

Case Note QLD - [R v Walker-Ely \[2025\] QCA 183](#)

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This was an appeal against conviction from a jury verdict of murder delivered in the Supreme Court at Mackay on 7 June 2024. The appellant had pleaded not guilty to murder but guilty to manslaughter.

The killing occurred in the early hours of 14 December 2021 near a caravan park at Paget, Mackay. The deceased, a man known to the appellant, died from multiple stab wounds inflicted by a knife. The appellant called 000 soon after, stating he had stabbed someone who was "coming onto him."

At trial, the sole live issue was provocation under s 304 of the Criminal Code (Qld) — whether the appellant's actions were provoked such that the offence was reduced from murder to manslaughter. The defence accepted that the appellant intentionally killed the deceased but contended that the deceased's sexual advances and threats triggered a loss of self-control amounting to provocation.

The jury rejected the partial defence and convicted the appellant of murder. He was sentenced to life imprisonment. The appeal to the Queensland Court of Appeal was brought on three main grounds, each alleging a miscarriage of justice.

**Issue 1: Prosecutor's Address and Directions on the Objective "Ordinary Person" Test**

Facts: During closing submissions, the prosecutor described the objective element of provocation, whether an "ordinary person" could have lost self-control as a "handbrake" on the defence, designed to filter out "unmeritorious claims." The prosecutor went further, arguing that the "ordinary person would not have done what the appellant did," because "the response was just too much." The Crown used phrases such as "it went too far" and "it was excessive," effectively suggesting a proportionality requirement between the provocation and the reaction.

In summing up, the trial judge gave the standard four-question direction on provocation but did not identify or correct the prosecutor's misstatements. The jury was not expressly told that proportionality was not part of the legal test, nor that the "ordinary person" standard should not be treated as a moral or social judgment.

Finding: The Court held that the prosecutor's characterisation was a misstatement of law. The "ordinary person" test in s 304 does not ask whether an ordinary person would have done the same act or whether the response was proportionate — only whether the provoking conduct could cause an ordinary person to lose self-control and form the intent to kill or cause grievous bodily harm.

Because the trial judge failed to rectify or neutralise the Crown's error, the Court found that a real risk of miscarriage arose: the jury may have applied a stricter, legally incorrect standard.

The appeal was therefore allowed on this ground.

## **Issue 2: Sexual-Interest Evidence and Crown Use**

Facts: Before trial, the prosecutor sought to adduce evidence from a female witness that the appellant had previously expressed an interest in performing oral sex. The Crown originally indicated this would support an inference that the deceased and the appellant had engaged in consensual sexual activity on the night in question, consistent with DNA evidence found on the appellant's body.

This was significant because the defence case relied on the deceased's unwanted sexual advances as the provoking conduct.

During the trial, however, the prosecutor changed tack, ultimately deciding not to pursue the inference of consensual sex, but failed to inform the defence of that change. The evidence was nonetheless led and later deployed in closing to attack the appellant's credibility, implying he had lied about his sexual orientation and about rejecting the deceased's advances.

Findings: The Court held that the prosecutor's handling of the evidence was unsatisfactory. Having foreshadowed one use and then shifting to another without notice deprived the defence of an opportunity to object or seek exclusion on unfairness grounds.

Although the Court found this conduct improper, it concluded that, taken alone, it did not cause a miscarriage of justice, as the main issue was already clouded by the misdirection on provocation. Nevertheless, the Court emphasised that such conduct "fell short of the Crown's duties of fairness and candour."

## **Issue 3: Cross-Examination and Crown Reliance on "10/10 Honesty"**

Facts: In cross-examination, the prosecutor asked the appellant whether he considered himself an honest person and how he would "rate his honesty out of 10." The appellant replied, "10 out of 10."

In closing, the prosecutor used that answer to attack credibility, stating it was a "red flag" and that "no truly honest person would rate themselves that high." The Crown urged the jury to see this as evidence of dishonesty and arrogance, suggesting the appellant's entire testimony was unreliable.

The trial judge made a brief reference to this exchange in summing up but gave no direction that the question was improper or that the jury should disregard it.

Findings: The Court held that the cross-examination was improper. A global self-assessment of honesty is collateral and irrelevant; it invites the jury to reject the accused's evidence based on character rather than the facts. By relying on the answer in closing, the Crown compounded the prejudice.

The absence of a clear judicial correction meant the risk of unfair prejudice was not neutralised. Even if the first ground had failed, the Court considered this conduct alone sufficient to warrant a retrial.

### Disposition

Appeal allowed.

Conviction for murder set aside.

New trial ordered.

### Notes for Practice:

- Provocation (s 304): The objective test concerns the capacity of the provoking conduct to cause an ordinary person to lose control and form the requisite intent. It does not involve assessing whether the reaction was “too much” or whether an ordinary person would have acted similarly (Pollock; Masciantonio; Johnson).
- Prosecutor's addresses: If a Crown address introduces moralistic or proportionality-based language (e.g., “handbrake,” “too far,” or “unmeritorious”), defence counsel should object immediately and seek explicit curative directions identifying the error.
- Sexual-interest evidence: The Crown must clearly articulate the purpose for which such evidence is led. If the Crown's use changes during trial, fairness may require re-examination of admissibility. Defence should insist on transparency and object if the purpose is altered.
- Cross-examination on honesty: Questions about general character or self-assessed honesty are inadmissible. If allowed, they require strong judicial instruction that they cannot be used to assess credibility or guilt.
- Miscarriage threshold: Where a combination of prosecutorial misdirection and inadequate judicial correction may have affected the jury's application of s 304, a new trial will generally be ordered rather than substituting a manslaughter verdict.

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