Lofty v R [1999] NTCCA 73

PARTIES:	LOFTY, Graham
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA12 of 1998
DELIVERED:	20 July 1999
HEARING DATES:	22 March 1999
JUDGMENT OF:	MARTIN CJ, MILDREN & RILEY JJ

CATCHWORDS:

EVIDENCE
Res gestae – provocation

Attwood v R (1960) 102 CLR 353, considered.

EVIDENCE
Lies – explanation

Edwards (1993) 178 CLR 193, applied.

EVIDENCE
Propensity

Gipp v R (1998) 155 ALR 15, distinguished

CRIMINAL LAW
Provocation – onus and standard of proof

Van Den Hoek (1986) 161 CLR 158, applied.

CRIMINAL LAW
Murder – mental element

Criminal Code Act 1983 (NT), s 162(1)(a)

Kenny Charlie v R (1999) HCA 23, applied.

CRIMINAL LAW
Summing up – Whether change in manner in which Crown case presented.

R v Torney (1983) 8 a Crim R 437, distinguished.
King v R (1986) 161 CLR 423, considered.

REPRESENTATION:

Counsel:

Appellant:	Mr Odgers
Respondent:	Mr Wilde QC & Mr Adams

Solicitors:

Appellant:	KARLAS
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF
CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Lofty v R [1999] NTCCA 73
No. CA12 of 1998

BETWEEN:

GRAHAM LOFTY
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 20 July 1999)

MARTIN CJ.

[1] The appellant was convicted on 28 May 1998, after trial upon indictment that on or about 13 July 1996, at Bulman in the Northern Territory, he murdered Regina Murray. There is evidence that the appellant and his victim had gone through a ceremony of marriage in accordance with Aboriginal customary law.

[2] Shortly, the Crown case was that the accused killed his wife by stabbing her four times with a knife on or around her shoulder blades intending to kill her or to cause her grievous harm. There was evidence that he had heard that she was intending to leave him and go away with one Felix Campion. The

traditional relationship between the deceased and Mr Campion made such a prospective liaison especially dangerous in aboriginal eyes. The killing occurred when the appellant and his wife were alone, but after an evening in which there had been altercations involving them and others. The Crown anticipated that provocation of the appellant by his wife would be an issue. There is evidence that the appellant had told lies regarding her whereabouts after he had killed her.

[3] In a somewhat unusual turn of events, for this jurisdiction, counsel for the appellant at trial addressed the jury immediately after the Crown opening. It was then admitted that the appellant had stabbed the deceased as alleged, and that one of the stab wounds had killed her. Amongst other things, counsel dealt with the issue of provocation in the legal sense and in respect of the evidence anticipated to be called in that regard. He raised the possibility of the alternative verdict of dangerous act causing death being open. He suggested evidence would emerge to explain the appellant's apparent lies in respect of the whereabouts of his wife after her death.

[4] The grounds of appeal are as follows:

> "1. The learned trial judge erred in failing to give proper directions on evidence of a fight involving the appellant and Terry Brennan and William Rickson.
>
> 2. The learned trial judge put to the jury a construction of the record of interview adverse to the appellant which had not been relied on by the prosecution and which the defence had

not been given a chance to meet.

3. The learned trial judge erred in admitting evidence of lies told by the appellant and his concealment of the body of the deceased.

4. The learned trial judge erred in the directions on the mental elements of murder.

5. The learned trial judge erred in the directions on provocation."

[5] The leave of this Court is required in relation to directions, omissions to direct, or decisions in relation to the admission or rejection of evidence by the learned trial Judge where objection was not taken at trial (*Supreme Court Rules*, r86.08).

Grounds 1 and 2 – The fight with Terry Brennan and William Rickson

[6] Both parties treated these grounds as being able to be satisfactorily dealt with together. It is not a ground of appeal that the evidence of the fight involving the appellant, Terry Brennan and William Rickson should not have been admitted, although it was unsuccessfully objected to at trial.

[7] It was submitted by counsel, then appearing for the Crown before the learned trial Judge, that the evidence, although complicated and uncertain, would show that the fighting had broken out at a time when the appellant had confronted the deceased with regard to the allegation that she was going to go away with the Felix Campion. The evidence was to be put forward as

to when provocation could be said to have arisen and the "state of play between the parties before the stabbing occurred" (Supplementary Appeal Book p78 & 79). The appellant did not wish to rely on that incident as relevant to provocation because it occurred some time before the killing; his case was that the provocation relied upon occurred immediately prior to the killing. In ruling the evidence admissible, his Honour referred to the evidence of events preceding the death, and, in particular, the evidence as to what took place between the accused, William Rickson and Terry Brennan and ruled that that evidence was admissible "as part of the res gestae" (Supplementary Appeal Book p142). In my opinion the evidence of the fight must be considered in relation to the happenings which followed.

[8] The evidence was certainly inconsistent and in many respects unclear, but it would have been open to the jury to find that an incident had occurred, that there was a fight involving the appellant, Terry Brennan and William Rickson, that the deceased was present when the fight arose and the other two men were attempting to protect her from a threatened attack by the appellant. The evidence indicated that by that time the appellant had been made aware that the deceased had indicated a desire to go away with Felix Campion.

[9] It is uncertain as to what period of time elapsed between that incident and the killing. There was evidence to suggest that about the same time as the fight was taking place, or shortly thereafter, Joyce Bohme, the Aboriginal wife of Felix Campion, and Mr Campion arrived at the scene. Mrs Bohme

told the appellant that he should give his wife a flogging. There was some altercation as between Mrs Bohme and the deceased and Mrs Bohme had thrown a fire stick at the deceased which hit her resulting in ashes in her hair.

[10] According to both Mrs Bohme and Mr Campion, the appellant and the deceased went to their house after the fire stick incident, and the two of them followed. They told the deceased in the presence of the appellant that she was not supposed to go out with Felix Campion because Felix was too close within the family relationship. The appellant and the deceased went into the house whilst the two others remained at the door. The appellant lit a candle and led the deceased into the house by holding her forearm. Mrs Bohme said that the deceased sat down and then got up to get a pair of pants, which were torn, from the washing line and that that led to an accusation by the appellant that she had had sexual intercourse with somebody else. Both Mrs Bohme and Mr Campion gave evidence that the appellant removed one of his boots and threatened to hit the deceased with it, whereupon it was removed from him and thrown onto the roof of the house. According to Mrs Bohme, the appellant said: "If I had a shot gun I would have blown you up a long time ago". According to Mrs Bohme the appellant was angry, but, in her words: "Alright". Mr Campion said that the appellant looked a bit wild, and added in his evidence that when Mrs Bohme said that she and Mr Campion were going home, the deceased had said: "Don't leave me. He's going to kill me". To which the appellant replied:

"Its okay, I'm not going to hurt you". Mr Campion described the appellant as looking calm, but a little bit drunk. Mrs Bohme and Mr Campion then left.

[11] His Honour referred to the evidence in respect of these matters in detail in his summing up. He then turned to the record made of the interview between the police and the appellant. Before doing so, his Honour explained to the jury that it was just like any other piece of evidence as to the weight to be given to it. Everything which was there said was part of the evidence, and that when evaluating it and deciding upon the weight to be given to it, the jury should have regard to all the other evidence in the case. The record of the interview being available to the jury, his Honour said that he proposed to simply draw attention to parts of the record in the form of a short summary.

[12] The appellant spoke to the police about an argument that he had had with his two brothers, Terry and William, how they had had a fight and: "They stopped us". He then said he took his wife back to camp and bashed her there a couple of times and then stabbed her, indicating on the left hand side of her back. Asked: "Why did you do that?" He replied: "Just to make me mad … to make me mad cos I was real drunk". He said he had then gone to sleep and when he woke up he saw that she was dead, but did not tell anyone because he was waiting for the police to come. Later, he referred again to the fight between himself and Terry and William and said that it was about "Regina sake I think". Asked about the problem:

"Was it a jealous fight?"
"Yeah".
"Who was jealous?".
"Oh me".
"Why were you jealous?"
"Cos that other two want to take her partner".
"That's Terry and William?"
"Yeah".
"Wanted to take her partner?"
"Yeah, had a fight there"
"What happened after the fight?"
"After the fight I take her back".

[13] He also mentioned the fight that had taken place between the deceased and Mrs Bohme, referring to it as a "stick fight" and saying that it was over Mrs Bohme's husband. He affirmed that it was another jealous fight. Going through the incidents leading up to the stabbing, he told the police that he had hit his wife a couple of times with his hand in the face: "Because I was upset". He told the police that he had said to the deceased: "What for you want to go to Maningrida?" She had not replied and that he had then got up, got a knife and stabbed her. Questioned further about the stabbing, the following questions and answers

"COFFEY: What did you want to happen to her? Can you remember what you were thinking – what you wanted to happen? Do you understand what I'm saying?
LOFTY: Yeah, I know what you're saying.

COFFEY: Yeah.
LOFTY: But can't answer that question.

COFFEY: Well, why not? If you don't want to answer it, that's fine. We'll go – I'll move on, um, but why did you stab her in the back?
LOFTY: 'Cause she made me upset, that's why.

COFFEY: And did you want her to finish up? Do you understand the ---
LOFTY: Yeah.

COFFEY: --- question? Do you want to answer or – did you want her to finish up or what?
LOFTY: Yep.

COFFEY: Why is that?
LOFTY: That's what make me upset, that's why.

COFFEY: All right, so you're saying: 'Finished up' mean: 'Break up'. Is that right, or ---
LOFTY: Yeah.

COFFEY: Might be misunderstanding each other here.
HILL: Which, relationship or ---

COFFEY: Yeah.
HILL: --- which – life.

COFFEY: Did you want to – did she want to split up with you – finish up ---
LOFTY: Yeah.

COFFEY: --- break up your relationship?
LOFTY: Yeah.

COFFEY: Is that right?
LOFTY: Yep.

COFFEY: And are you saying that's why you stabbed her?
LOFTY: Yeah.

COFFEY: All right. All right. Well did you want – did you want to kill her?
LOFTY: Yeah.

COFFEY: And why is that?
LOFTY: 'Cause she want to go to Maningrida, that's why.

COFFEY: And did you want to stop her?
LOFTY: Try to stop her, but she want to go.

COFFEY: How were you trying to stop her?
LOFTY: By talking to him.

COFFEY: And how else?
LOFTY: No way else, just talking. That's why I stab her.

COFFEY: All right. And you say you stabbed her four times. Is that right?
LOFTY: Yeah.

COFFEY: And all in the same place?
LOFTY: Yep.

COFFEY: And each one, how hard? How hard were the ---
LOFTY: Really hard."

[14] During the course of his review of the material contained in that record, his Honour referred to what the appellant had said as to the cause of the fight involving Brennan and Rickson, that they wanted to take the deceased as a "partner". His Honour did not mention the appellant's statement that he was jealous in that context or that it was a jealous fight. His Honour did, immediately afterwards, however, refer to the fight that the deceased had with Joyce Bohme about Felix Campion which the accused described as another jealous fight. The reference to "another" was capable of being understood to refer back to the cause of the fight involving the appellant and Brennan and Rickson.

[15] What his Honour was doing in the course of that summing up was to simply refer to what was contained in the record of the interview. It was part of the evidence in the trial. He had previously gone through the evidence of all others who were involved in the fight between the three men. We have not

been pointed to any other passage in his Honour's summing up wherein he referred to that fight and the reason which the appellant attributed to it.

[16] In putting the Crown case, his Honour noted that the prosecutor drew attention to the fact that in his interview the accused said nothing about his being concerned, let alone provoked, by any alleged breach of Aboriginal traditional law, that he had only spoken of being upset that the deceased wanted to go to Maningrida, that he was upset that she was interested in Felix Campion and that he had failed to talk her out of it. His Honour also noted the submission that there was evidence from both Joyce Bohme and Felix Campion that the accused was calm when they left the appellant and the deceased, and that any provocation was not such as would cause an ordinary person similarly circumstanced to have acted as he did. The Crown submission was that there was evidence that the accused was angry, that he was drunk, upset and jealous, but that the evidence did not support the proposition that he acted within the legal definition of provocation.

[17] The defence case as put by his Honour was that the deceased's expression of interest in Felix Campion and her desire to go to Maningrida was a terrible offence in the Aboriginal community of Bulman, the gravity of her offence against Aboriginal law and the determination of Joyce Bohme that action be taken against her, caused the appellant to lose his self control and stab her in the heat of the moment, intending to kill her or cause grievous harm. His Honour noted the submission made by counsel for the appellant to the jury that the provocation to the accused was increased by the intervention of

Terry Brennan, William Rickson, Joyce Bohme and Felix Campion preventing the accused from disciplining his wife. It was further compounded by the deceased's reference to having no pants on and her refusal to satisfy the appellant that she would not go to Maningrida, indeed she insisted upon going.

[18] Objection was taken to his Honour having referred to that part of the interview in which the word "partner" was used, upon the basis that it played no part in the Crown case, and had it been apparent that it did, then instructions would have been taken. Counsel for the appellant believed that the appellant was angry because the two other men had taken her "part" not that they wanted to take her as a "partner". Counsel said that he was not suggesting there was a mistake in the transcript, but rather that he was talking about the meaning of it. It was not agitated before this Court that the transcript was incorrect. The objection was pursued upon the basis that his Honour had mentioned that part of the evidence for the first time when the appellant had no chance to meet it. His Honour pointed out that he was not raising it, it was in the evidence which was before the jury. His Honour said in the course of discussion with counsel that the version of events given by the witnesses to the fight had been hardly challenged in cross-examination and that what he had read out was the only indication from the appellant as to what the fight was about (Appeal Book 170). Counsel pointed out that the Crown had not addressed anything to that piece of

evidence and that in effect the first time it had been highlighted was by his Honour in his summing up.

[19] It was put by counsel for the appellant upon the appeal that his Honour's reference to that particular passage operated unfairly in that although it was there, it was open to different interpretations and if counsel for the appellant at trial had thought that attention would be drawn to it, then he may have adopted a different course during the course of the hearing or in his address.

[20] Any question of jealousy arising from the desire of the other two men to take the deceased as their "partner" played no part in the case for the Crown or the appellant at trial.

[21] Nowhere does it appear that his Honour expressed a personal view about the effect of that piece of evidence. That factor, I think, distinguishes this case from those relied upon by counsel for the appellant such as *R v Torney* (1983) 8 A Crim R 437. The learned trial Judge here did not depart in his charge from the manner in which the parties had formed the case. He related the evidence and in conclusion put the case for the Crown and for the defence in the manner described above. No objection was made to the manner in which his Honour did that. It could not be said that there was "a distinct change in the manner in which the Crown case was presented to the jury" as referred to in *R v King* (1985) 17 A Crim R 184 at 187. In the High Court, *King v R* (1986) 161 CLR 423 at 432, Dawson J referred to:

> "the direction given by the trial Judge at the behest of the Crown involved such a change in the course of the trial at such a late stage that inevitably the conviction could not be allowed to stand".

[22] His Honour was not putting forward the impugned passage as any additional basis for conviction. Indeed, if that particular piece of evidence impressed itself upon the jury at all, it seems to me that it would have been favourable to the appellant in that it could be regarded as a circumstance strengthening his position in relation to provocation. It could have the effect of operating upon the minds of the jury in relation to the question of whether or not the Crown had negatived that an ordinary person similarly circumstanced to the appellant at the time he killed his wife would have acted in the same or a similar way. One of the circumstances was that he had the impression, rightly or wrongly, that there was something going on between the deceased and the other two men. It could be seen as being a circumstance operating at the later time when he could be considered to have been provoked by her and killed her.

[23] I am far from convinced that there has been any miscarriage of justice made out upon these grounds.

[24] Much as been said about the doctrine of res gestae, often critical, see for example the introduction of the subject in ch 19 of Waight & Williams, Evidence Commentary and Materials, 5th Ed, Law Book Co, 1998, commencing at p922. Amongst the cases there referred to is *Attwood v R* (1960) 102 CLR 353 where the Full High Court said at p360-361:

> "At common law no motives of policy of humanity or fairness excluded the proof of facts and circumstances forming the parts and details of the transaction and the incidents or matters tending to explain, identify or lead up to the occurrences forming the subject of the issue, in short what we commonly embrace under the term "relevant facts"; it did not exclude such evidence notwithstanding that it might disclose acts or conduct on the part of an accused person which would be considered inconsistent with good character".

See also *O'Leary v R* (1946) 73 CLR 566, per Dixon J at p577.

[25] A further objection under these grounds was that it was incumbent upon the trial Judge to direct the jury how they should and should not use the evidence, and, in particular, his Honour was criticised for not giving a direction that the evidence was not to be used for propensity reasoning. In that regard reference was made to *Beserick* (1993) 66 A Crim R 419; *BRS v R* (1997) 148 ALR 101; *Gipp v R* (1998) 155 ALR 15; *Kemp* (Queensland Court of Appeal, unreported, 29 August 1995); *G* (1996) 88 A Crim R 489; *R v Johnson* (Victorian Court of Criminal Appeal, unreported, 27 February 1997); *R v Peake* (1996) 67 SASR 297 and *R v Alexander* (South Australian Court of Criminal Appeal, unreported, 24 April 1996). The circumstances in this case did not call for any direction such as is suggested. For these purposes I think it sufficient to refer to what was said in *Gipp*. At p36 at [77] McHugh & Hayne JJ. referred to what McHugh J. said in *BRS*:

> "If the evidence is admitted for a reason other than reliance on propensity, the judge must direct the jury that they can use the evidence for the relevant purpose and for no other purpose. In some cases, the judge may need to be more specific. He or she may need to direct the jurors that they cannot use the evidence for an identified purpose. If the evidence is admitted because the Crown wishes to rely on the accused's propensity as an element in the chain of proof,

> it is especially necessary that the judge give the jurors clear directions as to the manner in which they may use the propensity evidence".

[26] At p54 at [139] Kirby J, commencing at [141] speaking of evidence variously described as "dispositional", "background", "tendency", "propensity", "relationship" or in some circumstances "similar facts" evidence said that it is only admissible if its probative value outweighs its prejudicial effect:

> "This Court has repeatedly warned of the dangers of allowing such evidence to be admitted, or permitting it to be received without immediate warning as to the limited basis upon which it may be considered then of the need to direct the jury, in the concluding charge, on the way in which, if at all, they should use such evidence."

See also Callinan J, p61at [174] quoting from *BRS*.

[27] *Gipp* was a case in which the appellant had been indicted on seven counts involving the sexual abuse of his stepdaughter. He pleaded not guilty to the charges. He denied that he had ever behaved improperly towards the complainant. The complainant gave evidence-in-chief that the appellant had regularly sexually molested her prior to the date of the offences. I do not consider that that case and others of a similar kind apply in the circumstances prevailing here. None of the evidence could be advanced as going to the appellant's propensity to offend the criminal law. The fact of the killing was admitted. His propensity to do such a thing was not in issue. The issues were intent, and provocation. As to intent, I can see nothing

arising in the incident involving the other two men which could bear upon it. As to provocation, for reasons already explained, the evidence could be taken as being of assistance to the accused and not something which enhanced the Crown case.

[28] It was put by counsel for the appellant before this Court that the reference to that passage in the record of the interview was very damaging to the defence because it raised the question that provocation occurred at about the time of the fight, and not, as on the defence case, at the time of the stabbing. It was put that if the jury decided that the accused was acting out of jealousy when he became involved in the fight, it could be reasoned that he was acting out of jealousy when he later stabbed the deceased. It does not seem to me to matter if the appellant was jealous of his wife on both occasions. He killed her. He admitted to it. The fact that he was acting out of jealousy is not to deny the possibility that he had been provoked by the deceased. The defence case was that the evidence indicated that the appellant had been insulted, that is, he had been subjected to the indignity of his wife's proposed liaison with Mr Campion, and particularly by the seriousness of that proposed relationship, bearing in mind Aboriginal tradition and her refusal to depart from her plan. That such an insult may be conterminous with or give rise to the passions associated with jealousy could be considered by the jury on the issue of whether the Crown had proved that the appellant had not been deprived of his power of self-control.

[29] Counsel for the appellant at trial did not seek any particular direction when he objected to his Honour's having referred to that passage of the evidence. He complained of unfairness in that his Honour referred to that passage from the record of the interview as he did. For the reasons given, I do not consider that it was unfair.

[30] *Ground 3 – Lies*

Prior to trial, objection was taken to the admissibility of evidence of things said by the appellant on the day following the killing. In a variety of ways he replied to enquirers that the deceased had gone away. The Crown intended to rely on that evidence as being relevant and admissible because it pointed to a consciousness of guilt in the commission of the killing. Counsel for the appellant submitted to his Honour that there was an alternative reason as to why the appellant had made no revelation of the death of the deceased because it did not matter how she met her death, by accident or otherwise, retribution would have been exacted upon him by members of the community.

[31] In his ruling the learned trial Judge said:

> "In broad terms, the evidence is to the effect that after the deceased met her death at the hands of the accused, he did not reveal that death to persons who inquired as to her whereabouts. He told several different versions of where she might have been. Her body was not discovered until one and a half days after her death. Such evidence is, in my view, quite clearly relevant and admissible. The extent to which it can be used against the accused by the jury will depend on whether the evidence before the jury satisfies them that it meets the tests laid down in the case of *Edwards* (1993) 178 CLR at 193, and I

rule that there is no basis to exclude the evidence of the alleged lies at this stage of the trial."

[32] The evidence objected to was adduced at the trial. The appellant's explanation was in the record of the interview with police:

Q. "Did you tell anyone about what happened?

A. No I didn't tell – I didn't tell anybody.

Q. Why not?

A. Cause they – they would all fight at me. That's why I won't and I was waiting for the police."

And later:

> "I didn't say anything cause I was waiting for the policeman to come. That's the time two policemen came. When they find the dead body, policeman's come straight into me, took me to side - my hand, take me there, lock me up. There was big mob of people coming there, trying to fight me. Two policemen take me away."

[33] There was thus evidence that the appellant had told lies, but equally, there was evidence of a reason for the telling of the lie, apart from realisation of guilt. In those circumstances "The jury should be told that, if they accept that a reason of that kind is the explanation of the lie, they cannot regard it as an admission", *Edwards v The Queen* (1993) 178 CLR 193 at 211.

[34] In his charge to the jury his Honour mentioned the evidence that the accused had told some witnesses various stories as to where the deceased might be and went on:

> "Now, not every lie told by an accused person is probative of guilt; lies can be probative of guilt in certain circumstances, but that is not the case here. The accused admits causing the death of Ms Murray

> by stabbing her. You have heard evidence that it was common knowledge in Bulman that a person who causes the death of another would face immediate retribution from the deceased's family, and that was regardless of the circumstances of the death. The evidence as to what occurred at Bulman when the police put the accused in the back of a vehicle for his own protection is not in dispute. You recall that evidence, a crowd of people were either attempting to or actually attacking the accused. You may well consider that the accused had good reason not to reveal the death, regardless of his guilt or innocence of any particular offence. In the circumstances of this particular case, the fact that the accused lied, if you accepted he did, about the deceased's whereabouts on the Sunday and Monday, can say nothing about the accused's guilt of a particular offence, murder, manslaughter or dangerous act. So in the particular circumstances of this case, the evidence of the accused's lying on the Sunday and Monday about the deceased's whereabouts cannot assist you in deciding whether he is guilty and, in particular, whether he is guilty of murder, manslaughter or dangerous act. So I suggest that in relation to that area of the evidence, you simply put it to one side, it will not assist you."

[35] Counsel for the appellant accepted that those directions were intended to direct the jury, as a matter of law that they could not use the lies as evidence of consciousness of guilt. However, it was put that it could not be assumed the jury followed those directions, particularly given the fact that they may have been understood as suggestions from the trial Judge, and thus it could not be concluded that the appellant did not lose a chance of acquittal by reason of the wrongful admission of the evidence.

[36] *Edwards* directs trial Judges to instruct juries that there may be reasons for the telling of a lie apart from the realisation of guilt, including, "to avoid a consequence extraneous to the offence". That was the situation in this case. When all the evidence was in, "The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it

as an admission". Trial Judges are to "appropriately" instruct the jury with respect to those matters. In my view there was nothing inappropriate in the way in which his Honour instructed the jury in relation to those matters. In fact it could be said that his Honour's instructions to the jury were more favourable to the accused than they need have been in that his Honour did not leave the question of fact finding entirely to the jury. He told them that in so far as lies were concerned they were to put it to one side, as it would not assist (as an admission of guilt).

[37] I do not consider that *Edwards* is authority for the proposition that because there is evidence of a lie and evidence of an innocent explanation for the lie, a trial Judge should exclude the evidence of the lie as irrelevant and inadmissible. Whether or not a lie was told and, if so, whether there is acceptable evidence of an explanation for it are matters for the jury. However, there is a duty upon the trial Judge to instruct the jury as to use which may be made of such of the evidence as is accepted.

[38] Ground 4 – Mental Elements of Murder

The appellant's submission is that an element of murder is that the appellant foresaw the possibility of death. His Honour's direction in relation to that was that at the time of stabbing the deceased the accused must be found to have intended either to cause her death or to cause grievous harm to her. At the time this appeal was argued in this Court there was pending before the High Court in *Kenny Charlie v R*, an appeal raising this precise issue. The

High Court has since delivered its judgment in that matter affirming the decision of the Court of Criminal Appeal that foresight of death is not an element of murder as prescribed in s 162(1)(a) of the *Criminal Code* 1983 (NT).

[39] *Ground 5 – Provocation*

It is objected that the directions given by his Honour on this issue failed properly to relate the test of provocation to the burden and standard of proof. The defence case was that the provocation to the appellant was exceedingly grave, while on the Crown case it was less so. The submission is that the jury were required to assess the gravity of the provocation in accordance with what was reasonably possible, that is, what was the highest level of gravity which was reasonably possible. The submission is that the directions instead required the jury to come to a determination as to what the gravity was in fact, before considering how an ordinary person might have reacted to an insult of such gravity. No authority was cited.

[40] The *Criminal Code* defines "provocation" as being "any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person, to deprive him of the power of self control". The defence case was that the provocation was constituted by insults. The definition was before the jury, not only in the course of his Honour's oral directions, but in a written Aide Memoire. Immediately prior to giving his directions on this aspect of the case, his Honour reminded the

jury again that it was for the Crown to prove the guilt of the accused, to prove it beyond reasonable doubt and that it was not necessary for the accused to establish provocation. The accused did not have to persuade the jury of anything, the Crown must prove beyond reasonable doubt that the killing was not the result of provocation. His Honour informed the jury in that context, both in his charge and in the Aide Memoire, that whilst the Crown bore that onus, it would be enough that it negatives any one of the five elements of provocation:

> "3(e) For the Crown to prove that the killing was not the result of provocation, the Crown must therefore prove beyond reasonable doubt ANY ONE of the following five elements:
>
> (i) that the accused did not stab Regina Murray with the knife because of provocation from Regina Murray; OR
>
> (ii) that the accused incited the provocation; OR
>
> (iii) that the accused was not deprived by the provocation of the power of self-control; OR
>
> (iv) that the accused did not act on the sudden and before there was time for his passion to cool; OR
>
> (v) an ordinary person similarly circumstanced to the accused would not have acted in the same or a similar way."

[41] In the course of those instructions, his Honour suggested to the jury that they should look at the gravity of the wrongful act or insult, that in assessing it they must look at it from the point of view of its significance to the appellant, including all of the circumstances of the relationship between him and the deceased, the whole of his conduct, his personal circumstances,

including his age, his sex, his race, his personal attributes and his history, all being relevant. He reminded the jury about the accused's life as an Aboriginal in a remote community, the evidence as to the extent to which he followed traditional customs and practices, his relationship with the deceased, the evidence as to the significance of his learning of her interest in Mr Campion, and whether the relationship between Mr Campion and the deceased would be a grave breach of Aboriginal custom as to family relationships. His Honour suggested to the jury that provocation may be cumulative, that is, something that comes on top of a series of stressful events which might cause the accused to lose his self-control:

> "Certain acts, certain words considered separately, you may think, would not amount to provocation, but you need to consider the combination or cumulatively whether what occurred was enough to cause the accused to lose self control. What you need to do is perhaps evaluate the gravity of the insult on a scale of say one to ten. How bad was it."

[42] Those directions were given in the context of the subjective test to be applied concerning whether or not the accused was deprived by the provocation of the power of self-control.

[43] His Honour invited the jury to consider all of the circumstances, including the evidence as to the accused's consumption of alcohol, leaving open whether it was a case where the accused was drunk, in a bad temper, and became angry because of jealousy and being belittled in front of the community. He told the jury it was a matter of fact for them, did the

accused lose his self-control, and if so, was it because of provocation or something else.

[44] His Honour moved on to put another element of provocation, that is, whether what had occurred would be sufficient to deprive an ordinary person of his self-control, the objective test.

> "… The next stage is to consider whether the Crown has proven that an ordinary person when faced with an insult of whatever gravity you find it to be and being in the situation of the accused, could not have lost his power of self control to the degree that he would form an intention to kill, or intention to cause grievous harm and, in fact, carry out that intention."

His Honour told the jury that the ordinary person was to be taken as sober, not drunk, that he did not possess a particularly bad temper, is not unusually or unnecessarily excitable or pugnacious and possesses such minimum power of self control as everyone is entitled to expect from an ordinary person living in the same or similar circumstances to the accused. He then invited the jury to measure provocation as they might find it to be, if any, and ask whether what occurred was sufficient to deprive an ordinary person of the power of self-control.

[45] It is undoubted that the defence bears the evidential burden, and once that has been discharged, the legal burden shifts to the prosecution. In *Van Den Hoek* (1986) 161 CLR 158 at 162 the High Court reviewed the steps which must be taken. The first question is whether there is evidence which, if believed, might reasonably have led the jury to return a verdict of

manslaughter on the grounds of provocation. If the jury accept the evidence, they then consider whether the conduct of the deceased was provocative (within the definition) and that by reason of that provocation, if found, the appellant lost his self-control and as a consequence did the acts that resulted in death. The next consideration is whether an ordinary man might, in consequence of the provocation, be so rendered liable to loss of control as to cause that person to act in the same or a similar way. They are all questions for the jury, but all the defence need do is to point to material which might induce a reasonable doubt. That was done and there is no issue taken as to the way in which his Honour put the defence case in that regard.

[46] I do not accept that his Honour's directions to the jury in relation to provocation were not in accordance with the law. Where the question is as to whether, as a matter of law, there is sufficient evidence of provocation to go to the jury, account must be taken of the version most favourable to the accused (*Stingel v R* (1990) 171 CLR 312 at 334; *Masciantonio v R* (1994) 183 CLR 58), but that is not this case. The matter being left to the jury, it was the Judge's duty to leave the question of the sufficiency and extent to which the accused person was induced, for them to weigh (*R v Withers* [1925] S.R. (NSW) 382 at 393). It is for the jury to determine whether on its view of the facts, manslaughter or murder is the appropriate verdict (*Holmes v DPP* (1946) 2 All ER 124) having regard to the alleged provocative conduct in its full context rather than in isolation (*Stingel* at p325).

[47] In my opinion his Honour's directions made it abundantly clear to the jury that in coming to their views on this subject, the evidence bearing upon provocation must be taken into account unless they were satisfied beyond reasonable doubt that it or any part of it should be excluded, and that it was for them to decide the question there being considered, bearing in mind the onus and burden of proof on the Crown. That is an alternative and satisfactory way of telling the jury that they must acquit of murder and find manslaughter on the grounds of provocation if they are not satisfied beyond reasonable doubt that the killing was unprovoked.

[48] Senior Counsel appearing for the appellant at trial did not object to the directions given by his Honour in regard to provocation, but nevertheless I would grant leave to raise it here.

[49] I would dismiss the appeal.

MILDREN J.

[50] I have read the draft judgment prepared by Martin CJ. I agree with it and have nothing to add.

RILEY J.

[51] I have read the draft judgment prepared by Martin CJ. I agree and have nothing to add.
