***Evans v The State of Western Australia* [2011] WASCA 182 (5 September 2011) – Supreme Court of Western Australia (Court of Appeal)**

'Alcohol' – 'Insanity' – 'Murder' – 'mental illness' – 'Physical violence and harm' – 'Provocation'

Charge/s: Murder.

Appeal type: Appeal against conviction.

Facts: During an altercation, the male appellant slashed his fiancee's arm with a knife (the first injury). Realising the seriousness of the injury, the appellant dropped the knife and applied a tourniquet to her arm. The deceased further goaded the appellant to kill her. The appellant slashed her twice in the neck, causing her death (the second and third injuries). The deceased was a person who frequently consumed excessive amounts of alcohol. During the months prior to the death, the relationship between the appellant and the deceased was characterised by frequent incidents of domestic violence, with the appellant usually being the victim. A few hours after the killing, the appellant was taken into custody and admitted to killing the deceased in a recorded interview. In the 8 years prior to the killing and thereafter, the appellant was admitted to psychiatric hospitals. It was accepted that he suffered psychotic episodes from time to time.

Issue/s:

1. The trial judge made material errors of law in his direction to the jury on the provocation defence resulting in a substantial miscarriage of justice.
2. The verdict of the jury was unsafe or unsatisfactory on the ground that the jury should have found the appellant insane at the time of the killing.

Decision and Reasoning: The appeal was upheld on ground 1 and a retrial was ordered. The State conceded that the trial judge made an error of law in his direction to the jury on provocation but argued that the error did not result in a substantial miscarriage of justice because the evidence was incapable of supporting the defence of provocation. McLure P (with whom Mazza J agreed) found that the evidence was capable of giving rise to a reasonable doubt as to whether the appellant was provoked to cause all three injuries. There was a resulting miscarriage of justice (See [142]-[143]). Pullin JA in dissent found that while the trial judge erred in directing the jury as to provocation (See [231]), there was no miscarriage of justice as provocation should not have been left as an issue to be decided by the jury. The appellant was no longer deprived of self-control when he caused the third injury (See [238]-[239]).

Ground 2 was dismissed. McLure P (with whom Mazza J agreed) held that it was reasonably open to the jury to fail to be persuaded on the balance of probabilities that the appellant was deprived of the capacity to know he ought not to kill the deceased. There was evidence in the police interview that the appellant was thinking rationally before and after the deceased's death (See [125]-[126]). Pullin JA, in a separate judgment, also held that while there was unanimous evidence from psychiatrists that the appellant suffered from a mental illness and that suffered from psychotic episodes, whether he was psychotic on the night of the killing and whether he lacked the capacity to know the act of slashing in the neck was wrong was a matter of controversy. Pullin JA was unable to conclude, on the balance of probabilities, that the appellant lacked the relevant capacity (See [219]-[220]). See also *Evans v The State of Western Australia* [2010] WASCA 34 (26 February 2010) and *The State of Western Australia v Evans [No 2]* [2012] WASC 366 (9 October 2012).