IN THE SUPREME COURT OF NEW ZEALAND

SC CRI 14/2004
[2005] NZSC 37

AERENGAROA TIMOTI

v

THE QUEEN

Hearing:	17 March 2005
Court:	Elias CJ, Gault, Keith, Blanchard and Tipping JJ
Counsel:	G J King, A Shaw and C J Milnes for Appellant J C Pike and F E Guy for Crown
Judgment:	21 June 2005

JUDGMENT OF THE COURT

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1. The appeal is allowed.

2. The conviction is set aside and a new trial ordered.

REASONS

(Given by Tipping J)

Introduction

[1] The appellant, Mr Timoti, was convicted of murder after a trial in the High Court at Auckland. His appeal to the Court of Appeal was dismissed.[1] He appeals to this Court, leave having been given on two points concerning his partial defence of provocation. The first of those points concerns the Court of Appeal's conclusion that provocation was untenable in the circumstances of the case. The second relates to the trial Judge's directions on proportionality. A third issue arises from the Crown's attempt to support the Court of Appeal's conclusion on the basis that provocation was not available to Mr Timoti as a matter of law.

[2] The case is an unusual one of its kind in that the provocation relied on was not given by the person killed and, furthermore, it is accepted that the case must be approached on the basis that Mr Timoti was convicted of murder under paragraph (d) of s 167 of the Crimes Act 1961.[2] Under this paragraph culpable homicide is murder if the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

[3] Mr Timoti set fire to premises in which the person killed was present. He was acquitted on charges of attempted murder in relation to the two people said to have provoked him. That acquittal (which rejected any intention to kill) means that the murder conviction must have been based on s 167(d). In that respect the jury must have found that he knew his lighting the fire with the object of burning down the building was likely to cause death, albeit he may have desired that his object should be effected without hurting anyone.

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1 *R v Timoti* [2005] 1 NZLR 466.

2 See [8] below.

[4] The logically first question is whether the Crown is correct in its submission that provocation can never reduce to manslaughter what would otherwise be murder under paragraph (d) of s 167. Before examining that question, we will describe the factual background to the extent necessary to put it and subsequent questions in context.

Factual background

[5] At the relevant time Mr Timoti, then aged 23, was living with other members of his family in a house in Auckland. Those present were his mother, Mrs Maru Timoti, his stepfather, Mr Fred Wuatai, and their infant daughter, Tiamarama. These three slept in the main bedroom. Mr Timoti slept in another bedroom with his two year old daughter, Valentina, whose mother was his stepsister, the daughter of Mr Wuatai. Two other relatives were sleeping in the lounge. They were Mr Marukore and the person who died in the fire, Mr Ruarau.

[6] We take the events leading up to the lighting of the fire by Mr Timoti from the trial Judge's ruling that provocation should go to the jury. Both sides accept the accuracy of the Judge's description.

> [9] … there is evidence from which a jury could conclude, as a reasonable possibility, that the acts of Fred Wuatai and Maru Timoti on the night of 23-24 January 1999, were, in the circumstances, sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the accused, of the power of self-control. There is evidence – I do not detail it – of long-standing family tensions between the accused on the one hand and his mother and her partner, Mr Wuatai, on the other. Those tensions were exacerbated when the accused formed a relationship with Mr Wuatai's daughter, Sharina, which relationship resulted in the birth of a daughter, Valentina, when Sharina was still aged only 16 years. There is evidence that the accused's mother and Mr Wuatai strongly disapproved of the relationship between their offspring, and in particular were aghast when Sharina gave birth at such a young age. Other causes of tension related to money. The accused's mother and Mr Wuatai did not consider that the accused was properly contributing to the household budget while he was living with them. Another major source of friction within the household was the upbringing of Valentina. There was a struggle for custody and control of her and her upbringing between the accused on the one hand and his mother and Mr Wuatai (Valentina's grandparents) on the other. (Valentina's mother seems largely to have been out of the picture so far as primary care-giver for Valentina was concerned.)

[10] These tensions reached boiling point on the evening of 23 January this year. Mr Wuatai returned late from a social cricket game. There is evidence that he had been drinking excessively and was intoxicated. When he got home, he found that the telephone in the kitchen was broken. He inquired as to how it had been broken and was told that it was done by the accused. There is evidence that he then flew into a rage and went into the accused's bedroom. The accused was in there with his daughter Valentina. Some evidence would suggest the accused was asleep; other evidence would suggest that he was awake. What does appear clear is that Mr Wuatai challenged the accused about the broken telephone and then demanded that he leave the house immediately, notwithstanding that it was the middle of the night and the accused had nowhere to go. There was fighting between Mr Wuatai and the accused. There is evidence that that fighting was initiated by Mr Wuatai. There is also evidence that Mr Wuatai insisted on taking Valentina and insisted that she would not be going with the accused. The accused's mother appears to have sided with Mr Wuatai in this dispute, including with respect to his demand that the accused leave the house immediately.

[11] The fighting became so threatening that the accused tried to ring the police. There is evidence that Mr Wuatai physically prevented him from ringing the police, and dragged him away from the telephone while he was screaming for the police to help. In the end the accused's mother rang the police. The police arrived. It is clear from the police officers' evidence that Mr Wuatai was warned in respect of his assault on the accused. The accused was warned in respect of the damage he had done to the telephone. The police quietened matters down. By this stage it was after 1 am on the Sunday, but matters quickly flared the moment the police left the house. There was effectively a physical tug of war between the accused and Mr Wuatai over Valentina. The accused went out and saw the police about this. They were still in their cars outside. The police returned and told Mr Wuatai that the accused, as Valentina's father, had the right of control over Valentina. The police then left again.

[12] There is evidence of further provocation after that time. There is evidence that the accused's mother and Mr Wuatai continued to mock the accused, saying that in any event he would be gone tomorrow. There is also some evidence of a rather unclear kind that the accused's mother and Mr Wuatai also indicated to him that they had others ready to take his room. In addition, there is evidence of Mr Wuatai threatening the accused that if he took Valentina with him, he, Mr Wuatai, would kill the accused.

[13] Much of the above abbreviated account is disputed, but there can be no doubt that the above account is a version open to the jury. In my view it does amount to a "credible narrative of causative provocation": see *R v Matoka* [1987] 1 NZLR 340 at 344 (CA). In all the circumstances it would be open, in my opinion, for a jury to find that these acts of the accused's mother and Mr Wuatai were sufficient to deprive a person, having the power of self-control of an ordinary person, of the power of self-control.

[14] There is also the possibility that the jury could find, on the basis of Dr Chaplow's evidence, that the accused had special characteristics which made him more susceptible to the taunts that he faced that evening.

> [15] I now turn to the second limb of the defence (b). There is evidence from which a jury could infer that the acts of the accused's mother and Mr Wuatai did deprive the accused of his power of self-control and did induce him to commit the act of homicide. There is evidence that he was extremely angry at what had occurred. The act of lighting the fire occurs within about three hours of the last of the taunts. I am of the view that it would be open to a jury to find that the lighting of the fire was done while the accused was still in the "heat of passion" or was done "before there [had] been time for his passion to cool": see *R v McGregor* [1962] NZLR 1069 at 1078 (CA). It is possible, I think, that a jury could find that in those early hours of 24 January, the accused was not "master of his mind" *(ibid).*

[7] The narrative can conveniently be picked up at this point from the judgment of the Court of Appeal:

> [5] After the altercations described above, Mrs Timoti and Mr Wuatai retired to their bedroom and locked the door. Mr Marukore and Mr Ruarau went to sleep in the lounge. The appellant went to his room and began to fret and to brood over what had happened. Aspects of his personality made him more sensitive to being provoked by what had occurred than the ordinary person, as will be seen by reference to psychiatric evidence discussed later in this judgment. He was very resentful that, as it seemed to him, his mother had sided with Mr Wuatai and had not intervened in the attack on himself. He was very distressed about having to leave the home and anxious about whether he would be able to take his daughter with him. He decided that he would, in his words, "get back" at his mother and stepfather.
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> [6] At about 5 a.m. on 24 January the appellant packed his personal effects in bags and put them outside. He took up a five litre canister of petrol and poured the contents along the hallway, up to the door of the bedroom where his mother, Mr Wuatai and Tiamarama were asleep, and poured petrol also into his own bedroom. There was a household hose attached to a tap outside, and to prevent this being used against the fire he disconnected it and threw it away. The appellant made a lighting torch out of a stick with cloth wrapping and, picking up his daughter, he walked out of the house, setting fire to the petrol trail as he exited. The house was engulfed in flames.
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> [7] Mrs Timoti and Mr Wuatai and Tiamarama woke and managed to escape through the bedroom window. Mr Marukore also woke and found his exit from the lounge blocked by smoke and flames. He tried to wake the deceased but was forced to flee for his life by leaping through a window. Mr Ruarau succumbed before he could escape. He died of smoke asphyxiation and his body was burnt beyond recognition.
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> [8] The appellant was charged with four counts; arson, attempting to murder Fred Wuatai, attempting to murder Maru Timoti and murdering Tereoro Ruarau. The appellant pleaded guilty to arson. He was acquitted by the jury on both counts of attempted murder and convicted on the count of murder.

Relevant legislation

[8] As the appeal turns on the provisions of ss 167 and 169 of the Crimes Act and the relationship between them, we now set these sections out:

> **167 Murder defined**
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> Culpable homicide is murder in each of the following cases:
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> (a) If the offender means to cause the death of the person killed:
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> (b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
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> (c) If the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed:
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> (d) If the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.
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> **169 Provocation**
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> (1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.
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> (2) Anything done or said may be provocation if—
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> > (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
> >
> > (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.
>
> (3) Whether there is any evidence of provocation is a question of law.
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> (4) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.
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> (5) No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

> (6) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.
>
> (7) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.

Relationship between s 167(d) and s 169

[9] The Court of Appeal rejected the Crown's argument that murder under s 167(d) is not susceptible to the partial defence of provocation. Mr Pike submitted that the Court of Appeal's conclusion was erroneous. The essence of his submission in the Court below, as noted in the judgment,[3] was that s 167(d) envisages a calculated course of conduct in pursuance of an unlawful object. It is therefore incompatible with the hot-blooded loss of self-control contemplated by the concept of provocation as a partial defence. In the course of rejecting the Crown's argument, the Court of Appeal pointed out that the terms of s 169 are broad enough to apply to any case of murder. Hence provocation could apply to murder under paragraph (d), albeit cases in which that might occur would be rare.

[10] In this Court Mr Pike endeavoured to persuade us to take a different view. He suggested that s 169 was not a complete code and should be taken as implicitly including certain common law concepts. That is not a proposition which we can accept. We agree with what is said in *Adams on Criminal Law* on this point.[4] The authors say that s 169 is a code within the code constituted by the Crimes Act. They rely on the decision of the Court of Appeal in *R v White (Shane)*[5] for that proposition. To similar effect is the decision in *R v Aramakutu*.[6] Section 169 contains a definition of what amounts to provocation and is designed to cover the whole ground. We agree with Mr King's submission that it is simply a matter of applying the terms of s 169 to the particular case in hand. When one does that the position, in our view, is plain enough.

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3 At [18].
4 At CA 169.22.
5 [1988] 1 NZLR 122.
6 [1991] 3 NZLR 429 CA.

[11] Furthermore the legislative history of the 1961 Crimes Act suggests that Parliament was bent on replacing the earlier statutory summaries of the common law principles[7] with a new self contained code. It is as well, however, to point out that some of that new code, subs (6) of s 169 being a case in point, is based substantially on common law principles. As will become apparent later, the words "mistake" and "accident" with which that subsection is concerned were designed to reflect earlier common law concepts, including the doctrine of transferred malice. But no common law case of which we are aware attempted to define or confine the concepts of mistake and accident. So the ordinary natural meaning of those words would not in any event be subject to any common law restriction. We should add that even if there were some common law overlay to s 169, Mr Pike acknowledged he could not cite any common law authority suggesting that provocation was not available in the case of what is now a paragraph (d) type of murder, based as that paragraph is on the old felony murder rule.

[12] Mr Pike further submitted that there was a linguistic and logical incompatibility between the loss of self-control inherent in the partial defence of provocation and paragraph (d) murder. This was so, essentially, as Mr Pike put it, because the person acting in terms of paragraph (d) is making a judgment. We cannot accept this proposition either.

[13] The starting point is s 169(1). The introductory phrase "culpable homicide which would otherwise be murder" contains no suggestion that one species of culpable homicide that would otherwise be murder, ie paragraph (d) murder, may not be reduced to manslaughter if the person who caused the death did so under provocation. If, as is self-evident, paragraph (a) murder involving a specific intent to kill can be reduced to manslaughter on account of provocation, we cannot discern any policy reason to read down s 169(1) from its plain terms. To do so would mean that if, under provocation, Mr Timoti had intended to kill his mother and stepfather when he lit the fire, and had succeeded in doing so, what would otherwise have been murder would have been reduced to manslaughter. But had he also killed Mr Ruarau

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[7] Section 165 of the Criminal Code Act 1893 and sections 184 and 185 of the Crimes Act 1908.

with the necessary foresight of his death, there would have been no capacity for any reduction to manslaughter.[8]

[14] Usually a paragraph (d) murder will involve less moral blameworthiness than a paragraph (a) murder. It certainly would not normally involve greater culpability. If the Crown's argument is right, a less or at least no more culpable species of murder would attract a harsher response to provocation. For these reasons policy considerations do not provide any reason for reading down the literal terms of s 169(1). What is more, any such reading down would obviously be against the interests of the accused and this is something which should be done only in compelling circumstances. There is nothing else in s 169 which gives any support for the Crown's argument.

[15] Mr Pike's point about the mental state of a paragraph (d) murderer being incompatible with provocation is not persuasive. The mental state of a paragraph (d) murderer is similar to that of a paragraph (b) murderer: see *R v Aramakutu*.[9] In each case there is an unlawful act which runs the risk of causing death. In paragraph (b) the unlawful act is the causing of bodily injury. In paragraph (d) it can be any act done for an unlawful purpose. The common thread is the fact that the person performing the act must know that his or her act is likely to cause death. The element of recklessness expressly mentioned in paragraph (b) is inherent in paragraph (d).[10] It is the running of a known risk of causing death which is common to both paragraphs. The mental state in both paragraphs is effectively the same. It is difficult therefore to view the mental state in a paragraph (d) case as being materially different from that in a paragraph (b) case where provocation is undeniably a defence. There is certainly insufficient difference between the two paragraphs to justify the exclusion of paragraph (d) from the concession to human frailty which is the rationale for the partial defence of provocation.

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8 In this example s 167(c) would not apply to the killing of Mr Ruarau. In common law parlance the malice would not be transferred to him. His death was an additional result.

9 [1991] 3 NZLR 429, 432 per Cooke P.

10 Recklessness is not a formal ingredient in paragraph (d) murder and the jury need not therefore be directed on it.

[16] With respect therefore to Mr Pike's argument, we consider that, if anything, it establishes the opposite of what he contended for. Both linguistically and logically s 169(1) applies to all forms of culpable homicide that would otherwise be murder under s 167. It is not possible to exclude paragraph (d) murder from the reach of s 169(1). We therefore agree with the Court of Appeal's conclusion that the partial defence of provocation is capable of applying to a paragraph (d) murder.

Was provocation tenable on the present facts?

[17] This issue turns largely upon the proper meaning to be given to s 169(6) and in particular to the phrase "by accident or mistake". The subsection deals with cases where it is not the person giving the provocation who is killed; the offender kills someone else by accident or mistake. The suggestion of the Court of Appeal in *R v McGregor*[11] that in spite of s 169(6) the provocation must come from the deceased cannot be reconciled with the plain terms of the second half of the subsection. The Court must have meant that the provocation had to come from the victim unless the concepts of accident or mistake could be invoked so as to allow provocation to apply when someone other than the provoker is killed.

[18] In the present case the provocation relied on was given by Mrs Timoti and Mr Wuatai but it was Mr Ruarau whom Mr Timoti killed. The essential question is therefore whether Mr Timoti killed him by accident or mistake. Unless that is so, provocation was not available to him. The same phrase "by accident or mistake" appears in s 167(c). There, it is a statutory reflection of the common law concept of transferred malice. At common law, murder was killing with malice aforethought. The malice was normally directed to the person killed but could be transferred to another person killed by accident or mistake. If the accused meant to kill A but actually killed B, the malice he bore towards A was transferred in law to the victim B. The culpability was, and still is, seen as the same. It is not lessened because the wrong person is killed.

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11 [1962] NZLR 1069, 1080.

[19] It is important to note that whenever provocation is invoked the act of homicide, as s 169(2)(b) calls it, must have been induced by the provocation. In an accident or mistake case that retaliatory act is aimed at, or at least thought to be aimed at, the person giving the provocation, but it actually causes the death of some other person in circumstances amounting to murder. It is that dissonance between the target or intended target of the act of homicide and the ultimate victim with which s 169(6) is concerned.

[20] The Court of Appeal held that the killing of Mr Ruarau could not in law be an accident or mistake because the foresight of death inherent in paragraph (d) meant that the death could not be regarded as accidental or mistaken. This is what the Court said:[12]

> [24] … Any person or class of persons whom the offender knows to be likely to be killed cannot be the object of accident or mistake because they must have been specifically envisaged as potential victims. A bank robber, for example, who fires a warning shot at a security guard and kills a customer, must have envisaged that risk to be guilty of murder at all, and it could not therefore have been an accident or mistake in any relevant sense. The class of potential victims in that case would be anyone within the range of the shot at the time it was fired. The same reasoning would apply in a case such as the present, where, if the offender knew that setting fire to the house was likely to kill any of the known or likely occupants, the killing of any one of them could not be considered an accident or mistake.
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> [26] … If, in the present case, the appellant knew that in setting fire to the house any person was likely to be killed then he must have known that any of the known occupants were at such risk. Mr Ruarau would not then have been killed by accident or mistake. His death would have been within the murderous intent of the appellant in terms of s 167(d). Since the provocation was not in any sense attributable to Mr Ruarau, the common law's restriction of the palliative defence, now modified of course to the extent indicated by s 169(6), would preclude its availability to the appellant.

[21] While recognising that the death involved in an intentional killing could not usually or generally be described as accidental, Mr King pointed out that it could still be regarded as mistaken as in a case where the accused intended to kill A but by mistake killed B. We interpolate that in such a case the killing of B can also, without

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[12] At [24] and [26].

difficulty, be described as accidental. The accused means to kill A but by accident kills B. The essence of Mr King's argument was that the Court of Appeal's approach was unsound in that foresight of death did not of itself preclude the operation of s 169(6).

[22] Mr Pike argued in substance, in accordance with the Court of Appeal's conclusion, that a contemplated death could not be accidental or mistaken, save in the case of the transferred malice inherent in cases where the victim is other than the intended victim. One difficulty with that argument is that it is just as appropriate, both conceptually and in policy terms, to transfer malice in the case of a contemplated but unintended death as it is in the case of an intended death. If someone runs a known risk of killing A and actually kills B, the mens rea inherent in their attitude to A can both conceptually and in policy terms be transferred to B.

[23] Both for that reason and generally we consider that the Court of Appeal erred in its view that a death of which the accused had the necessary foresight could not be regarded as accidental or mistaken for the purpose of s 169(6). A paragraph (d) murderer need have no intention to hurt anyone; indeed such a murderer may actually have desired that no-one be hurt. If Mr Timoti had had either paragraph (a) or paragraph (b) murderous intent towards Mrs Timoti or Mr Wuatai, and no murderous intent directed at Mr Ruarau when he lit the fire, then his killing of Mr Ruarau would uncontroversially have been an accident or mistake within the meaning of s 169(6). He would have had a specific intent to cause the death of A or B, or its policy equivalent under paragraph (b), and, in the event, would accidentally or mistakenly have caused the death of C. The Court said, however, that his killing of Mr Ruarau, which was murder under paragraph (d), was not a mistake or accident because the death of someone was foreseen as likely, ie as something that could well happen.

[24] There are both policy and conceptual reasons which lead us to the view that this approach is wrong. If the mistake or accident concept is available for what, if anything, is the worse case of intentionally killing the wrong person, it seems odd that it should not be available in the less or at least no more serious situation. It is

not appropriate to view the killing of an unintended victim as an accident or mistake when there is a specific intent to kill someone, yet to deny the concepts of accident or mistake when there is foresight of someone getting killed, but no intention to kill anyone or even to hurt anyone.

[25] Furthermore, as with s 169(1), there is no legislative suggestion that s 169(6) is incapable of applying to a s 167(d) killing. It might be argued that as the concepts of accident and mistake in s 167(c) apply only to paragraphs (a) and (b) murder, so the same concepts in s 169(6) can only apply to murder under those paragraphs and not to murder under paragraph (d). But that would not be an appropriate conclusion to reach. Section 167(c), as noted earlier, is designed to reflect the common law doctrine of transferred malice when there is a specific intent to kill or, its policy equivalent, a specific intent to cause bodily injury with knowledge of the likelihood of death resulting. Paragraph (d) murder reflects a different common law background; namely the general felony murder rule. There the malice was not transferred but constructive.

[26] Section 167(d) was included in the definition of murder to reflect the generality of the old felony murder rule in more modern terms. The concepts of accident and mistake were introduced into s 169(6) for the materially different purpose of dealing with cases where someone other than the person giving the provocation was killed. While the provoker is the target of the offender's actions, another person suffers the consequences. The common law concept of transferred malice can be present in these circumstances. But there is, as earlier discussed, no conceptual or policy reason to limit the scope of s 169(6) to paragraph (a) and (b) murders. The subsection does not contain any such express limit and there is no sufficiently compelling reason, contextual or otherwise, to regard the subsection as implicitly so limited. The purpose of s 169(6) is not so clearly limited to murder under paragraphs (a) and (b) to justify reading in the limit expressly stated in s 167(c). There the limit has a logical common law antecedent which does not, by clear and necessary implication, apply to the different context in which s 169(6) operates.

[27] We return to why we consider the Court of Appeal's reasoning based on foresight is wrong. The fact that someone foresees something as likely does not preclude its happening from being described as an accident or a mistake on any ordinary connotation of those words. We consider Mr King was right in his submission to that effect. Foresight of a likely consequence (a consequence which could well happen) does not, as paragraph (d) itself recognises, imply a wish for the consequence to happen. Indeed there may be a wish for it not to happen. It is true that the more probable the consequence the stronger may be the inference of intent, but we are dealing with a case where an intent to kill could not properly be inferred. As explained below, Mr Timoti was found not guilty on the charges of attempted murder of Mrs Timoti and Mr Wuatai. The jury were obviously not satisfied he intended to kill them. In that situation it is unsound to say that simply because a consequence was foreseen as something which could well result from the actor's conduct, that consequence, if it does ensue, cannot in law be regarded as accidental or mistaken for the purposes of s 169(6).

[28] Once it is established that s 169 as a whole, and specifically s 169(6), applies to a paragraph (d) murder, it must follow that if someone other than the provoker is killed, that killing is capable of being an accident or mistake. Under paragraph (d), there need be no intention to harm anyone, whether the provoker or anyone else. The resultant killing, although foreseen as something which could well happen, is in a sense doubly accidental or mistaken. In the first place, because the anger of the provoked person is directed at someone other than the person killed there is a relevant element of mistake. Secondly, because the killing itself, albeit foreseen as something that could well happen, is not intended, there is relevantly an accidental death.

[29] For these reasons we cannot agree with the Court of Appeal's view that Mr Timoti's reliance on provocation was untenable because of his foresight that someone's death could well ensue from his lighting of the fire. It is therefore necessary to examine the further issue whether the trial Judge misdirected the jury in what he said to them about proportionality.

Proportionality

[30] Before examining the legal issues which arise on this aspect of the case, we will set out the two passages in the Judge's summing-up which are relevant:

> A defence of provocation to a charge of murder can be valid only when the homicide has been committed in hot blood and while the accused is still in the throes of passion. In law, the provocation need not occur immediately before the killing, but the time element is of great importance. You must consider, as a weighty factor, whether the accused's acts leading to Mr Ruarau's death bear any proper or reasonable relationship to the sort of provocation said to have been given by the accused's mother and Mr Wuatai. The extent of loss of self-control has to be considered, in proportion to the alleged provocation. …
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> …
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> To sum up on this aspect, there are a number of factors you need to consider in deciding whether the provocation was such as to provide this partial defence:
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> 1. The nature of the act of provocation. Just how serious or challenging or distressing were the words used? Were they bad enough provocation to cause the kind of reaction? To what extent was it the culmination of generally provocative conduct?
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> 2. The lapse of time between the provocation and the act of killing.
>
> 3. The opportunities for cooling down, or following some other course.

[31] Mr King argued that aspects of these directions were material misdirections. Mr Pike argued that in the context of the summing-up as a whole the Judge had not misdirected the jury and, even if he had, any misdirection was not a material one. The Court of Appeal said that taken out of context the directions might be open to some criticism as suggesting a need for objective proportionality in a way difficult to reconcile with the assertion by Mr Timoti of a relevant characteristic. But the Court considered that the jury could not have lost sight of the asserted characteristic as a result of anything said by the Judge.

[32] It is fair to the trial Judge to point out that his summing-up was delivered before the Court of Appeal gave judgment in *R v Rongonui*,[13] albeit the trial took

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13 [2000] 2 NZLR 385.

place after the decision in *R v Campbell*.[14] In that case the Court of Appeal discouraged the use of proportionality directions in a characteristics case and stressed the need in all cases to avoid giving the impression that as a matter of law a reasonable relationship had to exist between the degree of provocation and the level of response. The authorities as they stood in 1996 were fully reviewed by the Court of Appeal in *Campbell* and there is no need for us to repeat that exercise.

[33] In a provocation case the jury must consider two questions. As suggested in *Rongonui*,[15] it is helpful to reverse the order in which they appear in s 169. The first question is whether the provocation did cause the accused to lose the power of self-control and, as a result, to commit the act of homicide. That is a question of fact. The second question concerns whether the provocation relied on was sufficient to deprive an ordinary person with the accused's characteristics, if they are relevant, of the power of self-control. This is an evaluative question, albeit also one of fact.

[34] On the first (factual) question the relationship between the level of provocation and the level of response is apt to be equivocal. An extreme response to relatively slight provocation could show that the accused had indeed lost the power of self-control. Alternatively, it could show that the accused was using the occasion for another purpose and self-control had been retained. Everything will depend on the circumstances of the individual case.

[35] Hence an abstract direction on proportionality is not likely to be helpful to the jury; the more so if it does not distinguish the factual question from the evaluative question. A case specific direction on the factual question which invites the jury to consider whether the relationship between the degree of provocation and the level of response assists them in deciding whether the accused did lose the power of self-control will be of assistance; and a rehearsal of the competing contentions of the parties in case specific terms will be of particular assistance to the jury in deciding this first factual issue. If it is decided in favour of the Crown, ie the Crown has established that the accused did not lose the power of self-control, the evaluative question will not arise. But, assuming that the second (evaluative) question does

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14 [1997] 1 NZLR 16.
15 At [234].

arise, it is necessary to consider whether the concept of proportionality is capable of assisting the jury in their evaluation of whether the provocation was sufficient to deprive the statutory hypothetical person of the power of self-control. It is important to note that on this question the actual mode of response of the accused to the provocation is irrelevant. This is the key point.

[36] The question now being addressed is not whether the accused did lose the power of self-control; rather it is whether the provocation was sufficient to cause the hypothetical person to do so. The accused's actual response is no more than a distraction on this issue. The question concerns the response of the hypothetical person to the provocation actually found to have been given. Hence a direction which invites a comparison between the level of provocation and the accused's response to it is inappropriate and apt to cause confusion on this second (evaluative) question.

[37] Obviously the question whether the provocation was sufficient to cause the hypothetical person to lose the power of self-control to the point of committing the act of homicide[16] carries within it a value judgment to which proportionality considerations are relevant. But the concept of sufficiency adequately incorporates this without any need for a confusing proportionality gloss. This approach is supported by observations made by the High Court of Australia in *Masciantonio v The Queen*.[17] In that case, even against a "do as he did"[18] criterion, Brennan, Deane, Dawson and Gaudron JJ, in their joint judgment, aptly said it was well established that the question of proportionality was "absorbed" into the application of the test involved in what we have called the evaluative question.[19]

[38] In summary, therefore, questions of proportionality may be of some assistance to a properly directed jury on the factual question but are likely to be more confusing than helpful to them on the evaluative question. On that question a direction couched in terms of proportionality between the provocation and the accused's response should not be given.

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16 See [46] below.
17 (1994-95) 183 CLR 58.
18 See [43] below.
19 At 67.

[39] In the light of the foregoing discussion we consider, as Mr King submitted, that there are several problems with the trial Judge's summing-up. The first is that the Judge did not, in the proportionality context, sufficiently distinguish between the factual and the evaluative questions. The summing-up would have been heard by the jury on a rolled-up basis. The next problem derives from the Judge's statement that the jury *must* consider "as a weighty factor" whether the accused's acts leading to Mr Ruarau's death bore any proper or reasonable relationship to the sort of provocation said to have been given. That direction came perilously close to leading the jury to think that it was a legal requirement for there to be a proper and reasonable relationship. Mr Pike suggested that the Judge's use of the phrase "as a weighty matter" saved the day. But while the Judge was thereby not taking the defence away, he could nevertheless have been seen by the jury as stating that unless there was the necessary proper and reasonable relationship the defence could or should not succeed.

[40] Thirdly, the Judge's reference to the need to consider the *extent* of loss of self-control in proportion to the alleged provocation was inappropriate. Once self-control has been lost, it is difficult to require the accused to control that loss, ie to lose self-control only to a certain extent.

[41] In his *Principles of Criminal Law* (3ed 1999) Andrew Ashworth discusses this topic.[20] He suggests that the idea that the mode of retaliation must bear a reasonable relationship to the provocation[21] appeared to be modelled on the proportionality requirement in self defence. He adds that this type of approach can be criticised as quite unsuitable for cases of provocation where loss of self-control intervenes between the provocation and the retaliation. Is it not both illogical and unreasonable, he asks, to require a person who has lost self-control to ensure, nonetheless, that his response is not disproportionate. A little later Ashworth suggests that acts done after loss of self-control are not sensibly susceptible to measurement.

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20 At 283-284.

21 See *Mancini v DPP* [1942] AC 1.

[42] In his *Textbook on Criminal Law* (1983) Glanville Williams expresses the same views, saying that proportionality between the level of provocation and the mode of response is inconsistent with the foundation of the defence of provocation.[22] He observes that if a person loses self-control and kills in a frenzy of rage "it may seem inconsistent" to require him to have retained self-control to the extent of being able to discriminate in the measures used. Smith & Hogan in *Criminal Law* (10ed 2002) implicitly support the views of Ashworth and Glanville Williams.[23]

[43] We agree with these observations. The comments of the Privy Council in *Phillips v The Queen*[24] tend to suggest that there are degrees of self-control or loss of it. These comments must, however, be read, as Smith & Hogan imply, against the words of s 3 of the Homicide Act 1957 (UK) focussing attention on what the accused did in response to the provocation. There is a material difference between the concept of provocation causing the accused to "do as he did" and provocation causing the accused to lose the power of self-control, as in our Act. Elias CJ pointed out this difference in *Rongonui*.[25] She also drew attention to an article by Professor Peter Brett[26] where the author, contrary to the suggestion in *Phillips*, observed that loss of self-control has something of "an all or nothing quality" and is not "nicely proportioned to the intensity of the precipitating anger or fear".[27]

[44] The New Zealand codification of provocation in s 169 does not mandate the *Phillips* approach. Our section focuses on loss of self-control per se, not on the acts of the accused pursuant to the loss of self-control. The decision of the Court of Appeal in *R v Anderson*[28] may appear inconsistent with the approach we favour. It must be said, however, that the Court in that case seems to have assumed that s 169 should be applied in the same way as s 3 of the Homicide Act 1957 (UK). Although recognising that s 169 was "expressed somewhat differently", the Court said it was reasonably plain that the common law rule "still applies".[29] The judgment records

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22 At 543.
23 At 376.
24 [1969] 2 AC 130, 137.
25 At [139].
26 *"The Physiology of Provocation"* [1970] Crim LR 634.
27 At [141].
28 [1965] NZLR 29.
29 At 36.

that counsel for the appellant did not argue to the contrary.[30] The so-called common law rule was that the jury had to bring to account "the degree and method and continuance" of the violence which produced the death. It was that approach upon which s 3 of the English legislation was based. But, for the reasons already given, this is not the correct approach to the evaluative question under s 169. There is a material difference between provocation which is sufficient to deprive the statutory hypothetical person of the power of self-control on the one hand and provocation which is sufficient to make that person do as the accused did on the other.

[45] This topic and our discussion of it must be understood in the light of the role of provocation under s 169. The jury will, of necessity, already have decided that the accused is otherwise guilty of murder. They will not reach provocation unless that is so. The role of provocation is to reduce what would otherwise be murder to manslaughter. For the case to be one of murder the accused must have unlawfully caused the death in question and the relevant physical actions must have been accompanied by one of the states of mind which make the killing murder. These are usually and compendiously referred to as constituting murderous intent. A culpable homicide which would otherwise be murder therefore necessarily involves action causative of death accompanied by murderous intent.

[46] When s 169(2)(b) speaks of provocation which has deprived the offender of the power of self-control and has thereby induced the act of homicide, it is implicit that the act of homicide encompasses not only the physical action which caused the death but also the necessary murderous intent. It follows that for the purposes of the evaluative question the provocation must have been sufficient to cause the statutory hypothetical person to lose the power of self-control to the point of forming the necessary murderous intent as well as performing an action which caused death. In short, the provocation must have been sufficient to cause in the hypothetical person loss of self-control inducing both a murderous act and murderous intent. What is not relevant to the evaluative question is the degree of the loss of self-control beyond that point. Hence the extent of loss of self-control manifested by the accused is not relevant. Referring back to our discussion of *R v Anderson*, the degree or method or continuance of the actions which caused the death are not relevant to the inquiry.

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[30] At 36.

[47] It is for these reasons that we are of the view that the Judge's directions in the present case suggesting that the extent of the accused's loss of self-control was a relevant factor were erroneous. They were inconsistent with the concept of loss of the power of self-control as it ought properly to be understood for the purposes of s 169.

[48] Finally, in the Judge's summary, he reverted to inviting the jury to consider whether the provocative words were bad enough to cause the kind of reaction. Again, there was no focus on what question this direction was aimed at and, to the extent the direction was aimed at the evaluative question, it was inapt, particularly because of the reference to "kind of reaction" rather than "loss of self-control".

[49] For these reasons we are of the view that the Judge misdirected the jury in what he said on the general subject of proportionality and in his failure to instruct the jury plainly as to how, and the extent to which, his proportionality directions related to the two questions they had to consider. The final question thus becomes whether in the circumstances of this case these misdirections were material in the sense that they could have given rise to a verdict which the jury might otherwise not have reached. To that question we now turn.

Were the misdirections material?

[50] We regard the misdirections as more substantial and potentially prejudicial than the Court of Appeal appears to have done. We must therefore assess whether they may have influenced the jury's verdict on that rather different basis. As noted above, the jury found Mr Timoti not guilty on the attempted murder charges. They were therefore not satisfied he intended to kill Mrs Timoti or Mr Wuatai. When they found the charge involving the murder of Mr Ruarau proved, they did so on the basis of s 167(d). There was some mention of s 167(c) during argument. That subsection, as we have seen, has the effect of transferring the mens rea inherent in a paragraph (a) or (b) case to another person not the subject of that mens rea but who is, by accident or mistake, the subject of the killing.

[51] Unless there is paragraph (a) or (b) mens rea, there is no capacity for paragraph (c) to operate. Clearly, in view of the not guilty verdicts on the attempted murder charges, Mr Timoti cannot have had paragraph (a) mens rea towards Mr Ruarau and it is extremely unlikely that he had paragraph (b) mens rea towards him either. Hence the parties were correct in concentrating on paragraph (d) in the case of the killing of Mr Ruarau. That is the basis upon which the jury must have found Mr Timoti guilty of Mr Ruarau's murder.

[52] The contention which the jury accepted was therefore that Mr Timoti lit the fire knowing that his doing so could well cause the death of someone who was present in the house at the time. The jury had to consider the two questions earlier identified. First they had to consider whether Mr Timoti did lose his power of self-control as a result of being provoked by Mrs Timoti and Mr Wuatai and was thereby induced to light the fire. More specifically, the jury had to consider whether the Crown had established that he did not lose his power of self-control as a result of that provocation. We consider there exists a real risk that the misdirections may have led the jury astray on this first (factual) question. We cannot accept the Crown's argument to the contrary, either in relation to this point or generally. The rolled-up nature of the directions means that the jury were not sufficiently made aware of the two separate questions which they had to consider and the entirely different focus of each. In this light we consider the jury could well have decided, in relation to the factual question, that whereas Mr Timoti did lose the power of self-control he should not have done so. They may have rejected his partial defence on that basis. Such an approach, which the directions left open, if not invited, would have been doubly prejudicial. First, it would not, of course, have been the correct way for the jury to deal with the first question. Second, in so far as this approach may have anticipated the evaluative question, it would have deprived the accused of the benefit, in relation to that question, of the characteristic upon which he relied.

[53] Furthermore, we are of the view that even if the jury were not misled on the factual question, there is a real risk that the misdirections deprived Mr Timoti of the reasonable possibility of a manslaughter verdict when the jury came to consider, if they discretely did, the second (evaluative) question. The correct approach to that question would have been simply to direct the jury to consider whether the

provocation was sufficient to deprive an ordinary person but with the accused's characteristics of the power of self-control. The Judge's proportionality directions did not do this with any clarity, if at all, and can only have confused his other references to the subject. Mr Timoti's response to the provocation was, as discussed earlier, irrelevant to the evaluative question. Not only did the Judge imply that it was relevant, he also inappropriately introduced the difficult concept of extent of loss of self-control. The implication was that if Mr Timoti had gone too far, that is, had lost his self-control to an inappropriate extent, his defence should fail.

[54] In essence Mr Timoti was saying that the provocation had caused him to light the fire and thereby to run a known risk of causing death. This is not of course such an extreme reaction as if the provocation had caused him to form an actual intent to kill. But the key point on the evaluative question was whether the provocation given by Mrs Timoti and Mr Wuatai was sufficient to cause the ordinary person with Mr Timoti's characteristics to lose the power of self-control. As already noted,[31] the provocation must also have been sufficient to induce the hypothetical person to lose the power of self-control to the extent of performing the murderous act with the necessary murderous intent. The present case is unusual because the murderous act (lighting the fire) was not one which led as immediately and directly to death as in most cases of murder. It was an act which was not intended to cause death nor to cause any bodily injury. Although the lighting of the fire was physically the cause of Mr Ruarau's death, what made the case murder, subject to provocation, was Mr Timoti's foresight of death as something which could well result, albeit he may have desired to burn the house down without hurting anyone.

[55] Against this background, which is of course the basis upon which Mr Timoti was convicted, the necessary directions on the evaluative question had to bring home to the jury that the provocation needed to be sufficient to cause the hypothetical person (a person having the power of self-control of an ordinary person but otherwise having Mr Timoti's characteristics) to do the murderous act (lighting the fire) with the alleged murderous intent (foresight of death as a likely result). Beyond

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[31] See also [46] above.

that, the extent to which self-control had been lost was irrelevant and the jury should have been clearly advised to that effect or at least not advised in general terms that the extent to which self-control had been lost was relevant. As pointed out earlier[32] neither the degree nor the method nor the continuance of the actions which caused the death are relevant. The Judge's reference to extent of loss of self-control could well have led the jury to the view that the nature and substance of the accused's actions in preparing for and then lighting the fire precluded any finding in his favour on provocation.

[56] For these reasons we are of the view that the misdirections were material in relation to both questions which the jury had to consider. We also find ourselves unable to conclude with the necessary confidence that a properly directed jury would necessarily have been satisfied beyond reasonable doubt that the provocation relied on was insufficient to deprive the statutory hypothetical person of the power of self-control. We consider it reasonably possible that with appropriate directions the jury may have been left with a reasonable doubt on this question. They could well have thought it at least reasonably possible that the provocation was sufficient to induce the hypothetical person to lose the power of self-control to the point of setting fire to the house, knowing that death could result but without wanting that to happen.

[57] A real risk exists that the misdirections may have deprived Mr Timoti of a manslaughter verdict. That is not to say that a manslaughter verdict would necessarily have resulted from a proper direction. It is sufficient to constitute a miscarriage of justice if a real risk exists that Mr Timoti could have been found guilty of manslaughter only, if the Judge had directed the jury properly.

[58] In short, the Judge did not sufficiently separate the factual and the evaluative questions in his proportionality directions. He suggested to the jury that proportionality applied to the evaluative question. He led the jury down an inappropriate path in inviting them to consider the extent of Mr Timoti's loss of self-control. Overall he gave the jury a strong message that if they thought, in objective terms, that Mr Timoti had over-reacted, he could or should not succeed on

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[32] At [46] above.

provocation. In order for these cumulative misdirections to be found immaterial, Mr Timoti's provocation defence to the paragraph (d) murder of Mr Ruarau would need to be so weak that it should almost not have been left to the jury at all. In the ruling in which he allowed provocation to go to the jury, the Judge himself rightly did not appear to view the defence in that way.

[59] We therefore allow the appeal, set aside the conviction for murder, and direct a new trial.

Solicitors:
Crown Law Office, Wellington