for several hundred years pre-dating the 1850s.

There have been numerous enquiries, both overseas, interstate and in NSW that have reviewed the Law of Provocation and it is submitted that the reasons why it remains a partial defence to murder is that it has proven over time to be a valued and important acknowledgment that homicide in many instances cannot be viewed in black and white terms. Indeed, the NSW Law Reform Commission (NSWLRC) in its 1997 report concluded that:

> "There are circumstances in which a person's power to reason and control his or her actions accordingly is impaired by a loss of self control to such an extent as markedly to reduce that person's culpability for killing. Through the defence of Provocation the law offers a degree of compassion to those whose will to act rationally is overcome by a loss of self control in circumstances where the community generally can understand or sympathise with their reaction ... It is appropriate that loss of self control be expressly recognised by way of a defence of Provocation because it is a condition which significantly impairs the accused's mental state and reduces his or her blameworthiness... Factors which significantly affect that mental state should be recognised as reducing the accused's responsibility for his or her actions."

Interstate comparisons

It is important to utilise experience of other Australian States in dealing with the Law of Provocation. However, extreme care should be exercised in making direct comparisons of certain States (Western Australia, Queensland and Tasmania), that adopted Criminal Codes rather than the common law. Sometimes comparing the laws of those States with New South Wales, which in many instances are considerably different is not an entirely appropriate comparison. For example, under the Queensland and Western Australian Criminal Codes Provocation can be a defence to ordinary assaults. That has never been the law in New South Wales or Victoria. In relation to the crime of murder, at various stages in the evolution of the criminal law of Western Australia, Queensland and Tasmania, they have had various degrees of murder, e.g. wilful murder, which again has never been the law in New South Wales.

Further difficulty is encountered when bland statements like other States have abolished the partial Defence of Provocation are made without close inspection of that relevant legislation; again by way of example, Western Australia has created a new offence under their Criminal Code (s281) which specifically deals with homicides which once would have invoked the Law of Provocation.

New South Wales is by a considerable margin the largest criminal jurisdiction in Australia. In population terms, it is bigger than the combined populations of Victoria, Western Australia and Tasmania. The laws concerning juveniles, traffic matters, confiscation of criminal assets and many more areas of the law are considerably different in some States to New South Wales. Even voting and electoral laws are significantly differencein Tasmania eg. Hare Clarke system.

Statistics

On occasions, members of the media are apt to high-light sensational cases which do not reflect the mainstream and on some occasions present a distorted view of the Law of Provocation. Again, by way of example, the simple raising of the defence by the accused doesn't by a long way result in an acquittal of murder by the jury. I have been involved in murder trials connected with the Law of Provocation in instructing Counsel as a law student, solicitor, junior barrister and Silk since 1973 and have certainly been involved in more such trials than most. On numerous occasions where the Accused maintains that he or she has been provoked on flimsy or on an unreasonable basis, the jury in my experience reject such claims.

The Australian Law Reform Commission/NSW Law Reform Commission Family Violence – A National Legal Response ALRC report 114/NSWLRC report 128 of 2010, compiled an impressive array of statistics dealing with homicide trials where the partial defence of Provocation was raised. Indeed, in quoting from the 2006 report of the Judicial Commission of NSW, it was established that in the period between January 1 1990 and September 21 2004, out of 897 persons charged with homicide in New South Wales there were 460 manslaughter convictions and 431 murder convictions. Provocation was raised on 115 occasions, resulting in 75 convictions for manslaughter by reason of Provocation and 40 where Provocation was rejected, leading to a conviction of murder. It was also established with considerable interest in my submission that cases involving family or domestic violence or intimate relationship confrontation accounted for only 32 of the 75 successful pleas of Provocation and the largest single category of 28 cases involved physical violent confrontations. It should also be noted that where statistics have been kept and anecdotal evidence is relied upon, it becomes obvious that the victim is more likely to be male.

It should also be noted that where a female invokes the partial defence of Provocation successfully, the sentences are significantly lower than for a male.

Should the judge decide?

It is my considered view that the appropriate determiner of whether Provocation is applicable in any homicide trial is plainly that it be left to the jury of 12 citizens who encapsulate the standards of our community at the time that they are hearing the facts. They are quite obviously best placed to determine what is reasonable and just in the circumstances. As has been said, there is a strong argument that the "application of community standard to the provocative conduct" should be undertaken by a jury rather than by a single judge (*R v Hajistassi (2010) 107 SASR 67*).

The notion that a single judge is going to be possessed of the collective and wide ranging bank of commonsense, community values of 12 ordinary members of that community is in my view flawed.

Quite recently in the case of *Philip Leung*, two separate Supreme Court Judges have independently and separately in two trials determined that there was insufficient evidence to go to the jury and entered verdicts of acquittal of murder and manslaughter on both occasions.

Mr Leung, as a result of two separate decisions of the Court of Criminal Appeal stands trial for the third time arising out of exactly the same facts, which will be determined later on this year.

Even though the facts have not altered, the Court of Criminal Appeal has held that the acquittal of murder is appropriate, but the acquittal of manslaughter is not.

Mr Leung's first trial was determined by way of an acquittal on 4 May 2009 and in respect of his second trial on 28 April 2011.

The general public may well be entitled to be of concern that two separate Supreme Court Judges were unable to correctly adumbrate the Law in that case which has resulted in Mr Leung facing a third trial.

Although Mr Leung's case did not involve Provocation, I highlight it simply to demonstrate that single judge's with the best intentions obviously, make significant legal errors and that the best forum for determining community standards and values is to have them dealt with before a jury.

Should the partial defence be maintained?

Occasionally, but fortunately very rarely, some cases attract inordinate publicity simply because it is perceived that the jury have made an error. Juries are constantly dealing with the administration of justice every working day, in both the District Court and the Supreme Court state wide continuously. The number of jury verdicts that are overturned by the Court of Criminal Appeal is extremely low and the community still remain very confident of the jury system and its inherent value.

A close inspection of the factual background of the overwhelming majority of Provocation cases reveal that there was a very short period of loss of self control by the assailant, that there were reasonable grounds which were accepted by the jury and the conduct was completely out of character.

Very recently in the case of *R v Won* (July 2012), the accused was found not guilty of murder but guilty of manslaughter when he by happenstance confronted one of his best friend's having sexual connection with his wife when he returned home having felt ill at work. Mr Won stabbed the deceased a number of times then fully co-operated with the police and ambulance, confessed his guilt and did not even make a bail application and remained in custody until his trial was heard some two years after the event. Mr Won was aged in his 50s, had a hard working employment history, had no criminal convictions of any kind and was regarded universally by various witnesses as both hard working, gentle, quiet and considerate. This case is almost a classic example of the law accepting that there must be a "concession to human frailty" (*R v Chhay (1994) 72 ACrim R 1*).

The partial defence of Provocation should be maintained. It is proven to be workable and valuable and an important feature of our criminal justice system and there is no legitimate reason for it to be removed.

Should you wish for me to meet you in person or indeed other members of the committee, please do not hesitate to contact me.

Yours faithfully,

Winston Terracini SC QC
Head of Chambers