***Silva v The Queen* [2016] NSWCCA 284 (7 December 2016) – New South Wales Court of Criminal Appeal**

'Manslaughter' – 'Physical violence and harm' – 'Reasonableness' – 'Relevance of past violent conduct' – 'Self-defence'

Charge/s: Manslaughter.

Appeal Type: Appeal against conviction.

Facts: The female appellant was in a relationship with the deceased, James Polkinghorne, and they had a child together. Evidence was led at trial that the deceased had physically and verbally abused the appellant throughout their relationship. She was unable to leave the relationship and saw seeking help from the police as impossible.

On the 13 May 2012, the appellant went to her parents' place, against the deceased's wishes. During the course of the day, there were 80 calls and SMS messages between the appellant and the deceased. These messages and calls were tendered as evidence at trial (recordings were available because the police had been tapping the deceased's phone in light of his suspected involvement in a previous murder). These messages, while not phrased in terms of 'killing' the appellant, were extremely threatening and abusive. The deceased was affected by methylamphetamine.

That night, the deceased went to the home of the appellant's parents. He was 'going crazy, screaming and kicking items'. The appellant's brother called 000. From here, there were some inconsistencies in the accounts of the appellant's father, brother and the record of interview from the appellant produced after the killing. There was no contention that the appellant was punched and thrown around by the deceased. Both the appellant in her record of interview and her brother at trial said that the deceased yelled, "I'm going to fucking kill her' and 'I'll get youse cunts'. The appellant's father and brother started fighting with the deceased. The appellant retrieved a knife from inside and stabbed the deceased. After trial by a jury, she was found not guilty of murder but guilty of manslaughter and sentenced to 18 months imprisonment wholly suspended.

Issue/s: Whether it was open for the jury to conclude, to the criminal standard of proof, that the fatal stab wound inflicted by the appellant was not a reasonable response to the circumstances as she saw them?

Decision and Reasoning: The appeal was allowed (McCallum J and RS Hulme AJ in majority, Leeming JA in dissent). In the majority judgment, RS Hulme AJ first held that there was no rational reason for the jury to reject the substance of the evidence before them. This evidence included the terms and tone of what the deceased had said in the phone calls and messages that day. As per His Honour at [163]:

*'Certainly he had not in terms threatened to "kill" the Appellant. However he was powerful, had been violent in the past, had previously attacked the Appellant and on the day in question he was very angry, irrational, and had threatened to seriously hurt her and to come to where the Appellant was, thus providing some opportunity to carry out his threats'.*

Further, notwithstanding the inconsistencies, much of the evidence suggested that the appellant and her brother had been in serious danger. Accordingly, RS Hulme AJ concluded that there was sufficient evidence that the appellant believed her act was necessary to defend herself or some other person (see [170]).

Second, His Honour held that the appellant's response was reasonable. This was in circumstances where the police would have taken time to arrive, the appellant saw substantial disadvantages in calling the police, and it was not obvious that they would be able to overwhelm the deceased. Therefore, it was not open to the jury to be satisfied beyond reasonable doubt that the Appellant had not acted in defence of herself or her brother and father (see [171]-[173]). The appeal was allowed.

McCallum J largely agreed with RS Hulme AJ but provided some additional comments. Her Honour was also unable to accept that the jury could, acting reasonably, have been satisfied beyond reasonable doubt that the appellant's conduct was not reasonable in the circumstances as she perceived them at the time of the stabbing (see [93]). Her Honour noted that Leeming JA in dissent had placed emphasis on the objective medical evidence and the evidence of eye witnesses at the confrontation. Acknowledging that it is important to have regard to the whole of the evidence, McCallum J continued:

*'Ultimately, however, the critical issue in this case is the reasonableness of inflicting mortal injury judging that issue by reference to an assessment of the circumstances in that instant as perceived by Ms Silva. While the evidence directly relating to the time of the stabbing is important, that assessment is also critically informed by a close analysis of the circumstances leading up to the fatal confrontation'* (see [94]).

McCallum J's own assessment was that the appellant could only have seen the deceased's attack on her that evening as 'urgent, life-threatening and inescapable' and that the events in the street could not be divorced from the 'irrational, menacing rage exhibited by the deceased in his calls to Ms Silva in the period leading up to the time when he confronted her physically' (see especially [95]-[109]). Her Honour concluded at [110]:

*'The circumstances described in the evidence in this case are the kind in which, more commonly, it is the woman who is killed. In my assessment of the record of the trial, the evidence was not capable of proving beyond reasonable doubt…that Ms Silva's conduct in fatally stabbing the deceased was not reasonable in the circumstances as she perceived them at the time of the stabbing'.*

In dissent, Leeming J was not persuaded that a deep penetrating stab into the deceased's chest cavity, while he was struggling with two other men, was a reasonable response to the circumstances as the appellant saw them at 9.09pm and it was therefore open to the jury to reach this conclusion (see discussion at [83]). His Honour also noted that the jury had the advantage of seeing the evidence first hand and therefore declined to interfere with the verdict.

See also *R v Silva* [2015] NSWSC 148 (6 March 2015).