[2020 Gib LR 1]

LISHMAN v. R.

COURT OF APPEAL (Rimer, Smith and Elias, JJ.A.): November 6th, 2019

Criminal Law—murder—loss of self-control—when deciding whether to leave defence to jury, judge to consider whether jury might reasonably conclude (a) defendant's acts in killing victim resulted from loss of self-control; (b) loss of self-control had qualifying trigger; and (c) person of defendant's age and sex with normal degree of tolerance and self-restraint would have acted in same or similar way—judge to consider all evidence and draw inferences most favourable to defendant

Criminal Law—murder—loss of self-control—defence should have been left to jury where jury could reasonably conclude deceased had stabbed appellant first and then been fatally stabbed by him

The appellant was charged with murder in the Supreme Court.

The appellant and the deceased had been married and had a young daughter. Unbeknown to the appellant, the deceased had been involved in a sexual relationship with another man. The deceased had told the appellant that she no longer wished to be married to him and left the matrimonial home. She had been concerned that the appellant might find out about her affair. The appellant was very distressed about his wife's decision to leave him.

An argument had ensued between the appellant and the deceased, during the course of which both received stab injuries caused by a kitchen knife. The deceased sustained 12 wounds. Severe force would have been required to inflict the fatal wound. There were four other serious wounds. The pathologist expressed the view that the deceased would have become incapacitated due to blood loss within seconds to minutes. The defendant had five wounds to his chest and two minor cuts on his hand. One of the chest wounds was potentially fatal and required emergency surgery. The others were superficial. It was the Crown's case that the appellant's wounds were self-inflicted.

The appellant was arrested and charged with murder. He pleaded not guilty on the basis of self-defence or loss of self-control under s.152 of the Crimes Act 2011. Section 152(1) provided:

"(1) If a person ('D') kills or is a 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."

The appellant claimed the deceased inflicted the serious injury on him. Their young child's *res gestae* statement was that "Mummy has stabbed Daddy, Daddy stabbed Mummy and Daddy stabbed himself."

The judge ruled that there was not sufficient evidence to leave the defence of loss of self-control to the jury in addition to the defence of self-defence. The jury was shown a video taken by a camera worn by one of the police officers at the scene and *res gestae* statements made by the appellant and his daughter. The jury convicted the appellant of murder and he was sentenced to life imprisonment with a minimum term of 18 years. After delivering their verdict, the jury sent a note to the judge expressing the view that counselling should be available to jurors in cases of this kind.

The appellant appealed on the grounds that (a) the judge had been wrong to rule that there was insufficient evidence to leave the partial defence of loss of self-control to the jury; and (b) the admission of the bodycam video film had been so distressing to the jury that it had tipped the balance of fairness of the trial against him. He submitted *inter alia* that (a) the judge had failed to consider all the available evidence on the issue of whether a jury might reasonably conclude that the appellant had lost self-control by focusing too narrowly on the wounds inflicted and the forensic evidence and leaving out of the account the underlying factual matrix and inferences which could properly be drawn; (b) the jury could reasonably have inferred that the deceased stabbed him to stop him accessing her mobile phone where, the jury might reasonably have inferred, there were messages pointing to her illicit affair; (c) there was a logical inconsistency between the judge's holding that the jury might find that the deceased had started the violence by stabbing the appellant and his decision that there was insufficient evidence of loss of self-control: the stabbing, if it occurred, was a sufficiently grave event that could amount to a qualifying trigger; and (d) the judge had tended to "read down" the defence case and elevate the prosecution case.

The Crown submitted that (a) the judge had been in the best position to evaluate the evidence, having conducted the trial, and the Court of Appeal should not readily interfere with his judgment; (b) as the appellant had decided not to give evidence, the judge had had to decide whether the three components were met, largely by drawing inferences from the evidence; (c) there was nothing untoward in the judge's ruling that there was not sufficient evidence to support a finding of loss of control even though there was sufficient evidence of a qualifying trigger in the (presumed) stabbing of the appellant; and (d) the Crown supported the judge's finding that the fact that the knife was found in the deceased's

hand gave rise to the self-evident inference that the appellant had placed it there and the judge had been entitled to take that into account as pointing away from there having been a loss of control.

Held, allowing the appeal:

(1) The court had no hesitation in rejecting the ground of appeal that the admission of the bodycam footage had been so distressing to the jury as to render the trial unfair. The video showed a distressing scene but it was far from horrifying. Possibly the most upsetting aspect was the attempt to resuscitate the deceased. It was filmed at close quarters and exposed the deceased's breasts. That part of the film was not probative and should have been edited out. The first part of the film, however, was of some probative value. It was usually helpful for a jury to have a clear vision of the scene of a crime and the film certainly helped in that regard. The film showed no signs that there had been a serious disturbance in the kitchen. It showed the knife in the deceased's hand and the mobile phone on the floor. It showed the appellant in a semi-comatose state on the floor of the hall and the soundtrack allowed the jury to hear the way in which the appellant spoke, which might have assisted them in assessing the reliability of his *res gestae* statements. There was nothing prejudicial to the appellant in the film. It showed nothing which might affect the jury's view against the appellant. Showing the film did not render the trial unfair (paras. 16–17).

(2) The judge had focused too narrowly on some aspects of the evidence when deciding whether there was sufficient evidence of loss of self-control for the defence to be left to the jury. No serious complaint could be made of the part of his ruling which set out the evidence in relation to the whole of the defence of loss of self-control. However, when it came to considering what the jury might reasonably accept of the appellant's case, the judge limited himself to saying that the factual matrix of the deceased stabbing the appellant first was one the jury "could conceivably accept." The judge did not deal with any of the other aspects of the evidence from which the jury might reasonably have drawn inferences which were favourable to the appellant. The judge reached his conclusion that there was insufficient evidence of loss of self-control on the basis that the *res gestae* were not suggestive of loss of control, so that the only evidence supporting a loss of self-control was the wounds the appellant inflicted on the deceased and the superficial wounds he inflicted on himself. Those injuries were not sufficient in themselves to meet the evidential threshold. Moreover, the fact that the knife was found in the deceased's hand, self-evidently put there by the appellant, undermined the suggestion that the appellant had lost self-control. This was too narrow a basis on which to reach the decision on the first component of the defence. Under s.152(6) of the Crimes Act 2011, a judge was required to consider the whole of the evidence which a jury might properly take into account when deciding whether there had been a loss of self-control. He or she was not limited to those parts of the evidence which directly supported a loss of self-control. The question which the judge was to ask

was whether a jury properly directed could reasonably conclude that the defendant had lost his self-control. The jury would have all the relevant evidence available to them, including any inferences they might properly draw. Therefore, the judge must consider the whole of that range of evidence and inference. Further, when considering disputed evidence or evidence from which inferences might be drawn, the judge must consider the version most favourable to the defence which could be open to the jury acting reasonably. In the present case, in looking only for evidence that directly supported the suggestion of loss of control, the judge took too narrow a focus. In particular, he was wrong to exclude from consideration the evidence (which he had already held the jury could properly accept) that the deceased might have stabbed the appellant first. Although that evidence was to be considered under the second component, to see whether the trigger was sufficiently grave to amount to a qualifying trigger, it did not follow that it should be excluded from consideration under the first component. The judge's task was to ask the statutory question (could the jury reasonably conclude that this component of the defence might apply?) separately and sequentially in respect of each component but that did not mean that the evidence should be compartmentalized. The evidence in relation to the deceased stabbing the appellant was relevant to the question whether he might have lost self-control. The jury could reasonably conclude that violence against his wife was out of character for the appellant and that the appellant was under some stress at the time and that there was much emotional tension between the parties. A jury could properly conclude that the appellant might have picked up his wife's phone and that her reaction might have been to try to prevent him reading any messages because she did not want him to find out about her affair. Although it would be an extreme reaction, a jury could reasonably conclude that she might have picked up the knife and stabbed the appellant. The jury could further reasonably conclude that the wounds inflicted on the deceased by the appellant had been caused at a time when he had lost his self-control. Even if the appellant had subsequently put the knife in the deceased's hand, which was not self-evident, that did not point conclusively against there having been a loss of self-control. While this suggested scenario was highly favourable to the appellant and the jury might not accept the factors mentioned, a trial judge was required to put the defence case at its highest, consistently with the evidence or reasonable inference. The judge erred in holding that a jury properly directed could not conclude that the appellant might have lost his self-control (paras. 35–39).

(3) There was no dispute that the second component was satisfied, that there was sufficient evidence to enable the jury reasonably to conclude that the deceased stabbed the appellant first. The judge held correctly that a stab wound to the chest was sufficiently grave to qualify under s.152(1)(a) and (9)(b) (para. 40).

(4) The judge had not found it necessary to address the third component in light of his conclusion that there was insufficient evidence of loss of self-control. As the court differed from the judge in respect of the first component, it must do so. The court must consider all the relevant evidence and pose the statutory question: Could a jury, properly directed, reasonably conclude that a person of the appellant's age and sex, with a normal degree of tolerance and self-restraint and in the circumstances of the appellant, might have reacted in the same or a similar way? Essentially this entailed a value judgment. The task was to place a person with a normal degree of tolerance and self-restraint in the circumstances of the appellant and ask whether that person might have reacted similarly. In the circumstances, the nature of the trigger being extremely serious, a jury could reasonably conclude that a man with a normal degree of tolerance and self-restraint might have reacted in the same or a similar way to the appellant (paras. 40–42).

(5) The judge fell into error and the appeal would be allowed. The appellant's conviction and sentence would be quashed. There would be a retrial. It would be open to the appellant to run any available defence. The appellant should remain in custody pending trial, unless a successful bail application were made (para. 43).

Cases cited:
(1) *R.* v. *Clinton*, [2012] EWCA Crim 2; [2013] Q.B. 1; [2012] 3 W.L.R. 515; [2012] 2 All E.R. 947; [2012] Crim. L.R. 539, considered.
(2) *R.* v. *Goodwin*, [2018] EWCA Crim 2287; [2018] 4 W.L.R. 165; [2019] 1 Cr. App. R. 9, considered.
(3) *R.* v. *Gurpinar*, [2015] EWCA Crim 178; [2015] 1 W.L.R. 3442; [2015] 1 Cr. App. R. 31, *dictum* of Lord Thomas, C.J. considered.

Legislation construed:
Crimes Act 2011, s.152: The relevant terms of this section are set out at para. 18.

C. Finch and *L. Debono* for the appellant;
C.M. Rocca, D.P.P. and *C.J. Ramagge* for the respondent.

1 **SMITH, J.A.:** This is the judgment of the court:

Introduction

On March 5th, 2019, before the Supreme Court of Gibraltar (Dudley, C.J. and a jury), the appellant, Real Lishman, was convicted of the murder of his wife, Carolina Lishman, on November 8th, 2017. He was sentenced to life imprisonment with a minimum term of 18 years. He now appeals against both conviction and sentence.

The evidence

2 Until shortly before November 8th, 2017, the appellant and the deceased lived together in an apartment in Gibraltar. They had a daughter, whom we will call X, then aged 6. The deceased also had another daughter, Y, by a previous relationship. Unbeknown to the appellant, the deceased was involved in a sexual relationship with another man. About three weeks before her death, the deceased went to the USA to undergo breast augmentation, a procedure which had been paid for out of the couple's joint savings. Immediately upon her return, the deceased told the appellant that she no longer wished to be married to him. She left the matrimonial home, taking Y with her, and went to live at her parents' home. X stayed at home with the appellant. The deceased was concerned that the appellant might find out about her affair, as this might affect her future with their daughter, X. There was evidence that, at the time of the incident leading to her death, the deceased's breasts were still tender following the operation.

3 The deceased consulted a solicitor to ask about obtaining a divorce. She was advised that this would not be available immediately as there had been no adultery or unreasonable behaviour on the appellant's part. She was advised that she would have to separate for a time.

4 The appellant was very distressed about his wife's decision to leave him. He resigned from his job but, after a few days, he regretted this decision and asked to return; this was refused as his place had already been filled. On November 8th, he consulted a solicitor and, during the discussion, asserted that he did not believe that his wife was having an affair.

5 In the afternoon of November 8th, the appellant collected X from school and took her home. The appellant arrived at the apartment some time before 6 p.m. An argument ensued between husband and wife, during which both received stab injuries to their upper bodies, caused by a kitchen knife. X was present throughout the whole or part of this incident which took place in the kitchen.

6 When the police arrived at about 6.14 p.m., the deceased was unconscious on the kitchen floor. There was a kitchen knife in her hand, between the right thumb and index finger. The appellant was semi-conscious on the floor of the adjacent passageway. X was not in the flat, she having run out and alerted neighbours a while earlier.

7 There was before the jury evidence of *res gestae* statements made by the appellant to the police soon after their arrival. The officer said that, at this time, the appellant was lapsing in and out of consciousness. The jury had the advantage of hearing some of these statements on the sound track of video film taken by a camera worn by one of the officers. When the

officer asked the appellant what had happened, he replied: "My wife and I were fighting. She pulled a knife and stabbed me and I took it off her and stabbed her and then she took it and . . ." His voice, as heard on the soundtrack, was slow and quiet. Sometime later, when the appellant had become "a bit more conscious" he said: "She went for me with a knife. She stabbed me in the heart. I took the knife. I defended myself." While being treated for his injuries in the Accident and Emergency Department at St. Bernard's Hospital, Dr. Lopez asked the appellant how he was feeling, to which he replied: "Why did she do it? I took her mobile and she stabbed me." Three days later, Police Sgt. Cottam cautioned the appellant and arrested him for murder. The appellant said: "Please make them protect me. Don't let them kill my daughter." On November 27th, 2017, that is almost three weeks after the incident, the appellant was interviewed by a psychiatrist. Although, not part of the *res gestae*, extracts of the conversation were admitted in the evidence. The appellant told the doctor that he was feeling "crap" and "in shock." He also said: I can't understand how this could happen. I miss her." Then, crying, he said: "I don't believe in violence. It goes against my beliefs."

8 Also before the jury was evidence of *res gestae* statements made by X to Police Const. Rooke, an off-duty woman police officer who lived nearby. X had been taken there by other neighbours shortly after running out of the house. Police Const. Rooke said that X told her:

> "Mummy has stabbed my Daddy. Mummy is in the kitchen laid down on the floor playing dead and Daddy has stabbed himself and is on the floor in the hall. They are both on the floor playing dead."

Later she said: "If I go live with my Mummy, I will get a new house. I live with Daddy I'll get a cat." According to Police Const. Rooke, X repeatedly said: "Mummy has stabbed Daddy, Daddy stabbed Mummy and Daddy stabbed himself. Mummy is in the kitchen both on the floor playing dead." There was blood on X's face and, when she was taken to be washed, Police Const. Rooke noticed that X was limping. On examination, a small circular mark was seen on her thigh. According to Police Const. Rooke, when asked how this had happened, X said that her daddy had told her to do it. However, this part of the evidence was challenged by the defence; it had not been in Police Const. Rooke's witness statement, made soon after the event. In addition to the statements we have already mentioned, Police Const. Rooke said that X also said "I'm scared. Mummy's on the floor in the kitchen and Daddy is trying to stab himself." She also continuously repeated: "I'm scared. I'm scared." All these *res gestae* statements were agreed by the defence save the one about her father telling X to injure herself.

9 Another woman police officer, Det. Const. Mohammed, went to Police Const. Rooke's flat to see X. She asked X how she had come to be injured

and she replied that she "tried to stop Daddy from stabbing himself" and "blood went on top of me." She also said that "when Daddy was stabbing himself Mummy on the floor and Daddy on the floor." Due to X's fragile state, the decision was taken not to take her evidence on video film.

10 At the time of her death, the deceased was aged 31, 161 cm. or 5 feet 4 inches tall, and weighed about 70 kg. She was considerably smaller than the appellant. *Post mortem* examination showed that she had sustained 12 wounds. The pathologist could not say in what order they had been inflicted. We will not describe every one of them but summarize the position as follows. The fatal wound was to the central part of the chest. It pierced the sternum and went completely through the heart, to a depth of 11.5 cm. Severe force would have been required to inflict this wound. There was a stab wound 15 cm. deep which damaged the deltoid muscle, the seventh intercostal space, the hemidiaphragm, the lower lobe of the right lung and the dome of the liver. Another wound, 6 cm. deep, damaged the right pectoralis muscle, an auxiliary vein and the right upper lung. It also damaged a bundle of nerves. A wound 5.5 cm. deep to the left breast did not penetrate beyond the breast implant. There was one serious wound to the right upper back; this was 7 cm. deep and damaged a rib. The pathologist was of the view that moderate to severe force would have been required in respect of this wound. In addition to these five serious wounds, there were seven that were less serious, most of which were described as superficial. Two were thought to be defensive wounds. It was not disputed that all had been inflicted using the same knife. In addition to the knife wounds, the deceased had suffered damage to the right superior thyroid cartilage, with a fracture with surrounding haemorrhage measuring 0.5 cm. This would have been caused by the appellant either grabbing the deceased with his hand or in an arm lock. The pathologist expressed the view that the deceased would have become incapacitated due to blood loss quite quickly; he estimated that this would have occurred "within seconds to minutes."

11 The appellant had five wounds to the chest and two minor cuts to the hand. Of the five chest wounds, four were superficial but one, to the centre of the chest, was potentially fatal as it had damaged the intercostal artery, leading to loss of blood. This required emergency surgery. The pathologist expressed the view that all the chest injuries had been self-inflicted and that was the prosecution case. However, he did not rule out the possibility that one of the injuries had been caused by another person, which was the defence case. The pathologist's opinion that the appellant was the last person to be stabbed with the knife was not challenged. He could not rule out the possibility that the appellant had been trying to kill himself.

The issues at trial

12 The appellant pleaded not guilty to the single charge of murder. We have summarized the prosecution case and the agreed evidence. The appellant did not give evidence in his defence. At the close of evidence, Mr. Christopher Finch, for the appellant, made a submission that the charge of murder should not be put to the jury but should be changed to one of manslaughter. This submission was rejected by the judge. That decision was not and could not have been challenged. Mr. Finch also submitted that there was sufficient evidence of a loss of control for the partial defence, pursuant to s.152 of the Crimes Act 2011, to be left to the jury in addition to the defence of self-defence. The judge ruled that there was not sufficient evidence to leave loss of self-control to the jury and undertook to give his detailed reasons at a later date. Counsel addressed the jury and the judge summed up leaving to the jury only self-defence and the lack of intent to kill or to cause serious harm. As we have said, the jury convicted of murder. After delivering their verdict, the jury sent a note to the judge expressing the view that counselling should be available to members of a jury in cases of this kind. It must be inferred from this that the jury had found the evidence or parts of it to be distressing. The judge later sentenced the appellant on the basis that he had not been stabbed by the deceased but had himself initiated the violence.

The grounds of appeal

13 The first ground of appeal was that the judge had been wrong to rule that there was insufficient evidence to leave the partial defence of loss of self-control to the jury. The second was that the admission of the bodycam video film had been so distressing to the jury that it had tipped the balance of fairness of the trial against the appellant. We will deal with the second ground first.

The contention that the trial was unfair

14 In his skeleton argument, Mr. Finch asserted that it should be inferred from the note sent by the jury, suggesting that counselling ought to be available in cases of this kind, that it was the video film that had distressed them. He also suggested, in his skeleton argument, that the admission of the video film had taken him by surprise. However, in oral submissions, he accepted that he had seen the film before the trial and could have objected to it at the plea and case management hearing, had he wished to do so. It was common ground that, on that occasion, the number of photographs to be shown to the jury had been greatly reduced by agreement, so as to minimize any possible distress to the jury. Mr. Finch said that he should also have objected to the showing of the film. It was, he said, of minimal probative value but the distressing effect on the jury had had a prejudicial effect against the appellant. The trial had been unfair.

15 Mr. Christian Rocca, the Director of Public Prosecutions, submitted that it was not clear that it had been the video film that had prompted the jury's note. There were other aspects of the evidence which might have distressed them. Further, the defence had had ample opportunity to object to the admission of the film. Far from doing so, Mr. Finch had actually asked for the film to be played to the jury a second time, so as to point out the position of the deceased's mobile phone on the kitchen floor. Further, he submitted that the film was of important probative value and was not significantly prejudicial to the appellant.

16 We can deal with this ground quite briefly. We watched the whole film twice. We preface our comments by accepting that, because we have spent long careers in the law, we are more accustomed to looking at material of this kind and therefore less likely to be distressed by it than a jury might be. This video showed a distressing scene but it was far from horrifying. Possibly the most upsetting aspect was the valiant but unsuccessful attempt at resuscitation carried out by the paramedics who attended the scene a few minutes after the arrival of the police. That attempt, which was filmed at close quarters, necessarily exposed the deceased's naked breasts. This part of the film was not, in our view, at all probative and could sensibly and properly have been edited out. Indeed, in our view it should have been because it unnecessarily deprived the deceased of her modesty.

17 The first part of the film was, however, of some probative value. It is usually helpful for a jury to have a clear vision of the scene of a crime and this film certainly helped in that regard. The film showed no signs that there had been a serious disturbance in the kitchen. It showed the knife in the deceased's hand and the mobile phone on the floor. It showed the appellant in a semi-comatose state on the floor of the hall or passageway and the soundtrack allowed the jury to hear the way in which the appellant spoke. This might have assisted them in assessing the reliability of his *res gestae* statements. Most significantly of all, in our view, there was nothing prejudicial to the appellant in the film. The film showed nothing which might affect the jury's view against the appellant. It is true that the jury might have felt greater sympathy for the deceased than for the appellant because she did not survive whereas he did, but that is almost inevitable in any murder trial. In our view, the showing of this film did not render the trial unfair. We have no hesitation in rejecting this ground of appeal.

The partial defence of loss of control

18 In the first ground of appeal, it is submitted that the judge erred in refusing to leave the partial defence of loss of self-control to the jury. The partial defence of self-control is governed by s.152 of the Crimes Act 2011, which is materially the same as ss. 54 and 55 of the Coroners and Justice Act 2009 in force in England and Wales.

19 So far as is relevant to the appeal, s.152 provides:

"152.(1) If a person ('D') kills or is a 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 is irrelevant 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.

. . .

(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.

. . .

(9) A loss of self-control had a qualifying trigger if—

(a) D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person;

(b) D's loss of self-control was attributable to a thing or things done or said (or both) which—

(i) constituted circumstances of an extremely grave character; and

(ii) caused D to have a justifiable sense of being seriously wronged;

(c) D's loss of self-control was attributable to a combination of the matters mentioned in paragraphs (a) and (b).

(10) 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 encouraged or assisted 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 encouraged or assisted 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."

20 At the start of his ruling, the judge said that he did not intend to set out all the evidence as he had summarized it in his summing up. That was the factual matrix which would underlie his decision but, for present purposes, he would set out only the most essential aspects. There followed a brief summary of the evidence, which focused mainly on the *res gestae* statements of the appellant and X; the judge also summarized the expert forensic evidence.

21 The judge then set out most of the statutory provisions. He omitted sub-sections (5) and (6) of s.152. This would be an important omission were it not for the fact that the judge later directed himself in accordance with those two sub-sections. He cited a passage from the judgment given by Lord Judge, C.J. in *R.* v. *Clinton* (1) ([2012] EWCA Crim 2, at paras. 45–46):

"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." [Emphasis added.]

22 The judge then cited a passage from *R.* v. *Gurpinar* (3), where Lord Thomas, C.J. said ([2015] 1 W.L.R. 3442, at para. 13):

"As the task facing the trial judge is to consider the three components sequentially, and then to exercise his judgement looking at all the evidence, it follows from the terms of the Act (as clearly set out in both *R v Clinton* and *R v Dawes*) that if the judge considers that there is no sufficient evidence of loss of self-control (the first component) there will be no need to consider the other two components. Nor if there is insufficient evidence of the second will there be a need to address the third."

23 Finally, the judge cited a long passage from the recent case of *R.* v. *Goodwin* (2), where Davis, L.J. summarized the relevant considerations for the judge and for any appellate court which might consider the judge's ruling at a later date ([2018] EWCA Crim 2287, at para. 33):

"33. We think that in a case of this kind there are a number of general considerations which need to be borne in mind which we should list. In doing so, we do not proffer this list as being necessarily an exhaustive list of the kinds of points that a trial judge, where such an issue arises, will need to bear in mind.

(i) The required opinion is to be formed as a common sense judgment based on an analysis of all the evidence.

(ii) If there is sufficient evidence to raise an issue with respect to the defence of loss of control, then it is to be left the jury whether or not the issue had been expressly advanced as part of the defence case at trial.

(3) The appellate court will give due weight to the evaluation ('the opinion') of the trial judge, who will have had the considerable advantage of conducting the trial and hearing all the evidence and having the feel of the case. As has been said, the appellate court 'will not readily interfere with that judgment'.

(4) However, that evaluation is not to be equated with an exercise of discretion such that the appellant court is only concerned with whether the decision was within a reasonable range of responses on the part of the trial judge. Rather, the judge's evaluation has to be appraised as either being right or wrong: it is a 'yes' or 'no' matter.

(5) The 2009 Act is specific by section 54(5) and (6) that the evidence must be 'sufficient' to raise an issue. It is not enough if there is simply some evidence falling short of sufficient evidence.

(6) The existence of a qualifying trigger does not necessarily connote that there will have been a loss of control.

(7) For the purpose of forming his or her opinion, the trial judge, whilst of course entitled to assess the quality and weight of the evidence, ordinarily should not reject evidence which the jury could reasonably accept. It must be recognised that a jury may accept the evidence which is most favourable to a defendant.

(8) The statutory defence of loss of control is significantly differently from and more restrictive than the previous defence of provocation which it has entirely superseded.

(9) Perhaps in consequence of all the foregoing, 'a much more rigorous evaluation' on the part of the trial judge is called for than might have been the case under the previous law of provocation.

(10) The statutory components of the defence are to be appraised sequentially and separately; and

> (11) And not least, each case is to be assessed by reference to its own particular facts and circumstances."

24 It has not been and indeed it could not be suggested that the judge had given himself anything other than a full, correct and comprehensive direction as to the law. Mr. Finch's criticism of the judge arises from his application of the law to the evidence before the court; in effect to the correctness of his evaluation. Bearing in mind the need for this court to give due weight to the judge's opinion, this is a difficult furrow for the appellant to plough.

25 After this extensive self-direction, the judge set out the evidence which he said was most favourable to the appellant capable of having been accepted by the jury. At para. 23 of his ruling, he said:

> "The case for the defence was that the single serious injury sustained by the defendant was inflicted upon him by Carolina, with the other minor wounds (or some of them) in the very proximate area having been self-inflicted. Although the only evidence supporting such an assertion was the defendant's *res gestae* statement to the effect that he had been stabbed in the heart, it was potentially corroborated by X's *res gestae* statement: 'Mummy has stabbed Daddy, Daddy stabbed Mummy and Daddy stabbed himself.' It is a factual matrix which the jury could conceivably accept."

26 Then under the heading "Loss of Control," the judge continued (at paras. 24–25):

> "The defendant exercised his right to silence when interviewed under caution and gave no evidence at trial. His only articulation of his state of mind when the incident took place is to be found in his *res gestae* statements which are not of themselves suggestive of a loss of control. Therefore, the only evidence supporting a loss of control on his part is the number of wounds he inflicted upon Carolina, and (premised upon the defence case that the single serious wound suffered by him was inflicted by Carolina) the self-infliction of 3 superficial wounds to his chest. This of course needs to be seen in the context of the knife having been found in Carolina's hand, with the self-evident inference to be drawn being that the defendant placed it there. In my judgment, the injuries inflicted and self-inflicted of themselves are insufficient to meet the evidential threshold which would allow loss of control to be left to the jury. Moreover, the knife in Carolina's hand undermines the suggestion that the defendant lost control.
>
> 25. Each case must of course be decided upon its own facts but I am fortified in my view by the decision in *Goodwin*. In that case, 18 blows to the face, head and neck consistent with having been struck

by a hammer, was of itself insufficient to give rise to an inference of loss of control."

27 That in effect disposed entirely of the partial defence. However, the judge went on to consider and decide the other two components of the defence. He held that, on the basis that the jury could conclude that the deceased had stabbed the appellant and had inflicted a very serious injury to his chest, s.152(9)(a) was engaged. Had there been a loss of control, there was evidence of a qualifying trigger. In effect, the second component of the defence was satisfied. As to the third component, he concluded that "the multiple stabbing was not consistent with the notional reasonable man's reaction, even if the question of sexual infidelity is taken into account."

28 Mr. Finch for the appellant submitted that the judge had failed to consider all the available evidence which bore on the issue of whether a jury might reasonably conclude that the appellant had lost his self-control. He had focused too narrowly on the wounds inflicted and the forensic evidence and had left out of account the underlying factual matrix and the inferences which could properly be drawn. By way of example, Mr. Finch mentioned the evidence that the appellant had told the doctor at hospital that he had taken his wife's telephone. This was corroborated, he submitted, by the fact that the mobile phone was found on the floor of the kitchen not far from the deceased's body. It was common ground that the deceased had been very anxious that her husband should not find out that she was having an illicit affair, as this might affect the prospect that X would live with her after the separation. Mr. Finch submitted that the jury might reasonably infer that she took up the knife and stabbed her husband to stop him getting into her phone where, they might reasonably infer, there were messages pointing to the illicit affair.

29 Mr. Finch also so submitted that there was a logical inconsistency between the judge's holding that the jury might reasonably find that the deceased had started the violence by stabbing the appellant and his decision that there was insufficient evidence of a loss of self-control. This stabbing, if it occurred, was a sufficiently grave event that could amount to a qualifying trigger. It was, he submitted, an important aspect of the evidence going to the issue of whether there had been a loss of self-control.

30 Further Mr. Finch submitted that the judge had tended to "read down" the defence case and elevate the prosecution case. His example of this was the judge's conclusion that it was "self-evident" that the appellant had put the knife back in his wife's hand after he himself had handled it. That was not so, submitted Mr. Finch. There was evidence that the deceased could have remained standing and capable of movement for some little time after she had been stabbed (seconds to minutes according

to the pathologist) and the jury would have been entitled to conclude that she had taken the knife back, as the appellant had claimed in his first *res gestae* statement.

31 Finally, Mr. Finch was critical of the way in which the judge compared the facts of the instant case with that of *Goodwin* (2), where there had been 18 hammer blows and the Court of Appeal had upheld the trial judge's decision not to put loss of control to the jury. Mr. Finch submitted that the facts of *Goodwin* were very different; in particular there had been no serious life-threatening injury as the qualifying trigger.

32 Mr. Rocca for the Crown submitted that the judge was in the best possible position to evaluate the evidence, having conducted the trial, and this court should not readily interfere with his judgment. Moreover, as the appellant had decided not to give evidence (as he was entitled to do), the judge was left in the position of having to decide whether the three components were met, largely by drawing inferences from the evidence. He submitted that, because of the absence of evidence from the appellant, the judge had given even more careful consideration to the facts and to those matters from which inferences could be drawn.

33 Mr. Rocca disputed Mr. Finch's claim that the evidence relating to the trigger of the deceased's stabbing of the appellant (presumed for present purposes to be a finding open to the jury) was relevant to other components of the test besides the second one. He submitted that Mr. Finch was conflating all the components into one solitary test and that would be wrong in law. The judge had been correct to consider the three components separately and there was nothing untoward in the judge's ruling that there was not sufficient evidence to support a finding of loss of control even though there was sufficient evidence of a qualifying trigger in the (presumed) stabbing of the appellant. He reminded the court that in *Goodwin*, the Court of Appeal had said that the existence of qualifying trigger did not necessarily connote that there will have been a loss of control. In passing, we would agree that the existence of a qualifying trigger does not necessarily connote a loss of control; but nor does it mean that the existence and nature of the trigger is irrelevant to the issue of whether there was a loss of control.

34 Mr. Rocca also supported the judge's finding that the fact that the knife was found in the deceased's hand gave rise to the self-evident inference that the appellant had placed it there. The judge was entitled, he said, to take that into account and it pointed away from there having been a loss of control.

Discussion in respect of the first component

35 We accept the general thrust of Mr. Finch's submissions. We think that the judge focused too narrowly on some aspects of the evidence when

deciding whether there was sufficient evidence of loss of control for the defence to be left to the jury. We recognize that the judge said that he had in mind the whole of the evidence as he had set it out in his summing up. Further, no serious complaint could be made of the part of his ruling which set out the evidence in relation to the whole of the defence of loss of control. However, when it came to considering what the jury might reasonably accept of the appellant's case, he limited himself, at para. 23 of his ruling, to saying the factual matrix of the deceased stabbing the appellant first was one the jury "could conceivably accept." He did not deal with any of the other aspects of the evidence from which the jury might reasonably have drawn inferences which were favourable to the appellant. At para. 24, which we have set out above, he reached his conclusion that there was insufficient evidence of loss of control on the basis that the *res gestae* were not suggestive of loss of control, so that the only evidence supporting a loss of self-control was the wounds he inflicted on Carolina and the superficial wounds he inflicted on himself. Those injuries were not sufficient in themselves to meet the evidential threshold. Moreover, the fact that the knife was found in the deceased's hand, self-evidently put there by the appellant, undermined the suggestion that the appellant had lost his self-control. We think that this was too narrow a basis on which to reach his decision on the first component of the defence.

36 In our view, under s.152(6) a judge is required to consider the whole of the evidence which a jury might properly take into account when deciding whether there had been a loss of self-control. He or she is not limited to those parts of the evidence which directly support a loss of self-control. The question which the judge is to ask is whether a jury properly directed could reasonably conclude that the defendant had lost his self-control. The jury would have the whole of the relevant evidence available to them, including any inferences they might properly draw. Therefore, the judge must consider the whole of that range of evidence and inference. Further, when considering disputed evidence or evidence from which inferences might be drawn, the judge must consider the version most favourable to the defence which could be open to the jury acting reasonably. In our judgment, in looking only for evidence which directly supported the suggestion of loss of control, the judge took too narrow a focus. In particular, we think he was wrong to exclude from consideration the evidence (which he had already held that the jury could properly accept) that the deceased might have stabbed the appellant first. Because that evidence falls for direct and close consideration under the second component, to see whether the trigger was sufficiently grave in its nature or effect to amount to a qualifying trigger, it does not follow that it should be excluded from consideration under the first component. The judge's task is to ask the statutory question (could the jury reasonably conclude that this component of the defence might apply?) separately and

sequentially in respect of each component but that does not mean that the evidence should be compartmentalized. The evidence in relation to the deceased stabbing the appellant is relevant to the question of whether or not he might have lost his self-control.

37 Applying that principle to the question of whether a jury could reasonably conclude that the appellant might have lost his self-control, we start with some background matters. The jury could reasonably conclude that violence against his wife was out of character for this appellant. We say that because the deceased, who wanted to divorce the appellant, had recently told her solicitor that there had been no unreasonable behaviour on the appellant's part. The jury would be entitled to infer that, if he had ever been violent to her, she would have mentioned it then. Secondly, we think that a jury could reasonably infer that the appellant was under some stress at the time and that there was much emotional tension between the parties when they met that evening. We say that because it was agreed that the appellant was distressed at his wife's decision to leave him (a decision which he did not understand because he did not know that she was having an affair) and that there was about to be a custody battle in respect of their daughter. X herself was aware of this. She told Police Const. Rooke that if she lived with Mummy she would get a new house; if with Daddy she would get a cat. He was also sufficiently upset when his wife told him she was leaving that he gave up his employment.

38 Coming then more directly to the incident itself, we think that a jury could properly conclude that the appellant might have picked up his wife's phone and that her reaction was to try to prevent him from reading any messages because she did not want him to find out about her affair. Although it would be an extreme reaction on her part, we think a jury could reasonably conclude that she may have picked up a knife and stabbed the appellant. Indeed, the judge accepted that, mainly in reliance on X's *res gestae* statements, the jury could conclude that that may have been so. There follows the attack on the deceased which was very violent. The appellant inflicted one blow which would have required severe force, another which required moderate to severe force, another three which penetrated quite deeply and about five more which were more superficial. Two of the wounds were to the deceased's back. There were also two defensive wounds and there was damage to the deceased's neck, apparently caused by the appellant either grasping her neck or holding her in an arm lock. We think that the jury could reasonably conclude that those injuries had been caused at a time when the appellant had lost his self-control. We accept that, of themselves, they do not necessarily support a loss of control. In our view, a jury could reasonably conclude that the wounds had been inflicted either deliberately in cold blood or while out of control. We think that, even standing alone, that evidence was so equivocal as to oblige the judge to find the first component satisfied. But the

surrounding circumstances are important because the jury could reasonably think it unlikely that this appellant would stab his wife in cold blood. We agree with the judge that the appellant's *res gestae* statements do not, of themselves, directly support a loss of control, but nor are they inconsistent with it. The judge laid great stress on the fact that the knife was found in the deceased's hand. He regarded it as self-evident that the appellant had put it there and that this undermined any suggestion of loss of control. We say two things about that. First, even if the appellant did put the knife in his wife's hand, we do not think it points conclusively against there having been a loss of control; it would be open to a jury to conclude that he had put it there after recovering his self-control, in an attempt to exculpate himself from what he realized he had done. Secondly, we do not think that it was self-evident that he put it there. We think that a jury could reasonably conclude that the deceased might have continued standing for "seconds to minutes" after being stabbed. On that hypothesis, she could have remained standing while the appellant was stabbing himself and might have taken it off him, as the appellant had claimed in his *res gestae* statement. It is difficult to say what the jury might have made of X's explanation for her own minor injury, given to Police Const. Mohammed, that she had "tried to stop Daddy from stabbing himself and . . . blood went on top of me." If the jury thought that X was trying to take the knife off her father, they might have thought that the deceased, if still standing, might have intervened and taken the knife. We are not saying that this was a likely conclusion but we think it was one open to the jury; we do not think it was self-evident that the appellant put the knife into his wife's hand.

39 We recognize that the scenario we have suggested is highly favourable to the appellant and the jury might not accept any of the factors we have mentioned. But a trial judge is required to put the defence case at its highest, consistently with it being based in evidence or on reasonable inference. We are of the opinion that the judge erred in holding that there was insufficient evidence of a loss of self-control or, putting it in terms of the statutory question, that a jury properly directed could not conclude that the appellant might have lost his self-control.

Discussion of the third component

40 There is no dispute that the second component was satisfied, that there was sufficient evidence to enable the jury reasonably to conclude that the deceased stabbed the appellant first. The judge held, correctly in our view, that a stab wound to the chest was sufficiently grave to qualify under s.152(1)(a) and (9)(b). Accordingly, we turn to the third component. The judge dealt with this very briefly. We make no criticism of that because, in the light of his conclusion that there was insufficient evidence of loss of self-control, it was not necessary for him to address the third

component at all. As we have differed from the judge in respect of the first component, we must do so.

41 We must consider all the relevant evidence and pose the statutory question:

> "Could a jury, properly directed, reasonably conclude that a person of the appellant's age and sex, with a normal degree of tolerance and self-restraint and in the circumstances of the appellant, might have reacted in the same or a similar way?"

Essentially this entails a value judgment. At paras. 37 and 38 above, we set out the evidence which we thought was relevant to the issue in the first component, putting it in the light most favourable to the appellant. We think that all that evidence is relevant to this third component save that we do not think that it would be relevant to consider whether the appellant was or was not normally a violent man. The task is to place a person with a normal degree of tolerance and self-restraint in the circumstances of the appellant and ask whether that person might have reacted similarly.

42 We recapitulate what we think a jury might reasonably consider that those circumstances were. The jury might reasonably think that the appellant was or may have been under a degree of emotional tension because of the breakdown of his marriage and the potential loss of the custody and company of his daughter. They might reasonably accept that the deceased may have stabbed him in the chest when he picked up her mobile phone. They might reasonably accept that the deceased may have inflicted a serious life-threatening wound and they might reasonably conclude, particularly if they thought that the appellant had been in a vulnerable emotional state, that that was an action of extreme gravity, giving rise in the appellant to a justifiable sense of being seriously wronged. They might then reasonably conclude that the appellant had or might have lost his self-control and had stabbed the deceased very violently. In those circumstances, the nature of the trigger being extremely serious, our judgment is that a jury could reasonably conclude that a man with a normal degree of tolerance and self-restraint might react in that or a similar way.

Conclusions

43 Notwithstanding our reluctance to interfere with the judgment of this very experienced judge, we think that he fell into error and that the appeal must be allowed. It follows that the conviction for murder and the sentence imposed must be quashed. There will have to be a retrial. It was common ground at the Bar that, if there were to be a retrial, it would be open to the appellant to run any available defence. We direct that the appellant should remain in custody pending trial, unless a successful bail application is made.

44 We have found it necessary to discuss the evidence in this case and the possible inferences to be drawn from it in great detail. We think that this discussion could be prejudicial to the retrial if potential members of the jury were able to read an account of this judgment in the media. Accordingly we direct that this judgment should not be published in any way until after the conclusion of the retrial and any appeal therefrom.

Appeal allowed.