Neutral Citation Number: [2012] EWCA Crim 2

Case No: 2011/04258/C3 (1)
2011/03081/D1 (2)
2011/03115/C3 (3)

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM:
(1)HH JUDGE SMITH (READING CC); (2) HH JUDGE METTYEAR
(3) MR JUSTICE LLOYD JONES
(1) T2010/7430; (2) T2010/7390-1; (3) T2010/7399

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2012

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE HENRIQUES
and
MRS JUSTICE GLOSTER DBE

- -

Between :

R	**Respondent**
- v –	
Clinton (1)	**Appellant**
R	**Respondent**
-v-	
Parker (2)	**Appellant**
R	**Respondent**
-v-	
Evans (3)	**Appellant**

- -
- -

M Birnbaum QC for Clinton (1)
W Harbage QC for Parker (2)
C Clee QC for Evans (3)
A Edis QC for the Crown

Hearing date: 25th October 2011

- -

Approved Judgment

The Lord Chief Justice of England and Wales:

Introduction

1. The difficulties of giving consistent effect to section 3 of the Homicide Act 1957, which encapsulated in statutory form the common law defence of provocation, were notorious. As Professor David Ormerod observes in Smith & Hogan's, Criminal Law, 13th Edition, "For the appellate courts to fluctuate so often and so significantly on the interpretations of a defence in cases of such seriousness led to confusion and presented a disappointing spectacle". This measured criticism is entirely justified. With effect from 4 October 2010 section 3 of the 1957 Act ceased to have effect. The ancient common law defence of provocation, reducing murder to manslaughter, was abolished and consigned to legal history books.

2. It was replaced by sections 54 and 55 of the Coroners and Justice Act 2009 (the 2009 Act) which created a new partial defence to murder, "loss of control". Just because loss of control was an essential ingredient of the old provocation defence, the name is evocative of it. It therefore needs to be emphasised at the outset that the new statutory defence is self-contained. Its common law heritage is irrelevant. The full ambit of the defence is encompassed within these statutory provisions. Unfortunately there are aspects of the legislation which, to put it with appropriate deference, are likely to produce surprising results.

3. In order to enlighten our understanding our attention was drawn to different passages in the Report of the Law Commission (Report No. 290, *Partial Defence as to Murder* (2004), the Law Commission Consultation Paper No. 177, *A New Homicide Act for England* (2005) and the Law Commission Report No. 304 (*Murder, Manslaughter and Infanticide* (2006). In July 2008 the Ministry of Justice issued its consultation paper in response to these recommendations, *Murder, Manslaughter and Infanticide; proposals for reform of the law*. Although the title of the Law Commission Report was adopted, its contents were selectively chosen. Looked at overall, the legislation does not sufficiently follow the recommendations of the Law Commission to enable us to discern any close link between the views and recommendations of the Law Commission and the legislation as enacted.

4. In these appeals the main focus of our attention is the controversial provision which relates to the impact on the "loss of control" defence of what is described as "sexual infidelity". We looked, de bene esse, at the debates in Parliament prior to the enactment. Even on the most generous interpretation of *Pepper v Hart*, the debates did not reveal anything which assisted in the process of legislative construction. So we must ascertain the meaning of these provisions from their language. As we shall explain, however, the conclusion we have reached is consistent not only with the views which would have been expressed by those who were opposed to this provision in its entirety, but also with the views expressed by ministers responsible for the legislation during its passage through Parliament.

The convictions

5. These are appeals against conviction for murder by:

(a) Jon-Jacques Clinton was born in 1965. On 15th November 2010 he killed his wife, Dawn Clinton, then aged 33 years, in the family home in Bracknell. On 23rd May 2011, in the Crown Court at Reading before Her Honour Judge Smith, he was convicted of murder and arson. On the following day he was sentenced to imprisonment for life on count 1, with a specified minimum term of 26 years, less 187 days, for murder and to 2 years imprisonment concurrent on count 2. The verdict was returned by the jury after considering the partial defence of diminished responsibility. Judge Smith ruled that there was insufficient evidence of loss of control for that issue to be considered by the jury. The correctness or otherwise of this decision forms the basis for the present appeal.

(b) On 26th October 2010 Stephen Parker killed his wife, Jane Parker, in the family home in …. On 9th May 2011, in the Crown Court at Hull before His Honour Judge Mettyear, the jury rejected the loss of control defence and convicted him of murdering his wife. He was sentenced to imprisonment for life. The specified minimum term was 17 years, less 196 days.

(c) Dewi Evans killed his wife … on 11th November 2010 in the matrimonial home in South Wales. On 29th June 2011, in the Crown Court at Swansea before Mr Justice Lloyd Jones, again, the jury rejected the loss of control defence and he was convicted of murdering his wife. He was sentenced to imprisonment for life, with a minimum specified term of 11 years, less 248 days.

The legislation

The "loss of control" defence

6. Section 54 of the 2009 Act provides:

> "**Partial Defence to Murder: loss of control**
>
> (1) Where a person ("D") kills or is party to the killing of another ("V"), D is not to be convicted of murder if –
>
> (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
>
> (b) the loss of self-control had a qualifying trigger, and
>
> (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
>
> (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
>
> (3) In subsection 1(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it. ”

7. Section 55 provides:

“**Meaning of “qualifying trigger”**

(1) This section applies for the purposes of section 54.

(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3) This subsection applies if D’s loss of self-control was attributable to D’s fear of serious violence from V against D or another identified person.

(4) This subsection applies if D’s loss of self-control was attributable to a thing or things done or said (or both) which –

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged.

(5) This subsection applies if D’s loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger –

> (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
>
> (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
>
> (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7) In this section references to "D" and "V" are to be construed in accordance with section 54."

8. This is the "loss of control" defence in its entirety. Its components are set out in section 54(1), as amplified in section 55. There is however a further reference in the 2009 Act to the concept of loss of control. Section 2 of the Homicide Act 1957, which dealt with the diminished responsibility defence, has been replaced by section 52 of the 2009 Act and, as with the law relating to provocation, the ingredients of the defence have changed. Its potential relevance to the issues under discussion is readily identified. There are cases, and *Clinton* was one, where the defences of loss of control and diminished responsibility will be raised in the same proceedings. The defence arises from an abnormality of mental functioning which

> "… (b) substantially impaired D's ability to do one or more of the things mentioned in sub-section (1a) and …
>
> (1A) those things are -
>
> (a) to understand the nature of D's conduct;
>
> (b) to form a rational judgment;
>
> (c) to exercise self-control. …"

9. The first feature of section 54 is that it identifies three statutory components (or ingredients) to the "loss of control" defence. We begin by emphasising that each is integral to it. If one is absent, the defence fails. It is therefore inevitable that the components should be analysed sequentially and separately. However, it is worth emphasising that in many cases where there is a genuine loss of control, the remaining components are likely to arise for consideration simultaneously or virtually so, at or very close to the moment when the fatal violence is used. Further, the discussion will proceed in terms which suggest that the defendant seeking to advance the loss of control defence is not always male. This is because experience shows that women as well as men kill when they have lost self control. In the legislation no special provision is made for the gender of the killer. Finally, by way of introduction, we do not overlook that the burden of disproof is on the prosecution.

The first component

10. For present purposes, subsection 1(a), which addresses the first ingredient, is self explanatory. The killing must have resulted from the loss of self control. The loss of control need not be sudden, but it must have been lost. That is essential. Before reaching the second ingredient, the qualifying trigger, there is a further hurdle, that the defendant must not have been acting in a "considered" desire for revenge. The possible significance of "considered" arises in the appeal of *Evans*. In the broad context of the legislative structure, there does not appear to be very much room for any "considered" deliberation. In reality, the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self control.

The second component

11. The qualifying trigger provisions are self contained in section 55. There is no point in pretending that the practical application of this provision will not create considerable difficulties. Sections 55(3) and (4) define the circumstances in which a qualifying trigger may be present. The statutory language is not bland. In section 55(3) it is not enough that the defendant is fearful of violence. He must fear *serious* violence. In subsection (4)(a) the circumstances must not merely be grave, but *extremely* so. In subsection (4)(b) it is not enough that the defendant has been caused by the circumstances to feel a sense of grievance. It must arise from a *justifiable* sense not merely that he has been wronged, but that he has been *seriously* wronged. By contrast with the former law of provocation, these provisions, as Mr Michael Birnbaum QC, on behalf of Clinton submitted, have raised the bar. We have been used to a much less prescriptive approach to the provocation defence.

12. Mr Birnbaum submitted, and we think correctly, that the defendant himself must have a sense of having been seriously wronged. However even if he has, that is not the end of it. In short, the defendant cannot invite the jury to acquit him of murder on the ground of loss of control because he personally sensed that he had been seriously wronged in circumstances which he personally regarded as extremely grave. The questions whether the circumstances were extremely grave, and whether the defendant's sense of grievance was justifiable, indeed all the requirements of section 55(4)(a) and (b), require objective evaluation.

13. The process of objective evaluation in each individual case is hugely complicated by the prohibitions in section 55(6) which identifies a number of features which are expressly excluded from consideration as qualifying triggers. Thus the defendant, who, looking for trouble to the extent of inciting or exciting violence loses his control, does not qualify. In effect self induced loss of control will not run. The most critical problem, however, which lies at the heart of the *Clinton* appeal, is subsection 6(c), "sexual infidelity".

14. This provision was described by Mr Andrew Edis QC, who acted for the prosecution in each of the appeals, as a "formidably difficult provision": so indeed it is. On the face of the statutory language, however grave the betrayal, however humiliating, indeed however provocative in the ordinary sense of the word it may be, sexual infidelity is to be disregarded as a qualifying trigger. Nevertheless, other forms of betrayal or humiliation of sufficient gravity may fall within the qualifying triggers specified in section 55(4). What, therefore, is the full extent of the prohibition?

15. We highlight some of the matters raised in argument to illustrate some of the potential problems. This list is not comprehensive. The forensic analysis could have gone on much longer, and so, for that matter, could this judgment.

16. We immediately acknowledge that the exclusion of sexual infidelity as a potential qualifying trigger is consistent with the concept of the autonomy of each individual. Of course, whatever the position may have been in times past, it is now clearly understood, and in the present context the law underlines, that no one (male or female) owns or possesses his or her spouse or partner. Nevertheless daily experience in both criminal and family courts demonstrates that the breakdown of relationships, whenever they occur, and for whatever reason, is always fraught with tension and difficulty, with the possibility of misunderstanding and the potential for apparently irrational fury. Meanwhile experience over many generations has shown that, however it may become apparent, when it does, sexual infidelity has the potential to create a highly emotional situation or to exacerbate a fraught situation, and to produce a completely unpredictable, and sometimes violent response. This may have nothing to do with any notional "rights" that the one may believe that he or she has over the other, and often stems from a sense of betrayal and heartbreak, and crushed dreams.

17. Mr Birnbaum drew attention to and adopted much of the illuminating and critical commentary by Professor Ormerod at pp.520-522 in Smith and Hogan's Criminal Law. To begin with, there is no definition of "sexual infidelity". Who and what is embraced in this concept? Is sexual infidelity to be construed narrowly so as to refer only to conduct which is related directly and exclusively to sexual activity? Only the words and acts constituting sexual activity are to be disregarded: on one construction, therefore, the effects are not. What acts relating to infidelity, but distinguishable from it on the basis that they are not "sexual", may be taken into account? Is the provision directly concerned with sexual infidelity, or with envy and jealousy and possessiveness, the sort of obsession that leads to violence against the victim on the basis expressed in the sadly familiar language, "if I cannot have him/her, then no one else will/can"? The notion of infidelity appears to involve a relationship between the two people to which one party may be unfaithful. Is a one-night-stand sufficient for this purpose?

18. Take a case like *R v Stingel* [1990] 171 CLR 312, an Australian case where a jealous stalker, who stabbed his quarry when he found her, on his account, having sexual intercourse. He does not face any difficulty with this element of the offence, just because, so far as the stalker was concerned, there was no sexual infidelity by his victim at all. Is the jealous spouse to be excluded when the stalker is not? In *R v Tabeel Lewis* … an 18 year old Jehovah's Witness killed his lover, a 63 year old co-religionist, because on one view, he was ashamed of the consequences, if she carried out her threat to reveal their affair to the community. She was not sexually unfaithful to him, but he killed her because he feared that she would betray him, not sexually, but by revealing their secret. Mr Birnbaum asked rhetorically, why should the law exclude one kind of betrayal by a lover but not another?

19. Mr Edis agreed that "sexual infidelity" is not defined. He suggested that its ambit is not confined to "adultery" and that no marriage or civil partnership ceremony or any formal arrangement is required to render the violent reaction of the defendant to the sexual infidelity of the deceased impermissible for the purposes of a qualifying trigger. He suggested however that the concept of "infidelity" involves a breach of

mutual understanding which is to be inferred within the relationship, as well as any of the more obvious expressions of fidelity, such as those to be found in the marriage vows. Notwithstanding their force, these considerations do not quite address the specific requirement that the infidelity to be disregarded must be "sexual" infidelity. The problem was illustrated when Mr Edis postulated the example of a female victim who decided to end a relationship and made clear to her former partner that it was at an end, and whether expressly or by implication, that she regarded herself as free to have sexual intercourse with whomsoever she wanted. After the end of the relationship, any such sexual activity could not sensibly be called "infidelity". If so, for the purposes of any qualifying trigger, it would not be caught by the prohibition in section 55(6)(c). In such a case the exercise of what Mr Edis described as her sexual freedom might possibly be taken into account in support of the defence, if she was killed by her former partner, whereas, if notwithstanding her disillusionment with it, she had attempted to keep the relationship going, while from time to time having intercourse with others, it could not.

20. Mr Birnbaum and Mr Edis could readily have identified a large number of situations arising in the real world which, as a result of the statutory provision, would be productive of surprising anomalies. We cannot resolve them in advance. Whatever the anomalies to which it may give rise, the statutory provision is unequivocal: loss of control triggered by sexual infidelity cannot, on its own, qualify as a trigger for the purposes of the second component of this defence. This is the clear effect of the legislation.

21. The question however is whether it is a consequence of the legislation that sexual infidelity is similarly excluded when it may arise for consideration in the context of another or a number of other features of the case which are said to constitute an appropriate permissible qualifying trigger. The issue is complex.

22. To assist in its resolution, Mr Edis drew attention to the formal guidance issued by the Crown Prosecution Service on this issue. This provides that "it is the issue of sexual infidelity that falls to be disregarded under sub-section (6)(c). However certain parts of the case may still amount to a defence under section 55(4)". The example is given of the defendant who kills her husband because he has raped her sister (an act of sexual infidelity). In such a case the act of sexual infidelity may be disregarded and her actions may constitute a qualifying trigger under section 55(4).

23. This example is interesting as far as it goes, and we understand it to mean that the context in which sexual infidelity may arise may be relevant to the existence of a qualifying trigger, but in truth it is too easy. Any individual who witnesses a rape may well suffer temporary loss of control in circumstances in which a qualifying trigger might well be deemed to be present, although in the case of a rape of a stranger, insufficient to cause the defendant to have a sense of being seriously wronged personally. A much more formidable and difficult example would be the defendant who kills her husband when she suddenly finds him having enthusiastic, consensual sexual intercourse with her sister. Taken on its own, the effect of the legislation is that any loss of control consequent on such a gross betrayal would be totally excluded from consideration as a qualifying trigger. Let us for the purposes of argument take the same example a little further. The defendant returns home unexpectedly and finds her spouse or partner having consensual sexual intercourse with her sister (or indeed with anyone else), and entirely reasonably, but vehemently,

complains about what has suddenly confronted her. The response by the unfaithful spouse or partner, and/or his or her new sexual companion, is to justify what he had been doing, by shouting and screaming, mercilessly taunting and deliberately using hurtful language which implies that she, not he, is responsible for his infidelity. The taunts and distressing words, which do not themselves constitute sexual infidelity, would fall to be considered as a possible qualifying trigger. The idea that, in the search for a qualifying trigger, the context in which such words are used should be ignored represents an artificiality which the administration of criminal justice should do without. And if the taunts by the unfaithful partner suggested that the sexual activity which had just been taking place was infinitely more gratifying than any earlier sexual relationship with the defendant, are those insults – in effect using sexual infidelity to cause deliberate distress - to be ignored? On the view of the legislation advanced for our consideration by Mr Edis, they must be. Yet, in most criminal cases, as our recent judgment in the context of the riots and public order demonstrates, context is critical.

24. We considered the example of the wife who has been physically abused over a long period, and whose loss of self control was attributable to yet another beating by her husband, but also, for the first time, during the final beating, taunts of his sexual activities with another woman or other women. And so, after putting up with years of violent ill-treatment, what in reality finally caused the defendant's loss of control was hurtful language boasting of his sexual infidelity. Those words were the final straw. Mr Edis invited us to consider (he did not support the contention) whether, on a narrow interpretation of the statutory structure, if evidence to that effect were elicited (as it might, in cross-examination), there would then be no sufficient qualifying trigger at all. Although the persistent beating might in a different case fall within the provisions for qualifying triggers in section 55(4)(a) and (b), in the case we are considering, the wife had endured the violence and would have continued to endure it but for the sudden discovery of her husband's infidelity. On this basis the earlier history of violence, as well as the violence on the instant occasion, would not, without reference to the claims of sexual infidelity, carry sufficient weight to constitute a qualifying trigger. Yet in the real world the husband's conduct over the years, and the impact of what he said on the particular occasion when he was killed, should surely be considered as a whole.

25. We addressed the same issue in discussion about the impact of the words "things said" within subsection 55(6)(c). Everyone can understand how a thing done may constitute sexual infidelity, but this argument revolved around finding something "said" which "constituted" sexual infidelity. Mr Edis accepted that no utterance, as such, could constitute sexual infidelity, at any rate as narrowly construed. Professor Ormerod suggests the example of a defendant hearing a wife say to her lover, "I love you". On close examination, this may or may not provide evidence of *sexual* infidelity. However it does not necessarily "constitute" it, and whether it does or not depends on the relationship between the parties, and the person by whom and to whom and the circumstances in which the endearment is spoken. It may constitute a betrayal without any sexual contact or intention. Mr Birnbaum raised another question. He pointed out that in the case of Clinton, Mrs Clinton confessed to having had an affair on the day before she was killed, but earlier she boasted that she had had sex with five men. If the boast, intended to hurt, was simply untrue, how could those words "constitute" infidelity?

26. We are required to make sense of this provision. It would be illogical for a defendant to be able to rely on an untrue statement about the victim's sexual infidelity as a qualifying trigger in support of the defence, but not on a truthful one. Equally, it would be quite unrealistic to limit its ambit to words spoken to his or her lover by the unfaithful spouse or partner during sexual activity. In our judgment things "said" includes admissions of sexual infidelity (even if untrue) as well as reports (by others) of sexual infidelity. Such admissions or reports will rarely if ever be uttered without a context, and almost certainly a painful one. In short, the words will almost invariably be spoken as part of a highly charged discussion in which many disturbing comments will be uttered, often on both sides.

27. We must briefly return to the second example suggested by Professor Ormerod, that is the defendant telling his spouse or partner that he or she loves someone else. As we have said, this may or may not provide evidence of *sexual* infidelity. But it is entirely reasonable to assume that, faced with such an assertion, the defendant will ask who it is, and is likely to go on to ask whether they have already had an affair. If the answer is "no" there would not appear to be any sexual infidelity. If the answer is "yes", then obviously there has been. If the answer is "no", but it is perfectly obvious that the departing spouse intends to begin a full relationship with the new partner, would that constitute sexual infidelity? And is there a relevant distinction between the defendant who believes that a sexual relationship has already developed, and one who believes that it has not, but that in due course it will. Situations arising from overhearing the other party to a relationship saying "I love you", or saying to the defendant, "I love someone else", simple enough words, will give rise to manifold difficulties in the context of the prohibition on sexual infidelity as a qualifying trigger.

28. This discussion of the impact of the statutory prohibition in section 55(6)(c) arises, we emphasise, in the context, not of an academic symposium, but a trial process in which the defendant will be entitled to give evidence. There is no prohibition on the defendant telling the whole story about the relevant events, including the fact and impact of sexual infidelity. To the contrary: this evidence will have to be considered and evaluated by the jury. That is because notwithstanding that sexual infidelity must be disregarded for the purposes of the second component if it stands alone as a qualifying trigger, for the reasons which follow it is plainly relevant to any questions which arise in the context of the third component, and indeed to one of the alternative defences to murder, as amended in the 2009 Act, diminished responsibility.

29. We shall return to the question whether, notwithstanding that it must be disregarded if it is the only qualifying trigger, a thing done or said which constitutes sexual infidelity is properly available for consideration in the course of evaluating any qualifying trigger which is not otherwise prohibited by the legislation.

The third component

30. Assuming that the qualifying trigger is present, the defence is still not complete. We must return from section 55 to section 54 (1)(c). This third ingredient is related to the requirement, that even faced with situations which may amount to a qualifying trigger, the defendant is nevertheless expected to exercise a degree of self control. For this purpose the age and sex of the defendant is relevant. Perhaps a very immature defendant will be less likely to be able to exercise the self control which might be exercised by an adult. The defendant's reaction (that is what he actually did, rather

than the fact that he lost his self control) may therefore be understandable in the sense that another person in his situation and the circumstances in which he found himself, might have reacted in the same or in a similar way.

31. For present purposes the most significant feature of the third component is that the impact on the defendant of sexual infidelity is not excluded. The exclusion in section 55(6)(c) is limited to the assessment of the qualifying trigger. In relation to the third component, that is the way in which the defendant has reacted and lost control, "the circumstances" are not constrained or limited. Indeed, section 54(3) expressly provides that reference to the defendant's circumstances extends to "all" of the circumstances except those bearing on his general capacity for tolerance and self-restraint. When the third component of the defence is examined it emerges that, notwithstanding section 55(6)(c), account may, and in an appropriate case, should be taken of sexual infidelity.

32. We must reflect briefly on the directions to be given by the judge to the jury. On one view they would require the jury to disregard any evidence relating to sexual infidelity when they are considering the second component of the defence, yet, notwithstanding this prohibition, would also require the same evidence to be addressed if the third component arises for consideration. In short, there will be occasions when the jury would be both disregarding and considering the same evidence. That is, to put it neutrally, counter intuitive.

Diminished responsibility

33. The situation for the jury, and the judge, is yet further complicated if and when, as sometimes happens, the defence is inviting the jury to consider possible verdicts of manslaughter both on the grounds of loss of control and diminished responsibility. If the defendant is suffering from a recognised medical condition, for example, serious and chronic depression, the discovery that a partner has been sexually unfaithful may, and often will be said to, impair the defendant's ability to form a rational judgment and exercise self control. This situation is not all that uncommon. It arose in Clinton where one of the psychiatrists suggested that if Clinton was telling the truth, the effect of his "depressed state" would have been that he would have been more likely to lose self control following his wife's graphic account of sexual activity with other men and her taunts that he lacked the courage to commit suicide. Sexual infidelity may therefore require consideration when the jury is examining the diminished responsibility defence even when it has been excluded from consideration as a qualifying trigger for the purposes of the loss of control defence.

Sexual infidelity – conclusion

34. We must now address the full extent of the prohibition against "sexual infidelity" as a qualifying trigger for the purposes of the loss of control defence. The question is whether or not sexual infidelity is wholly excluded from consideration in the context of features of the individual case which constitute a permissible qualifying trigger or triggers within section 55(3) and (4).

35. We have examined the legislative structure as a whole. The legislation was designed to prohibit the misuse of sexual infidelity as a potential trigger for loss of control in circumstances in which it was thought to have been misused in the former defence of provocation. Where there is no other potential trigger, the prohibition must, notwithstanding the difficulties identified earlier in the judgment, be applied.

36. The starting point is that it has been recognised for centuries that sexual infidelity may produce a loss of control in men, and, more recently in women as well as men who are confronted with sexual infidelity. The exclusion created by section 55(6) cannot and does not eradicate the fact that on occasions sexual infidelity and loss of control are linked, often with the one followed immediately by the other. Indeed on one view if it did not recognise the existence of this link, the policy decision expressly to exclude sexual infidelity as a qualifying trigger would be unnecessary.

37. In section 54(1)(c) and (3) the legislation further acknowledges the impact of sexual infidelity as a potential ingredient of the third component of the defence, when all the defendant's circumstances fall for consideration, and when, although express provision is made for the exclusion of some features of the defendant's situation, the fact that he/she has been sexually betrayed is not. In short, sexual infidelity is not subject to a blanket exclusion when the loss of control defence is under consideration. Evidence of these matters may be deployed by the defendant and therefore the legislation proceeds on the basis that sexual infidelity is a permissible feature of the loss of control defence.

38. The ambit of section 55(3) and (4) – the second component, the qualifying triggers – is clearly defined. Any qualifying trigger is subject to clear statutory criteria. Dealing with it broadly, to qualify as a trigger for the defendant's loss of control, the circumstances must be extremely grave and the defendant must be subject to a justifiable sense of having been seriously wronged. These are fact specific questions requiring careful assessment, not least to ensure that the loss of control defence does not have the effect of minimising the seriousness of the infliction of fatal injury. Objective evaluation is required and a judgment must be made about the gravity of the circumstances and the extent to which the defendant was seriously wronged, and whether he had a justifiable sense that he had been seriously wronged.

39. Our approach has, as the judgment shows, been influenced by the simple reality that in relation to the day to day working of the criminal justice system events cannot be isolated from their context. We have provided a number of examples in the judgment. Perhaps expressed most simply, the man who admits, "I killed him accidentally", is never to be treated as if he had said "I killed him". That would be absurd. It may not be unduly burdensome to compartmentalise sexual infidelity where it is the only element relied on in support of a qualifying trigger, and, having compartmentalised it in this way, to disregard it. Whether this is so or not, the legislation imposes that exclusionary obligation on the court. However, to seek to compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole is not only much more difficult, but is unrealistic and carries with it the potential for injustice. In the examples we have given earlier in this judgment, we do not see how any sensible evaluation of the gravity of the circumstances or their impact on the defendant could be made if the jury, having, in accordance with the legislation, heard the evidence, were then to be directed to excise from their evaluation of the qualifying trigger the matters said to constitute sexual infidelity, and to put them into distinct compartments

to be disregarded. In our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections 55(3) and (4), the prohibition in section 55(6)(c) does not operate to exclude it.

40. We have proceeded on the assumption that legislation is not enacted with the intent or purpose that the criminal justice system should operate so as to create injustice. We are fortified in this view by the fact that, although the material did not assist in the construction of section 55(6)(c), our conclusion is consistent not only with the views expressed in Parliament by those who were opposed in principle to the enactment of section 55(6)(c) but also with the observations of ministers who supported this limb of the legislation.

41. Thus, for example, on 3 March 2009, Angela Eagle, speaking for the Government, said that the Government did not believe that "sexual infidelity ought to be a sufficient reason to reduce a murder charge to a finding of manslaughter … we do not accept that *that itself* ought to lead to reducing a murder finding …" (our emphasis).

42. On 9 November 2009, Claire Ward, speaking for the Government, said that the Government did not think it appropriate in this day and age "for a man to be able to say that he killed his wife as a result of sexual infidelity … if other factors come into play, the court will of course have an opportunity to consider them, but it will not be able to make the decision *exclusively* on the ground of sexual infidelity". Answering a later question, she observed that the court would not be able to "take into account a set of circumstances in which the defendant killed someone in an attempt to punish … them or carry out some form of revenge *purely* as a result of sexual infidelity". Later still she said "We are simply saying that sexual infidelity *in itself* cannot and should not be … a defence for murder". Yet later she spoke of how important it was in relation to sexual infidelity "to set out the position precisely and uncompromisingly – namely that sexual infidelity is not the kind of thing done that is ever *sufficient on its own* to found a successful plea of loss of control". Later she observed: "If something else is relied on as the qualifying trigger, any sexual infidelity that *forms part of the background* can be considered, but it cannot be the trigger". (Our emphasis). This was the consistent pattern of her observations.

43. In the House of Lords, Lord Bach on 26 October 2009, speaking for the Government, invited opponents of the prohibition in section 55(6)(c) to explain "why they consider that, when one person kills another, the fact that the deceased had been unfaithful to their killer should ever be enough …". Shortly afterwards, on 11 November 2009, he suggested that opponents of the provision were implicitly arguing that the defendant "should be able to make out a partial defence based on sexual infidelity, in and *of itself*, on the part of the victim. We simply do not agree…" (Our emphasis.)

44. Our approach to the legislative structure is entirely consistent with these responses.

The responsibilities of the judge

(a) at the conclusion of the evidence

45. One of the responsibilities the trial judge in the context of the new defence is defined. Unless there is evidence sufficient to raise the issue of loss of control it should be

withdrawn from consideration by the jury. If there is, then the prosecution must disprove it. In this context "sufficient evidence" is explained by reference to well understood principles, that is, that a properly directed jury could "reasonably conclude that the defence might apply". In reaching this decision the judge is required to address the ingredients of the defence, as defined in section 54 and further amplified in section 55. There must be sufficient evidence to establish each of the ingredients defined in subsections 54(1)(a),(b) and (c), and this carries with it, evidence which satisfies the test in subsections 55(4)(a) and (b). In making the decision in accordance with the principles identified in this judgment the judge must exclude the specific matters which might otherwise be regarded as constituting possible justification in section 55(c)(b) and the express conditions to be disregarded in accordance with section 55(6)(a) and (c). In the end however, although the judge must bear these different features in mind when deciding whether the case should be left to the jury, and the task is far from straightforward, these statutory provisions reflect well established principles summarised in the phrase "the evidential burden". Sufficient evidence must be adduced to enable the judgment to be made that a jury could reasonably decide that the prosecution had failed to negate the defence of loss of control.

46. This requires a common sense judgment based on an analysis of all the evidence. To the extent that the evidence may be in dispute, the judge has to recognise that the jury may accept the evidence which is most favourable to the defendant, and reject that which is most favourable to the prosecution, and so tailor the ruling accordingly. That is merely another way of saying that in discharging this responsibility the judge should not reject disputed evidence which the jury might choose to believe. Guiding himself or herself in this way, the more difficult question which follows is the judgment whether the circumstances were sufficiently grave and whether the defendant had a justifiable grievance because he had been seriously wronged. These are value judgments. They are left to the jury when the judge concludes that the evidential burden has been satisfied.

47. When exercising these responsibilities, the judge is not, where there is no sufficient evidence to leave the loss of control defence to the jury, directing a conviction in the sense prohibited in *Wang* [2005] 1WLR 66. The statutory provision is clear. If there is evidence on which the jury could reasonably conclude that the loss of control defence might apply, it must be left to the jury: if there is no such evidence, then it must be withdrawn. Thereafter in accordance with the judge's directions the jury will consider and return its verdict.

48. The appeals of Clinton and Parker highlight these difficulties. In Clinton the defence was not left to the jury and it is argued that it should have been. In Parker the defence was left to the jury, and certainly had the prosecution suggested that the defence should be withdrawn, the judge might have felt it necessary to withdraw it from the jury.

(b) The Summing Up

49. Confining ourselves to the second component (the qualifying trigger or triggers under section 55), for the reasons already given, if the only potential qualifying trigger is sexual infidelity, effect must be given to the legislation. There will then be no qualifying trigger, and the judge must act accordingly. The more problematic

situations will arise when the defendant relies on an admissible trigger (or triggers) for which sexual infidelity is said to provide an appropriate context (as explained in this judgment) for evaluating whether the trigger relied on is a qualifying trigger for the purposes of subsection 55(3) and (4). When this situation arises the jury should be directed:

a) as to the statutory ingredients required of the qualifying trigger or triggers;

b) as to the statutory prohibition against sexual infidelity on its own constituting a qualifying trigger;

c) as to the features identified by the defence (or which are apparent to the trial judge) which are said to constitute a permissible trigger or triggers;

d) that, if these are rejected by the jury, in accordance with (b) above sexual infidelity must then be disregarded;

e) that if, however, an admissible trigger may be present, the evidence relating to sexual infidelity arises for consideration as part of the context in which to evaluate that trigger and whether the statutory ingredients identified in (a) above may be established.

Jon-Jacques Clinton

50. We shall summarise the facts very briefly, and then describe them in much greater detail. Mr and Mrs Clinton had lived together for 16 years. They had two children of school age. They married in 2001. Two weeks before her death, the appellant's wife had left him and the children of the family as they began what was described as a trial separation. She went to live with her parents. The couple continued to spend time together with the children as a family, and their mother would return to the family home to look after them on their return from school until the appellant returned home from work.

51. Mrs Clinton spent time in the family home on Saturday 13th November, and they went swimming and ate dinner together as a family on the next day. On that day Mrs Clinton told the appellant that she was having an affair.

52. That evening Mrs Clinton's Land Rover or Jeep (her most treasured possession) was stolen from outside her parent's home. On the following morning it was found in a burnt out condition. The jury was satisfied that the appellant was responsible for the removal and damage to the car. He was contacted by the police on the morning when the vehicle was found. He went over to see Mrs Clinton at her parent's home to tell her of the incident, and during a brief visit, arrangements were made for her to return to the family home to collect insurance documents relating to the vehicle. During the morning the appellant consumed drink and drugs, including a large amount of Codeine and he searched websites containing material dealing with suicide.

53. Mrs Clinton was dropped at the family home by her mother at about 14.00 hours. When her mother returned at 15.40 she found that the curtains were drawn and the door was barricaded. Police attended at about 17.10. They forced the front door.

They found the body of Mrs Clinton on the living room floor semi naked. She had obvious head injuries. There was a ligature around her neck. She was pronounced dead. The appellant was found in the loft with a noose around his neck attached to the rafters.

54. The deceased had been beaten about the head with a wooden baton, strangled with a belt, and then a piece of rope had been tightened around her neck with the aid of the wooden baton. There were defensive injuries. The cause of death was head injury and asphyxia caused by a ligature compression of the neck. After he had killed her the appellant removed most of her clothes and having put her body into a number of different poses, took photographs of it and then sent text messages to Mr Montgomery, the man with whom she was having a relationship.

55. The prosecution case was that the appellant had set fire to the Land Rover out of spite and then, incensed when he found out that she was conducting an affair with another man, he had confronted her at the family home in the afternoon of 15th November. He had planned to kill her before she arrived at the house and had made preparations to do so. During the confrontation he beat her and strangled her to death. At a plea and case management hearing the appellant pleaded guilty to manslaughter, but not guilty to murder. Although responsible for his wife's death, either on the basis of "loss of control" or "diminished responsibility", he was not guilty of murder.

56. We shall narrate the facts in more detail.

57. By the autumn of 2010 the couple were seriously overdrawn at the bank and dependent on Mrs Clinton's earnings once the overdraft limit had been reached, as it normally was, by the middle of the month. The appellant had a history of depression for which he was prescribed medication and Mrs Clinton herself was prescribed anti-depressants. Their teenage children gave evidence of some of the tensions between them. By mid-September 2010, via Facebook, Mrs Clinton had come to know another man. A relationship developed between them.

58. In early November Mrs Clinton moved out of the family home to the home of her mother, leaving the children in the family home. After her departure there was evidence that the appellant's behaviour became more erratic. The appellant was desperate for his marriage to work, and eventually become "obsessional" about it. He mentioned to the mutual friend on 12th November in an email his suspicions that his wife was having an affair. She was worried that he would try and kill himself. On 13th November he indicated that his son had told him that his wife had put an entry on her Facebook page which read "bollocks to it all". On the following day they went swimming together and that evening the vehicle was stolen from outside Mrs Clinton's mother's home. The following morning it was found, significantly damaged. The appellant expressed concerns about how his wife would react to the news of the fire. Together with a police officer he went to her mother's home and saw her. He did not apologise for what had happened to the vehicle and, as we know, he was later to insist that he was not responsible. The evidence suggested that the appellant appeared to be concerned and gave his wife a hug. Indeed her mother said that he was all over her like a rash and kissing her, but, as her mother could see from her reaction, she did not want him.

59. Following earlier searches of suicide websites at the end of October, the appellant recommenced his searches on 14th November continuing them through to the 15th. Among the searches shown in a schedule before the jury there were entries referring to "sleeping pills" and "how to hang yourself" and "the best suicide methods". From early in the morning of 15th November he also accessed various sites including sites on which he and his wife had formerly posted photographs of themselves, his wife's Facebook site, and a website which had been set up by Mr Montgomery called "Fast as Fuck". At 12.10 he visited his wife's Facebook site and at about 12.30 he returned to look at suicide sites. At 12.58 on 15th November the appellant received a telephone call from his wife which lasted just over 1 minute 30 seconds. At 13.12 he composed a "note to everyone". The Crown suggested that it showed an intention to kill himself and his wife, but his case was that it was a suicide note. At 13.31 he texted the mutual friend to say that he had asked his wife to come round "so we could tell the kids two bits of bad news". He said that he had been drinking and had had a very bad night's sleep. His voice was shaking and he sounded shattered and exhausted. She told him to calm down. He said that they would tell the children that the separation would be permanent. He was expecting his wife to arrive at 2 o'clock.

60. At 13.07 Mrs Clinton sent a text message to the appellant asking him to text the children to let them know he would collect them from school. He did this at 13.10.

61. Mrs Clinton's mother dropped her off at the family home at about 2pm. At 14.24 the appellant sent a message to his daughter telling her that there had been a change of plan and they were to go to their Grandmother's house. At 14.42 an unanswered telephone call was made from Mrs Clinton's mobile phone to a man called Nick whose number was stored in her "contacts list" and text was sent to Mr Montgomery at 14.47 and 14.49 which read respectively "Cunt" and "It's over". At 15.20 a further text message from Mrs Clinton's phone to Mr Montgomery comprised a jumble of letters which made no sense. By not later than 14.51 Mrs Clinton was dead. At that time and again at 14.59 explicit photographs of her naked body had been taken on her mobile phone. All this material was relied on in support of the Crown's case that the appellant was acting out of a desire for revenge.

62. Following the visit by Mrs Clinton's mother to the family home at about 3.40 the police were called and in due course forced the front door. They found Mrs Clinton's body in the living room. We have described her injuries. They found the appellant in the loft with a rope round his neck attached to the rafters. He said "it's the voices in my head". His voice was slurred. He said he had been drinking all day. He said his children's names were "cunt and cunt". Following his arrest he told a doctor that he had taken 22 Cocodemal and 15 Phenagan tablets and that he wished he was dead. A subsequent toxicology report suggested that the drugs had been taken after the death of the deceased.

63. On "loss of control" the appellant's evidence was critical. After dealing with background matters he said that from the end of 2009 financial difficulties had imposed a strain on the relationship between him and his wife. From March 2010 her interest in him and their children dwindled and he suggested that she had become "tarty" and "slutty" in her behaviour and there was increasing tension at home. He himself was much less tolerant and often angry. He had lost his libido. He felt a failure at work and was prone to tears. He suffered depression. He saw his doctor, and after taking medication, there was some improvement in the relationship.

However by September she was drawing away from him and becoming angry with the children. At work things were "ramping up".

64. On 30th October Mrs Clinton told him she needed time out. They agreed on a trial separation for 4 weeks. He had searched suicide sites and was contemplating suicide as one option, and later "it became more serious", although by 14th November he still had some hope. When cross-examined he explained that Mrs Clinton had caught him looking at suicide sites and told him not to be stupid. She would only be gone for a month. She said that she needed time out of the relationship. She had been prescribed anti-depressant tablets herself.

65. On 13th November they met and for the sake of the children discussed going to Relate. Although he didn't think that she was genuine she had to go, and this gave him some hope. On the 14th the family went swimming. On their return to the family home he showed her a note he had written on his computer. In the note he had said that he now knew that she would not be coming back which was something he had feared for a long time. He expressed a fear about how he and the children would manage when she had gone. He wrote "where will we live, how will we live"? It went on, "there is so much underneath in both of us just bubbling away your fear, mine, add our finances, my bullying, the kids getting a bit older, you wanting freedom, me getting suspicious … a lot of it is my fault but we both had our parts to play. We all need to move on now. Don't we?"

66. He gave evidence that his wife told him about her affair. When she did so, she was upset and crying, and they agreed to meet the next week to discuss how they would tell the children. He realised that his marriage was over.

67. On 15th November he obtained access to her Facebook, and he viewed Mr Montgomery's website via a link from her website. After taking the children to school he "tortured himself" by looking at the photographs they had posted on the internet site and he visited Mrs Clinton's Facebook site. He found messages containing sexual innuendos. She had made an entry on the date of their daughter's birthday in February about wanting to be "poked". Her "status" was shown as "separated" and "open to offers". At about 12.30 he looked at some sexual images which confirmed that Mrs Clinton had been unfaithful to him.

68. By the time she arrived at the family home at about 14.00 he had taken 80mg of Codeine and about a quarter of a bottle of brandy. When she arrived he made a cup of tea. They sat on the sofa in the living room. She went to the kitchen for more milk and when she came back she was holding a piece of wood. She said "did you fucking do that to Fred?" They were both agitated. She was tearful. Although he knew what she had been doing he asked her what was going on and she said "there's nothing going on. You're fucking paranoid". He then touched the cursor on the laptop and looked at her Face book page and said "how could you do that at half term and go shagging other people?" She became very spiteful and said "it should have been like that every day of the week" and that she had had sex with five different men. She gave details about the sexual activity saying that they had come inside her. The appellant said that this was deeply hurtful.

69. She asked him whether he had done the damage to Fred. He denied it. She came back to the room holding a piece of wood, which was kept in the house, and she asked

again whether he'd damaged the car telling him to "tell me the truth now". He stood up and said "how dare you fucking talk to me about the truth", and he took the piece of wood off her. There was no struggle. She had just been pointing it at him. When he took it off her, that was quite easy. He was angry and hurt when she asked him to tell the truth because "for months he had been asking her to tell him the truth of what was going on". He put the piece of wood down. She sat down. He went into the kitchen. While she was sitting down she was still a little bit agitated and so was he, and, in effect, for distraction purposes, he asked how her mother's shoulder was.

70. They were sitting on the sofa. After some conversation about the police and the vehicle he said "look we need to discuss things". He realised that the relationship was over. To say he was quite upset was an understatement. He had been open and honest with her, and he wanted her to be the same with him so that he could realise that it "wasn't 17 years of a bloody sham". So he asked her, as he'd asked her many times before what was going on. She said "nothing. I've told you before, "it's you, you're fucking paranoid. There is nothing going on." With that he touched the cursor thing on the laptop and it showed her Face book page through their son's log in. Her Face book page came up on the screen. He said "well it's all there, you know. I've looked on it. I know what you've been up to. How could you leave them at half term, as you did, and go shagging other people leaving them?" With that she became, "very spiteful". He had never seen her like that. It was "like she was another person". She said either "it could have been" or "should have been everyday of the fucking week". He took that to mean that there were "five different people, Monday to Friday". He went on "like I say, I've never, ever, ever, ever seen her behave like that. She's never – it was just pure – it was said with such pure hatred. I can't explain it".

71. At that point they stood up. He was getting angry but he didn't want a confrontation. He wanted "a bit of open honesty so that he could make sense of what she was throwing away, why we were throwing away 17 years of a relationship".

72. He walked towards the kitchen thinking that he would calm down and have a cigarette. He didn't want the confrontation. As he was walking towards the kitchen she turned round and "started giving me some graphic details of sexual acts that had, in the past, formed part of our kind of role play stuff, about other men, her with other men, she wanted me to watch, etc. etc. – it was in a different context now and it wasn't very nice, obviously, hearing your wife talking about up to 5 different people having sex with her. I didn't want to go into detail, but it was very very graphic".

73. He had never seen her like that before. She was "almost in a rage". It seemed "to build up and up and up, it didn't seem like she was going to stop this kind of thing." "She was talking, more or less but in a much sort of gruffer, I guess deeper voice than she would do normally. So it wasn't really a shout, but it was – I mean … she obviously raised her voice as she was giving me the graphics of it".

74. He was asked how long this had gone on for and he said that he couldn't rightly remember. He went into the kitchen, and after pouring another brandy and coke, and perhaps having a swig of Codeine he had a cigarette. He started smoking it. He didn't want to go back into the living room because his wife was angry and he could feel that he was getting angry too. While he was in the kitchen there was no conversation. He took control of himself to calm down. He smoked a cigarette and had a drink to calm himself.

75. When he returned into the living room, there was some conversation about what they would tell the children. There was no point in carrying a conversation about her infidelity, "as much as it hurt me, we needed to talk about the children". He told her that he was scared that he wouldn't have enough money to feed them. He was concerned about finances. She "sort of sighed" and said something like "it won't be fucking easy for me either". He had never seen her talk like that before. He said "How could you do that on your daughter's birthday?" He then realised he's made a mistake in bringing the conversation back to her affairs, but he probably said it in response to her. He heard her kind of snigger. He was not looking at her and she was not looking at him. He heard her snigger and "sought of almost like laugh", and then she said "you haven't got the fucking bollocks". I thought "what?" so I turned round and looked. "She'd gone on to one of the pages I'd minimised, suicide sites, the hanging rope". She then went on "it would have been easier if you had, for all of us". He never ever seen "my Dawnie like that". He felt "useless, awful, confused and fearful. And then she became very angry saying that she'd done her bit with the children. She said "I didn't fucking sign up for this. You have them. You look after them". He said it was horrible. His wife was a different person "it was like she was somebody else". With that the walls and the ceiling just seemed to close in. She was talking but he could not hear what she was saying. He could see her mouth opening and closing. He could hear a noise, like the distant sea. He wanted everything to stop. He wanted everything to slow down. He then reached out and grabbed the piece of wood. The attack on her followed.

76. At the conclusion of the evidence Judge Smith directed herself that there was no evidence that the loss of self-control necessary for the purposes of this defence was due to one of the qualifying triggers identified in the statute. She was required "specifically" to disregard anything said or done that constituted sexual infidelity. The remarks allegedly made by the wife, challenged about her infidelity, to the effect that she had intercourse with five men were to be ignored. Removing that element of that evidence, what was left was the evidence when the wife saw that the appellant had visited the suicide site on the internet, she commented that he had "not the balls to commit suicide" and that she also said, so far as the future was concerned, that he could have the children who were then currently living with him at their home. The judge observed that she could not see that the circumstances were of an extremely grave character or that they would cause the defendant to have a justifiable sense of being seriously wrong. On this issue no sufficient evidence had been adduced. She could not find that a jury properly directed could reasonably conclude that the defence might apply. In due course she proceeded to her summing up, leaving diminished responsibility for the consideration of the jury.

77. In addressing these problems, Judge Smith did not have the advantage of the careful and detailed submissions made to us by leading counsel on behalf of the appellant and the Crown. On the basis that the remarks made by the wife had to be disregarded, her conclusion that the defence should be withdrawn from the jury was unassailable. In context, it was a characteristically courageous decision. For the reasons we have endeavoured to explain in this judgment, we have concluded that she misdirected herself about the possible relevance of the wife's infidelity. We have reflected whether the totality of the matters relied on as a qualifying trigger, evaluated in the context of the evidence relating to the wife's sexual infidelity, and examined as a

cohesive whole, were of sufficient weight to leave to the jury. In our judgment they were. Accordingly the appeal against conviction will be allowed.

78. In the circumstances of this case, we shall order a new trial. The issues should be examined by a jury.

R v Steven Parker

79. The appellant and his wife, Jane, were both in their mid twenties at the date of her death. They had been in a relationship for some 10 years, and they were married for the last 4 years. They had three children together.

80. During their marriage the appellant had a number of affairs, and his wife had a brief sexual relationship with another man. The appellant was unaware of this until after her death. During the year prior to her death she had confided in close friends and family that she was unhappy in her marriage and was seeking to separate from the appellant. She planned to leave him after the October half-term holiday in 2010, although she had not told the appellant.

81. On the night of 26th October 2010 in the course of an argument between them, he inflicted what was described as a "fat lip" on her. On the following afternoon while she was at an activity centre with her children, Mrs Parker sent a text message to the applicant who was at home. Ignoring the text language it reads as follows:

> "I'm sorry, Steve. I will always love you but you have hurt me too much now. I've never forgived you for Claire, so think it's time for us to separate. Pack your stuff while I am here so kids don't see it all. And I'll drop car off in a bit for you to put your stuff in and go. Nothing you say or do will change my mind. x"

82. On leaving the activity centre her brother-in-law accompanied her to the matrimonial home. They arrived at the house between 15.54 and 15.58. Mrs Parker went into the house. The appellant locked the back door. Her brother-in-law was told to wait outside. Within a short period of her entering the house, the precise length of which was in dispute, Mrs Parker was attacked and repeatedly stabbed by the appellant. Her brother-in-law heard her screams and broke into the house. He wrestled the appellant off her and summoned the emergency services. Paramedics and the police arrived.

83. The deceased was found dead at the scene. It later emerged that the deceased had suffered 53 separate stab wounds to the body, which varied in severity, but also included 5 stab wounds to the neck, shoulder and face. There were superficial incised and stab wounds to the body, with defence incised wounds to the hands. The cause of death was blood loss from the stab wounds to the neck.

84. The appellant was arrested outside the house. After her brother-in-law had pulled him off Mrs Parker, he had become compliant with whatever he was told to do. He waited outside for the emergency services and on a number of occasions said he was very sorry for what had happened. He had scratches the length of his left arm which appeared to be self inflicted, and a heart and the initials JP (his wife's initials) scratched onto his chest.

85. Investigating officers recovered a letter from the lounge floor addressed to Mrs Parker. In it the appellant declared his love and pleaded to her not to leave him. An open family photograph album and photographs were found on the bed in an upstairs bedroom. Two knives were recovered from the scene, a large kitchen knife and a shorter knife, the tip of which was missing, which was discovered under the deceased's body.

86. In interview the appellant exercised his right to silence. He produced a prepared note which explained that his decision to do so was made on the basis of legal advice. It is clear from the tape recording that throughout the interview he was sobbing. The appellant admitted that he was responsible for the fatal injuries.

87. The case for the prosecution was straightforward. The appellant had decided to kill his wife before she arrived at the house and that this was why he asked her brother-in-law to remain outside. The crown alleged that he had locked the back door of the house. He had placed knives close to hand in preparation for the attack, which started almost as soon as she entered the house. The appellant was jealous and controlling and he resented Mrs Parker's newly found confidence and ambition, and, although not habitually violent, he was capable of being violent towards her, as indeed he had been on the previous night. He was guilty of murder.

88. The defence case was that the appellant was guilty of manslaughter, but not murder, on the basis of "loss of control" within the 2009 Act. There was no pre-planning and that the loss of control resulted from a combination of the contents of the text message demanding that he leave the family home, which it was said came as a "bolt from the blue", and from what she said to him and her manner when she returned to the house, and his realisation that she would have the children and that she had been planning this for a while with other people behind his back.

89. The appellant was a man of previous good character. In evidence he described various problems in the relationship at an earlier stage, but by 2010 he thought the relationship was in good order. He knew nothing of any relationship in which she had become involved.

90. The argument on the evening of 26th October was about money. He said that he pushed her out of frustration as he walked past. The cup struck her in the mouth. He didn't realise she had an injury, and didn't mean to hurt her. She chucked it at him and its contents went everywhere. He cleared it up. He apologised. They had sexual intercourse together that night.

91. On the following morning she took him to work and then went with the children. They had a disagreement via text messages as to whether he had apologised for the incident the previous night, but he still thought that everything was all right between them. She collected him from work because he was unwell, dropped him off home, and then went back to the children.

92. The text message came as a "bolt from the blue". He was devastated. He used the small knife which was later found under Mrs Parker's body to self harm, scratching his left forearm repeatedly but not deeply. He scored a love heart onto his ribs. He wrote a non-threatening letter to his wife, professing his love for her. He was really

upset, distressed and crying, and not thinking clearly. He had never self harmed before.

93. He said that he put that knife down in the kitchen and went upstairs to pack his belongings. He felt that he had no choice. He looked through a family photograph album which he happened to come across, and became increasingly upset. He texted her asking how long she would be. He wanted to be able to tell her that he loved her.

94. When she returned home, the car pulled up without the children. He realised it was all over between them, and that her actions had been pre-planned. He remembered going to the back door, but did not recall opening it or asking her brother-in-law to give them a minute, nor did he recall locking the back door, although he accepted that he must have done. Mrs Parker walked passed him into the kitchen. He followed and pleaded with her not to leave. He said that he loved her. With a smug look on her face she said that she did not love him anymore. He then lost it.

95. He said that he was upset and he "snapped "and lashed out at her. He said that he did not recall doing it. He could not recall if he used the small knife. He had no recollection of the large knife or of the attack itself. The next thing he could recall was his brother-in-law with his arm around his neck shouting at him to drop the knife.

96. We must briefly address a distinct further submission on appeal. During the course of the Crown's case, the prosecution sought leave to introduce hearsay evidence from friends and family about the background to the relationship and events which led up to Mrs Parker's death. This included evidence of violence by the appellant directed at his wife. The crown suggested that this was admissible hearsay and admissible as bad character evidence under section 101(1)(c) as important explanatory evidence within the ambit of section 102 of the Criminal Justice Act 2003.

97. Although it was accepted at trial that a number of different categories of evidence could be put before the jury by consent, the main contention was that the evidence of previous incidents of violence should be excluded. The level of violence described by the witnesses did not provide any real explanation for the level of violence which occurred on the afternoon of Mrs Parker's death. There was a dispute about some of the details, and this would lead to satellite litigation.

98. The judge ruled that evidence of the appellant's bad behaviour to his wife, including the occasional use of violence, was relevant to the prosecution case not least because it made it more likely that the crown's submission as to the truth of events which occurred on 27th October was correct. It was relevant, and unless there were reasons for it to be excluded, it should be admitted. Although hearsay, it was admissible pursuant to section 116 of the 2003 Act, and the judge was satisfied that it was in the interests of justice that the evidence should be put before the jury. In relation to the admissibility of bad character evidence he held that in principle it was admissible. To exclude it would deprive the jury of important explanatory evidence and leave them with only the appellant's version of the background. This would convey an unreal impression of the facts, and make it difficult for the jury to grasp the issues in the case. Although he specifically excluded passages of the evidence from two witnesses, in general terms he agreed with the crown's submissions.

99. This ground of appeal arises from a straightforward ruling which, when examined in the factual background, causes us no concern. It is further suggested that the judge gave inadequate directions to the jury about how this evidence should be approached. We are equally untroubled.

100. The main ground of appeal arises from the way in which the judge directed the jury on the loss of control issue. It is suggested that he failed to direct them adequately about the burden of proof, wrongly implying that the burden rested on the defendant. Alternatively, the summing up on these issues was unclear and confusing and had the effect of reversing the burden of proof.

101. The criticisms of the judge's directions to the jury begin with his assertive failure to tell them what a "loss of control" was, and what it amounted to, and the jury's attention was not drawn to all relevant matters in a coherent way.

102. Judge Mettyear began his directions to the jury in unequivocal terms. The burden of proof rested on the prosecution. It "always, always rests" on the prosecution and never shifts. The Crown had to prove all the elements of the offence. The standard to be reached was that the jury had to be sure of guilt. The directions were given in unequivocal terms.

103. In his route to verdict (which was agreed by both counsel at trial), the judge directed the jury:

> "The defendant has admitted unlawful killing of his wife Jane Parker. He is, on the facts of this case guilty of murder unless the killing resulted from his loss of self control".

Question 1. When he stabbed Jane had he lost self control?

If you are sure he had not lost his self control your verdict must be guilty of murder and you should proceed no further. Otherwise go to the next question.

Question 2. Was the defendant's loss of self control caused by a qualifying trigger? (note. The qualifying triggers are things which you find to be said or done by Jane individually or in combination which

a. constitute circumstances of an extremely grave character and

b. which caused the defendant to have a justified sense of being seriously wronged. You should look at the whole of the evidence relating to the relationship between them including the events of the 27th October, when judging whether things said or done by Jane constituted circumstances which caused the defendant to have justifiable sense of being seriously wronged.

If you are sure that his loss of self control was not caused by a qualifying trigger or triggers then your verdict must be guilty of murder and you should proceed no further. Otherwise go on to the next question.

Question 3. Might a man of the defendant's age with a normal degree of tolerance and self restraint have reacted in the same or in a similar way to the way that the defendant reacted?

If you are sure that such a person would not have reacted in the same or similar way to the defendant then your verdict must be guilty of murder. If you think such a person might have reacted in the same or a similar way your verdict must be not guilty of murder but guilty of manslaughter.

104. We have examined the document, and the judge's oral directions. On this particular point, taken in isolation, the answer to the second question could have been more felicitously expressed in relation to the burden of proof. However that may be, the remainder of the directions to the jury were impeccable. In particular, the references in the route to verdict plainly put the burden of proof where it rested. It carefully isolated the three ingredients of the "loss of control" defence. We have examined the criticisms of the summing up with care. We can discern no unfairness or lack of balance. It fairly reflected the available evidence. The defence was put before the jury in careful detail. We cannot identify any reason for concluding that this conviction was unsafe.

105. Before leaving the conviction appeal we propose to add one further observation. The judge was not invited to withdraw the "loss of control" defence from the jury. With our increased understanding of the differences between the loss of control defence and the former provocation defence, we anticipate that such a submission would now be raised by the Crown for the judge to consider. He might well have concluded that the matters relied on by the appellant could not reasonably be treated by any jury as circumstances of an extremely grave character which caused him to have a justifiable sense that he had been seriously wronged.

106. The appeal against conviction is dismissed. We were invited to give leave to appeal against sentence. The submission that the sentence was manifestly excessive is unarguable. The judge carefully weighed the essential features of the case and, bearing in mind the provisions of Schedule 21, reached a conclusion which cannot be criticised.

R v Dewi Evans

107. The applicant was a man of good character, aged 61 years at trial. He had been married to his wife …, … for 41 years. They had adult children, and grandchildren.

108. On 11th November 2010 the appellant inflicted stab wounds to his wife's neck and killed her.

109. The prosecution case was that she was murdered because she told her husband that she was going to leave him. The defence case was that Mrs Evans had stabbed the appellant before he stabbed her, and when he did stab her he had lost his self control. The crown's case was that wounds found on the appellant after the fatal attack were self inflicted, but that in any event, when stabbing his wife, he had acted out of revenge and not through any loss of control.

110. The question raised in this appeal is whether the judge properly directed the jury as to the meaning of the words in section 54(4) of the 2009 Act, "acted in a considered desire for revenge".

111. For the children of this couple, this trial must have been an ordeal. Their son gave evidence about his father's gentleness. He never lost his temper or raised his voice. It was his mother who told them off. He accepted that his mother had a bit of a temper. He had never seen her act violently towards him, although she had told him that on one occasion she had slapped his father. He thought that when he was growing up his parents had a brilliant relationship. Their daughter also described a happy loving relationship, at any rate until an incident in 2004, when the appellant found the dead body of his neighbour. Thereafter he became totally different, very lazy and unmotivated, and much quieter, reliant for everything on his wife. She tried to help him, but gradually she became frustrated at his behaviour. He became obsessed with her, like a shadow. He was referred to a counsellor and psychiatrist. Mrs Evans started to become aggressive, shouting at him, because he was lazy and pathetic. She saw her mother push her father on a number of occasions, and her mother told her that she had slapped the appellant more than once.

112. Plainly, after 2004 the marriage sadly deteriorated. Mrs Evans talked about leaving the appellant, but when in the end she could not do it. She had applied to be re-housed in March 2007. She was offered a flat. Then she turned it down, saying that she did not want to move. She wanted to remain on the housing list. In April 2009 she stated on a housing application form that her husband suffered from depression. He needed his own room.

113. Evidence from an occupational therapist described how the appellant acknowledged that his problems related to and arose from the death of his neighbour. His wife was very supportive. She wanted him to change so that they could go back to the life they used to have together. He also said that he was concerned that his wife was having an affair. He was diagnosed as suffering from depression and severe anxiety. He was seen by psychiatric nurses for assessment and treatment of his mental health on some eighteen occasions between December 2008 and July 2010.

114. On 11th November 2010 their son could hear his parents arguing in the early morning. His mother was in the kitchen sobbing, saying she could not take any more. Mrs Evans called her daughter who described her as upset. Various members of the family saw Mrs Evans that day, and by then she seemed like her normal self. Their son saw them both at 13.30, and their daughter saw her mother at 14.45. Both were untroubled. He said that his parents were happy, and their daughter said that her mother was fine.

115. At about 16.45 the son arrived home with his children. He walked into the house and saw his mother on the floor. Her face was swollen. There was a knife on the floor next to her. He went into the bedroom and found the appellant. He said "I couldn't help myself" or "I couldn't control myself I lost my temper". The appellant lifted his tee-shirt and showed his son a wound on the stomach. Help arrived. The appellant was seen in the bedroom. He said that he had been stabbed. When the police arrived the appellant was lying on the bed clutching his stomach. The record of what he said was "Had an argument. She went for a knife. I went berserk so I stabbed her in the neck. I cut my wrist. My wife stabbed me in the stomach. She stabbed me in the bedroom. I grabbed knife and stabbed her in living room, twice to neck".

116. When the paramedics arrived the appellant said that he had caused injuries to his wrist, and his wife had caused the wound to his abdomen.

117. The knife found on the living room floor had been a lock knife purchased by the son many years earlier. Mrs Evans didn't like it, and their son believed that it had been handed in during a knife amnesty. He had never seen it in a drawer or cupboard in the kitchen. It had never been left in a unit. It might have been kept in the tool box in the shed. The knife found on the bed, referred to as the green handled kitchen knife, was kept in a utensil jar in the kitchen, for show.

118. On post mortem four separate penetrating incise wounds, seven superficial incise wounds, wounds, caused by a separate impact, but with two separate injuries possibly caused in one action were found. There was bruising to the lips, swollen eyelids, and defensive injuries, together with an abrasion on the neck. There was evidence to suggest that pressure had been applied to the neck. The account given by the appellant in interview did not account for the totality of the injuries sustained by his wife. Either knife could have caused the superficial incised wounds. The lock knife was the more likely cause of the penetrating wounds. The deep penetrating wounds to the neck caused death.

119. Neither the pathologist nor the forensic scientist could throw significant light on the question whether the appellant had suffered an injury to his stomach before he stabbed his wife. Analysis of blood stains and findings of blood, again, were inconclusive.

120. The appellant was interviewed on a number of occasions. As he did not give evidence at trial, we should set out his account in some detail.

121. During the first interview, the appellant said that they were watching television and started to argue. His wife started shouting at him over something silly. He said he would watch television in the bedroom. Five minutes or so later she came to the bedroom holding the kitchen knife and held it to the soft part at the bottom of his neck saying, "I'll let you have this in your throat now". He responded "You do that". She had done this before, he thought it was a joke. She then called him an ugly little bastard, taking a step back and with both hands on the knife, she stabbed him in the stomach, leaving the knife in place. She left the bedroom, and he pulled the knife out and threw it down on the bed. The wound wasn't bleeding. He could not remember whether his tee-shirt was up or down when she stabbed him, a question of some importance because no cuts to the tee-shirt were found. He said "I was mad, crazy, I saw stars".

122. He went into the kitchen to look at his wound in better light. The wound was still not bleeding. The lock knife was on the top of the unit. He then noticed some yellow liquid coming out of the wound. This made him feel mad. He opened up the knife and stabbed his wife in the throat. He said "it wasn't a spur of the moment thing, it just … look at the knife, went in the living room and stuck it in her throat". He said he knew what he had done, but at the time it was just the way he felt.

123. Later he said "I wasn't intending to, you know, to do that, it's just that it happened on the spur of the moment thing". He hadn't walked in intending to do it. He had walked into the lounge and things happened from there. He decided to do what he did when he was walking into the lounge. He intended to frighten her, but everything got out of hand. He agreed that he had stabbed his wife twice in the throat. As he walked out he started to bleed heavily from his wound. When he saw the injuries to his wife

he said to himself "well what have I done? I thought the best way, the easiest way out was to go back to the bedroom, pick up the other knife and slit my wrists". There were two stab wounds because he thought he had missed with the first.

124. In the second interview he said that no violence took place in the living room other than his wife grabbing his arm. He did not think that he had stabbed her a third time. He dropped the knife down by the settee and put his hand on it. When he walked into the lounge his wife had said something like "go on then good boy". When he stabbed her he had his hand on her shoulder for balance. The struggle only lasted for seconds, and when he stabbed her the first and second time he thought "what am I doing?" He intended to hurt her, but he went too far. After stabbing his wife he stood in the passage for a while and went back to the bedroom and cut his wrist.

125. In this interview he said that he had felt frightened of his wife when she held the knife over him. She had held the knife to his throat before. He went on to state that relations that day had been pretty good. She had kicked him in the morning. He said that if she fancied giving him a clout, she would. His son had seen her do it. She had pulled his hair, hit his head against a wall and kicked him. This had happened on several occasions. She would hit him once a day. This had gone on for a few years. Asked why she treated him in this way, he said that he nagged her, he didn't do anything physically, but perhaps mentally.

126. In the third interview he said that if he wanted to injure his wife he would have taken the knife which she had used to stab him. It was when he was in the kitchen that he started boiling. He just wanted to stab her back after he had seen the knife. He felt ashamed to call the police and say he had been stabbed by his wife. He didn't know how his wife had received injuries to her face and neck, because he had never punched her.

127. In the fourth interview he said that he was concerned that his wife was having an affair. That morning she had told him that she was going to leave him, but that was something she said every other day. He denied that it was the thought of her leaving that drove him to assault her. It was put to him that the stab wound to his stomach was higher than his belly button, but below his ribs, and his shirt would have had to come up very high to have been missed by the knife. He insisted that he had not stabbed himself. He thought he had only stabbed his wife twice. He denied making the other two penetrating puncture wounds.

128. When he summed up the judge addressed the issue of loss of self control in accordance with section 54 and 55 of the 2009 Act. He explained a loss of self control.

> "The defendant lost his self control if his ability to restrain himself was so overwhelmed by emotional passion that he could not resist the impulse to attack (his wife) with a knife. A considered act of revenge, whether performed calmly or in anger, is not a loss of self control. The Act of Parliament says that the defence does not apply if the defendant acted in a considered desire of revenge."

That was precisely accurate, a clear reference to the crown's contention that Mrs Evans had been killed in the course of a revenge attack on her by her husband.

129. The judge then amplified the meaning of a considered desire for revenge:

> "An act of retribution as a result of a deliberate and considered decision to get your own back, that is one that has been thought about. If you are sure that what the defendant did was to reflect on what had happened and the circumstances in which he found himself and decided to take his revenge on (his wife), that would not have been a loss of self control as the law requires."

130. He then summarised the evidence relied on by the crown which was said to be consistent with an absence of loss of control but consistent with a considered act of revenge. He then, with equal emphasis, summarised the evidence relied on by the defence to show that there must or may have been a loss of self control, and that he was not acting out of a considered desire for revenge. He concluded this part of his summing up:

> "If you conclude so that you are sure either that this was a considered act of revenge by the defendant or that he had not lost the ability to control himself, this defence does not apply and your verdict would be guilty of murder".

131. The criticism of this direction is that it did not provide the jury with a sufficient elucidation of the significance of the use of the word "considered" in its statutory context. The problem with the argument is simple. The judge directed the jury in accordance with the statutory language. There was no need to rewrite, and there was a potential for confusion if he had rewritten the language of the statute, and reformulated the statutory criteria. There was no reason to do so. The language is clear. The direction accurately encapsulated the issue to be decided by the jury, and the way they should approach to it.

132. There are no further grounds of appeal. Accordingly the appeal will be dismissed.