

## ***Rogers v R* [2021] NSWCCA 61 (9 April 2021) – New South Wales Court of Criminal Appeal**

‘Application for leave to appeal against conviction’ – ‘Defence relied upon at trial’ – ‘Extreme provocation’ – ‘Murder’

Charges: Murder x 1.

Proceedings: Appeal against conviction.

Facts: The male appellant suffocated his wife during a physical altercation and attempted to commit suicide. The appellant had discovered his wife had formed a relationship with another man. There was evidence that the deceased kicked the appellant during the struggle. At trials in 2018 and 2019, the appellant relied upon the partial defence of substantial impairment by abnormality of mind under s 23A *Crimes Act 1900* (NSW). The jury rejected the partial defence and convicted the appellant of murder. No application was made at trial for the partial defence of extreme provocation to be left to the jury.

Grounds of appeal/Issues: Application for leave to rely upon the ground of appeal pursuant to Rule 4 Criminal Appeal Rules (NSW).

Ground: A miscarriage of justice resulted from the failure to leave the partial defence of extreme provocation under s 23 *Crimes Act 1900* (NSW) to the jury.

Held: Leave to rely on the ground of appeal refused; leave to appeal against conviction refused.

*Issue 1*: As Bathurst CJ observed in *ARS v R*, the *Criminal Appeal Act 1912* (NSW) does not exist to enable an accused who has been convicted on one set of issues to have a new trial under a new set of issues which could or should have been raised at the first trial. In any event, the appellant had not lost a real chance of a verdict of not guilty of murder, but guilty of manslaughter, because extreme provocation was not left to the jury: ([166]-[167]).

*Issue 2*: Properly constructed, s 23 provides that the conduct of the deceased to which the accused person responded (s 23(2)(a)), and which caused the accused person to lose self-control (s 23(2)(c)), and which was capable of causing an ordinary person to lose self-control (s 23(2)(d)) must be conduct which constituted a serious indictable offence (s 23(2)(b)). Omitting the words “in the position of the accused” in the 2014 amendment means s 23(2)(d) now significantly departs from the common law. “[T]he ordinary person test now contained in s 23(2)(d) assumes a calm ordinary person and that it is not relevant that the accused person was particularly sensitive to the situation or was experiencing a depressive disorder” (see [92]-[104]).

The critical and determining aspect of the appeal concerned the objective element in s 23(2)(d). It was accepted that the notional ordinary person may act in unreasonable ways but “the reaction must still be within the range of possible reactions of an ordinary person as assessed by the Court when considering the threshold question of law involved.” In the context and factual circumstances of the case, the reaction of the appellant was “not within the range of possible reactions of an ordinary person. The partial defence of extreme provocation ought not to have been left to the jury” ([141]-[163]).